

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL  
IN THE MATTER OF:  
JULIUS NDUNG’U KABERERE  
Applicant  
and

THE COMMONWEALTH SECRETARIAT  
Respondent

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## JUDGMENT

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### Introduction

1. Mr. Julius Kaberere was a senior and long-serving employee of the Commonwealth Secretariat.
2. Latterly, he was employed as Adviser, Technical Co-operation and Strategic Response in the Government and Institutional Development Division (“GIDD”).
3. On 6th February 2012 he wrote to the Secretary General of the Commonwealth Secretariat stating that he wished “to offer three months’ quit notice” from his employment.
4. His letter went on to thank the Secretary General, senior management and colleagues “for all the support they have provided me during the eight or so years I have been at the organisation”. He said that he had to “single out” his “interaction and collaboration with you when I was elected as the Chair of the Commonwealth Staff Association (CSSA) from December 2009 to December 2011”. The letter stated that after the end of the notice period in May he planned to return to Kenya his home country “and to play an active role in its development”. He had put himself forward as a candidate for the post Governorship of Murang’a County.
5. This gracious letter of departure gives little clue as to what would follow: his suspension on disciplinary grounds (the lawfulness of which he would contest), disputes about whether his resignation was effective and about the payment of his gratuity, allegations by him that had been constructively dismissed and that the Secretariat had victimised and discriminated against him - at least in part because of his CSSA activities.
6. In his application Mr Kaberere claims
  - (a) an order staying hearings of the disciplinary panel and a determination that the continuation of disciplinary proceedings after his employment was unlawful and invalid;
  - (b) a remedy for breach of contract in withholding his gratuity
  - (c) a financial remedy for “constructive dismissal”
  - (d) a financial remedy for breach of disciplinary procedures in suspending him, “leading to discrimination

and victimization"

(e) a financial remedy for "unfair discrimination and unequal treatment"

(f) costs

(g) any other relief which the Tribunal might consider appropriate.

7. Certain of these claims have been to some extent overtaken by events. The disciplinary process (whether or not validly commenced) has run its course. Mr Kaberere has agreed to a reduction in the gratuity to account for certain sums owed by him and the balance has been paid with interest. These developments have limited the questions we have to decide, in particular as regards his claims (a) and (b) above.

8. We will first set out our general findings of fact. We will then address each of Mr Kaberere's claims, so far as remains appropriate in the light of subsequent developments. In doing so we will make further findings of fact which relate to the issue under consideration. We will then summarise our conclusions.

9. Our findings of fact are made on the balance of probabilities. We have made our findings having regard to all the material before us.

10. In reaching our conclusions on both fact and law we have of course taken full account of the helpful submissions contained in the Application, the Answer, the Reply and the Rejoinder.

11. For simplicity we will refer to Mr Kaberere as "the Applicant" and to the Commonwealth Secretariat as "the Respondent". Occasionally, particularly where the expression is being used in correspondence, we will refer to the Respondent as "ComSec"

General findings of fact.

12. The Respondent employed the Applicant on successive "fixed term" contracts.

13. His latest contract was for a three year term expiring on 11th January 2013. The appointment was on the Respondent's standard "terms and conditions of service" ("TACOS"). The letter dated 28th October 2009 offering this latest contract confirmed that the Applicant's employment would continue to be subject to the "Staff Regulations and Staff Rules as they may be amended from time to time".

14. The Staff Regulations include the following provisions:

Regulation 5

(a) No staff member...shall at any time engage in any activity which would in any way adversely affect their usefulness to the Secretariat or involve a conflict of interest. They shall at all times conduct themselves in a manner befitting themselves as staff members of the Commonwealth Secretariat

(b) Staff members shall make a confidential declaration of any occupation, activity, interest external remuneration or benefit which they believe may affect their usefulness to the Secretariat or constitute, at the time of making [or] at any future time, a conflict of interest ... [There follow provisions as to the consequences of such a declaration]

#### Regulation 7

Staff members shall not engage in any political activity which is inconsistent with or might reflect on the independence and impartiality required by their status as being in the service of the Commonwealth countries collectively

#### Regulation 19

If a charge of misconduct is made against a staff member and the Secretary-General is satisfied that a prima facie case has been established, the staff member may be suspended from duty, with or without pay, during investigation, the suspension being without prejudice to the rights of the staff member"

15. The terms applicable to the Applicant contained the following express provisions which are of relevance to this case :

#### Period of Notice

...employment may be terminated by the Secretariat giving six months or by the staff member giving three months, written notice

#### Pension Gratuity

..staff who do not wish to join the GSPP [Pension Plan], may opt to join the gratuity scheme, whereby each month the Secretariat will pay the equivalent of 15 per cent of gross salary into an interest bearing account. At the end of the contract the staff member will receive an ex-gratia payment of the cumulative amount including interest. This payment is at the Secretary-General's discretion.

16. It appears that the Applicant opted to join the gratuity scheme.

17. In addition to doing his job for the Respondent (latterly Adviser Technical Co-operation and Strategy, GIDD) the Applicant served for a period as Chairman of CSSA. The Application (para 32) records that he was elected to Chairman of CSSA on 9th December 2010. His resignation letter, quoted above, gives the date as a year earlier.

18. In the course of his Chairmanship of CSSA he became aware of some articles which were said to be critical of the Respondent and the Secretary General. They had been written by a former member of staff. In an email dated 8th November 2010 the Applicant raised, as CSSA Chairman, a concern with Steve Cutts ASG that "insider knowledge" had been used. Mr Cutts' response indicates that he had seen the articles some time ago and was not unduly concerned. He asked the Applicant what insider knowledge had been disclosed. From the material before us, the matter does not appear to have progressed from there

19. The Applicant resigned as Chairman of CSSA in November 2011. His email dated 9th December 2011 to all members explained that he had "stepped aside amicably" to allow resolution of an internal dispute as to the interpretation of the CSSA constitution (and in particular as to whether the Chairmanship was for a one or two year term). He reflected warmly on the achievements of CSSA during his Chairmanship and noted that these had been achieved with "a strong mandate from you colleagues and working collaboratively with the ASG and SG".

20. ASG Steve Cutts responded :

"Nice message Julius. Incidentally I can promise that I know of absolutely no involvement of management

in the issue that led to your resignation. The first I even heard that the two year term was through the email you sent to all staff.

In any case I would like to thank you for all your hard work on behalf of staff over the last year. I like to think that in addition to the concrete progress we made in many areas, we also developed a co-operative working relationship between management and CSSA. And this was to the benefit of staff and the organisation itself.

It is right to record that this exchange does show that the Applicant had some suspicion that management were involved in some way in the issue which brought about his resignation. But it does not provide any evidence that management had been involved. Moreover the terms of the exchange suggest nothing but respect and gratitude on the part of Mr Cutts for the Applicant's work at CSSA, which Mr Cutts regarded as benefitting both staff and the organisation.

21. The Applicant's email to CSSA members mentioned that he was away on a mission for the Respondent. The mission was to his home country of Kenya. His activities on that mission were to become the subject of dispute with his line manager, Tim Newman, and with senior management in the Respondent, as we record below.

22. On 1st January 2012 the Applicant announced his intention to run for political office in Kenya.

23. On 17th January 2012 the Applicant met with Max Everest Phillips, Director of GIDD ("the Director") to discuss the mission and issues arising. We have been provided with the Director's notes of the meeting and with the Applicant's own document summarising the background to the mission and his role in it. The Director expressed concerns about various aspects: in particular that the Applicant had not respected a management instruction with regard to the limited "ComSec" time he should spend on the mission and had changed travel arrangements without permission. There was also a discussion as to whether the Applicant had contravened Staff Regulation 7 by his declaration of intent to stand for the Governorship of a Kenyan Province. The Applicant said that this was simply a statement of intent and did not contravene Staff Regulation 7. He said he was not linked to any party and that there was therefore no breach of Regulation 5 (conflict of interest) either. The elections would probably take place in early 2013 and that he therefore intended (quoting the note) "to resign from ComSec fairly soon – probably by April /May 2012".

24. Putting this together it seems clear that he had decided to resign from the Respondent by the time of this meeting and that his reason was that he wished to run for political office in Kenya, having already announced in Kenya that he would be running.

25. On 27th January 2012, apparently in his capacity as outgoing CSSA Chairman, he wrote to Steve Cutts ASG thanking him for taking forward some specific CSSA recommendations on terms and conditions. The letter concludes with more general thanks to Mr Cutts personally and "Senior management" for "involving CSSA during my tenure as Chairman to achieve these TACO's [sic] reform package".

26. On 6th February he sent his letter offering three months notice to the Secretary-General. At this stage it is appropriate to set out the letter at greater length

Re; Three Months Quit/Resignation Notice

As per the provisions of my contract with the organisation and the Sutherland Handbook, I wish to offer three (3) months' quit notice from my role as an Adviser, Technical Co-operation and Strategic Response under the Governance and International Development Division, in the Secretariat.

I have enjoyed working with Comsec and GIDD, and take this opportunity to thank you personally, Senior Management and my colleagues in GIDD for all the support they have provided me during the eight (8) or

so years I have been with the organisation ... In particular I have to single out my interaction and collaboration with you when I was elected as the Chair of the Commonwealth Staff Association (CSSA) from December 2009 to December 2011.

After the end of my notice in May, I plan to return to my home country and to play an active role in its development. Just so that you know, I have an intention of vying and have offered my name for consideration as a candidate for the Governor Murang'a County, under the new Kenyan Constitution.....

I thank you again for all your support and that of your colleagues in GIDD and wish the organisation every success in the future."

27. It will be seen this is headed as a "notice". It refers to the contract, specifies correctly (in word and number) the length of the notice in question and contains reference to "the end of my notice period in May". All of this suggests that the writer considered himself to be giving notice under the contract by sending this letter and that the words "I wish to offer" three months' notice are no more than a courteous form of expression.

28. There is however a possible ambiguity in the expression "I wish to offer" [three months' notice]. There is a possible implication that immediate unilateral notice is not being given and that it was for the Respondent to accept the offer or otherwise.

29. The Secretary General's immediate response (by email dated 13th February 2012) was that he was unable to "accept" the "offer" of resignation as concerns had been brought to his attention which he said must first be addressed. These included an allegation of engagement in political activity whilst employed by the Respondent.

30. The Applicant replied by email of 14th February 2012, expressing surprise that his resignation had not been accepted and referring to the notice period in the contract and the Staff Rules.

31. We interpolate (jumping forward a little in the story) that it is not necessary for us to resolve the question whether properly construed, the letter of 6th February 2012 constitutes a notice or a mere offer to give notice, nor whether the Secretary General had any power not to accept the notice if it was such. This is because the impasse was resolved by the parties' agreement to treat it as effective to bring the employment to an end. The penultimate paragraph of a letter from Deputy Secretary General Ransford Smith dated 24th February 2012 (to which we will refer further below) treats the Applicant's email of 14th February as having clarified the position by making clear that his letter of 6th February was intended to be a resignation. It states that "accordingly the necessary processes" (for resignation) would be put in place. The parties thereafter proceeded on the basis that the letter of 6th February would be treated as notice of resignation and the employment would come to an end at 5th May 2012. We will therefore refer to it as the notice of resignation.

32. The question of the effectiveness of the letter of 6th February 2012 to terminate the employment on 5th May 2012 was thus soon resolved. However it does appear that relations between the Applicant and Respondent took an adverse turn shortly after that letter was written.

33. On 12th February 2012 (in a letter misdated at the heading, but not at the foot as 2011) the Applicant launched a grievance. He addressed it to the Secretary General, explaining that the "Director, GIDD [Mr

Everest Phillips] seems to side with opinions expressed by ASG [Mr Cutts] , perhaps because they are both British" and that he considered it unlikely Mr Cutts would give him a fair hearing. He expressed his grievances as follows. First he said Mr Everest Phillips ("the Director") did not offer him an equal opportunity when the Applicant went to him but sided instead with the head of section who was also British. He said that the Director had used unspecified offensive and derogatory language in an email of 3rd February (which the Applicant did not enclose or provide to us). He further alleged that the Director issued consultancies to British based organisations without advertising and that most of the consultants thus appointed were the Director's colleagues "in organisations in which he worked before".

34. Four days later on 16th February the Applicant wrote to the Secretary General (copy to Mr Cutts and others) , accusing Mr Cutts of having "broken ComSec Rules" by "awarding himself a 30% salary increase" , describing the situation as "grave" and an abuse of position and office.

35. Meanwhile, the Applicant featured on 22nd February 2012 in the Kenyan press (Nairobi Star ) as someone "aspiring for the Governor seat" who was funding scholarships for students in the area in which he was to stand for office.

36. In his letter dated 24th February 2012 (to which we have referred above) DSG Ransford Smith (in addition to dealing with the effectiveness of the 6th February letter to terminate the employment and noting that the Applicant was now absent sick) set out "concerns" about the Applicant's conduct "as foreshadowed" in the email of 13th February from the Secretary General. DSG Ransford Smith noted that it had not been possible to speak because the Applicant had been signed off sick. He wished to apprise the Applicant of three "concerns" amounting to serious allegations. He invited the Applicant to respond either in writing or at a meeting in due course. The letter outlined the "concerns" as follows:

The first concern relates to a meeting of the "Kenya Diaspora Forum". Information received...suggests that you are the Managing Director of this Forum and that funds from the Commonwealth Secretariat were to be used to hire a venue for this meeting. I note that such funding does not appear to have been authorised in line with the terms of reference for the relevant programme and as such should not be funded by the Commonwealth Secretariat...

The second concern relates to your announcement last December of your intention to run for elected office in Murang'a County, Kenya, and that you have apparently engaged in political activities in support of this campaign whilst employed in the Commonwealth Secretariat. As you would be aware the Regulations... prohibit staff members from engaging "in any political activity which is inconsistent with or might reflect on the independence and impartiality required by their status as being in the service of the Commonwealth countries collectively" and require disclosure in advance to the Secretary-General so that appropriate decisions can be taken.

The third concern relates to your apparent breach of the clear directive communicated to you from the Office of the Secretary General regarding sending emails to staff, coupled with the additional issue of the tone and potential defamatory nature of your emails dated 15 February 2012.

37. The reference to "defamatory" emails dated 15th February appears to relate to the circulated e-mail concerning Mr Cutts ' salary increase dated 16th February which we have quoted above.

38. The Applicant remained absent from work in March, signed off for work related stress. He obtained a medical report from the Respondent's Occupational Health Adviser Dr Schilling dated 8th March 2012 (following a visit by the Applicant on 6th March) in which Dr. Schilling indicated agreement to the

Applicant's suggestion that he take a therapeutic week in Kenya to assist his recovery. He obtained a further report in Kenya from a "Counselling Psychologist" dated 20th March 2012 . This referred to the "work-related stress" as being the continuing cause of his absence from work.

39. The Applicant remained absent sick when Jose Maurel, Acting Deputy Secretary General wrote to inform him on 22nd March that he was suspended. The letter informed the Applicant of "today's decision" made "by" the Secretary-General to suspend the Applicant under Staff Regulation 19. The letter referred to the concerns raised in the letter of 24th February set out above. It added a further concern concerning possible work the Applicant might have done for "DVK Group" without the permission of the Secretary General to engage in outside work. The letter further noted that whilst on leave from the office he had built up a large bill on the Blackberry provided for official purposes. An explanation was sought and the Applicant was reminded that the cost of personal calls should be reimbursed.

40. On 28th March 2012 the Applicant wrote to the Secretary General summarising his position.

41. As regards what he described as "questions of procedure" he made the following principal points.

- (a) that his letter of 6th February was an effective notice to terminate which did not require the Secretary General's consent
- (b) that because the Respondent had not issued a formal letter raising issues about his performance or conduct before resignation, it should not do so now;
- (c) that he was signed off sick to 28th March and that a further three weeks leave had been recommended medically
- (d) that he was shocked to find that his pay had been withheld, having been initially credited to his account and then withdrawn as paid in error
- (e) that he has no other source of income
- (f) that he sought restoration of his salary pending resolution of the issues
- (g) that he requested an independent disciplinary board with his CSSA representatives in attendance, to consider whether the correct procedure was followed in suspending him and withholding salary during suspension.

42. As regards questions of "substance" the Applicant explained his position as follows:

- (1) In relation to the Kenya Diaspora Investment Forum he said that he was Chairman of the Forum and had in that capacity approved a request to the Respondent to contribute to some of its costs. He said that no ComSec funds had been used however because his manager Mr Newman had instructed him that the Respondent would not sponsor it.
- (2) In relation to running for political office he said that the elections had been announced for 4th March 2013, after the expiry of his tenure at the Respondent in January 2013. He said he had set up a website relating to his candidacy but had now closed it. He denied he had engaged in political activity which was inconsistent with the ethos of the Secretariat or infringed Regulation 7. He also drew attention to the facts that, as he alleged, Ms Daisy Cooper had stood in a UK General election which took place only a month after she had left the Respondent and that a Ghanaian colleague Ms Betty Mould had resigned from CSAT only after being appointed a Minister in the Ghanaian government.
- (3) As regards the sending of derogatory emails he said that "as a former Chair of CSSA he had become

used to commenting on topical issues and believed it was right to communicate with staff about them. He said he thought it was right that he had commented on certain members of staff being paid a higher percentage than "had been agreed". (We infer that this was a reference to his allegation concerning Mr Cutts)

(4) In relation to employment by DVK Group he said that he had shared a platform with this group both as Chair of the Kenya Diaspora Investment Forum and on behalf of the Respondent but denied that he had been appointed or remunerated by this group.

43. The letter expands on certain points. It concludes with a call for the appointment of an independent disciplinary board. The Applicant asserted that Mr Cutts was an "interested party" who "cannot be impartial and fair should he be allowed to participate" in decisions concerning the Applicant's employment. The reasons given were that Mr Cutts was his "interlocutor" during the Applicant's tenure as CSSA Chairman, that the Applicant had "raised issues about [Mr Cutts'] handling of some matters including him being awarded a 30% pay rise while the agreed rates are 16%." and that the Applicant had also raised issues about articles written by a former employee of the Respondent

44. On 2nd April 2012 the Nairobi Star reported that the "battle" for the Governor's seat had intensified, with heightened activity "at the weekend" when all three candidates; including the Applicant, "wooed voters" and participated in debate.

45. Email correspondence continued about the re-instatement of the Applicant's salary during suspension. This culminated in a communication to the Applicant on 19th April 2012, stating that the Secretary General had considered the Applicant's representations about the difficulties caused by lack of salary and had decided to reinstate the Applicant's salary from the point of suspension. This was put into effect.

46. On the same day (19th April) the Applicant wrote to DSG Smith suggesting a meeting at the end of the month, after DSG Smith's return from a mission. The stated purpose was to discuss allegations against the Applicant and to clear his name. The email added that his legal advisers had advised him to request that his employment contract was handled by "substantive office holders" and not delegated to anyone in an "acting capacity".

47. On 27th April 2012 the Applicant wrote to the Secretary-General expressing surprise and bewilderment that he had not heard anything since 24th February about the processes for "smooth handover and transition from ComSec's employment back to my home Country, Kenya" after the expiry of notice on 5th May. He added that:

"despite having enjoyed working for the organization for most of the time , I was pushed into the treatment I received from Comsec's managers. In particular, I raised the issue of my having been discriminated against and victimized by the Director of GIDD, Mr Max Everest Phillips. To-date, more than two months since I filed my grievance letter to you against Mr Max Everest -Phillips on the 12th Feb, 2012 NO action seems to have been taken."

48. The letter continues by referring to "false allegations" about his conduct after he resigned and in particular in the letters of 24th February and 22nd March recorded above. He said that the lack of response to his letter dated 28th March (in which he had summarised his position in procedural and substantive terms) showed that "Max and his backers were out to get me out of ComSec at all costs" . This had led to

his further ill-health. The treatment he had received after some eight years of diligent service had left him, he asserted, with "no option other than to resign ....prematurely before my tenure officially ended on 11th January 2013" .

49. The letter goes on to refer to his attempts to promote harmonious labour relations as Chairman of CSSA "defending both staff and management when necessary". He expressed surprise that he could be treated "this shabbily"

"after defending the Secretary General from accusations such as from Daisy Cooper's opinion pieces...I am aware that a few senior colleagues were not quite happy about some of the matters I raised and surprised that the Secretary General should allow them to use their positions in the organisation to frustrate me due to my work as the elected chair of...CSSA, to the extent of being forced to resign my post with Comsec like I have done"

50. On 2nd May 2012 the Applicant emailed the Secretary General.. He referred also to his letter of 28th March and asserted that he was being punished by raising issues of mismanagement in ComSec.

51. On 3rd May 2012 Simon Gimson, Head of the Secretary General's Office, replied in the absence of the Secretary-General who was abroad. The letter recorded that the Secretariat was endeavouring to have a meeting with the applicant "now that you have returned to London". The letter set out the Respondent's position on a range of issues, and expressed surprise at the assertion in the 27th April letter that the Applicant considered he had been forced to resign.

52. The Applicant responded by letter of 4th May 2012 , stating that he believed he was being "victimised and hounded out of my job because of raising various issues relating to mismanagement of the Secretariat , when I was elected Chair of the CSSA and earlier this year". He said that the Secretary General had been misled into suspending him and that proper procedures had not been followed because there should first have been an investigation with an opportunity for him to respond. He stated that the grievance filed on 12th February arose from Mr Everest Phillips, Director" "siding with" his line manager Mr Newman on 17th January and that this formed the background to his resignation. He queried the lack of action on his grievance. He thanked Mr Gimson for his "kind words" with regard to his role Chairman of CSSA. He said that whilst he acknowledged the management decision to implement the "TACOS" reforms he was dismayed that issues for Administrative and Support staff had not been addressed. He expressed dismay at the late stage at which his departure arrangements were being addressed.

53. The same day (4th May) Mr Maurel, then Director Special Advisory Services Division, wrote to the Applicant saying that the Secretary General had asked him to review the applicant's responses to the letters of 24th February and 22nd March and suggesting a meeting on 8th May.

54. The suggested meeting date of 8th May was of course after the expiry of the Applicant's notice on 5th May.

55. On 5th May, the day of expiry of the notice, the Applicant wrote to Mr Maurel declining his invitation to meet on 8th May. He stated :

As you were not in my line management and nor were you GIDD's HR Adviser or indeed the HR Manager/Director...or indeed a Legal Adviser , I am afraid I will not be meeting up with you on Tuesday 8th May as you request."

The letter goes on to summarise some of the recent correspondence from his perspective.

56. On 21st May 2012 Mr Maurel wrote to the Applicant stating that he had been charged by the Secretary-General with taking matters forward. He noted that the Applicant had set out his responses to matters raised against him in writing but had declined the meeting offered for 8th May. Having reviewed the correspondence Mr Maurel said he had formed the view that there was "sufficient material to warrant a disciplinary panel". The letter added with regard to the "ongoing allegations" against ASG Cutts:

"We find your accusations that [Mr Cutts] has conducted himself in a manner which is abusive or unlawful completely baseless."

57. Pausing there it is not entirely clear who is included in the pronoun "We" but it is clearly intended to represent the Respondent's concluded position. The letter continues by explaining the facts surrounding the pay of directors and UK staff at diplomatic pay grades.

58. On 25th May the Director of the Legal Division wrote to the Applicant noting that he had accumulated a significant bill during his absence on the blackberry provided to him for official purposes. He stated that the cost of personal calls should be reimbursed to the Respondent. He further noted the exchanges about disciplinary proceedings and observed that withholding of gratuity was one of the sanctions permitted if an adverse conclusion was reached in the disciplinary process.

59. The same day (25th May) the Applicant wrote to the Secretary General making a number of points. He stressed that he had ceased to be an employee of the Respondent on 5th May 2012. He said he had declined to meet Mr Maurel on 8th May on the advice of his legal team.

60. He also said in the letter of 25th May 2012 that having taken further legal advice he believed he was no longer bound by the provisions of the Sutherland Handbook (ie the Staff Regulations Rules and policy material contained there) because his tenure had ended on 5th May. (This was the consistent position he maintained thereafter.) Accordingly he said the convening of a disciplinary panel at this stage would be unlawful. He awaited communication about "his final dues".

61. The subsequent history can be taken shortly.

62. On 26th May 2012 the Applicant wrote claiming that the decision to "withhold" or not "release" his gratuity was a breach of contract. He raised the matter again on 3rd July. On 5th July 2012 Mr Khan replied by letter that the gratuity would only be paid "following the completion of all necessary processes." In due course, as the later pleadings record, the Applicant agreed to the deduction from the gratuity of the cost of his private calls on the blackberry. There were certain other uncontentious deductions recorded by the Respondent in paragraph 34 of the rejoinder. The Respondent eventually paid the balance of the gratuity (Reply paragraph 12) and with interest (Rejoinder para34).

63. On 14th July 2012 the Applicant wrote to the Chair of the Disciplinary Board convened to hear his case requesting that any sittings of the board should be suspended. He set out some of the history from his perspective and stressed the central point that his employment had ended on 5th May. From this it followed, he contended, that the disciplinary procedures could not lawfully be applied. On 25th July 2012 the panel, (writing through Mr Mahmood Noman HR Adviser and Secretary to the Disciplinary Board)

declined to suspend panel sittings in the absence of any "order of stay". However sittings were delayed for administrative reasons and the composition of the panel was changed.

64. Meanwhile the Applicant brought the present application on 31st July 2012.

65. The Disciplinary Board hearing was reset for 30th and 31st October 2012. We infer that it took place then (and in the Applicant's absence) but neither side has provided any record of the proceedings or any record of the outcome. It appears from the Pleadings that, once it had met, the Board reached conclusions carrying certain criticisms of the Applicant and directed that Blackberry costs not referable to official business should be recovered from the Applicant. As recorded above this was eventually achieved by an agreed deduction from the gratuity.

66. We are not asked to adjudicate about the Board's proceedings or conclusions, except in so far as the Applicant contends that the proceedings ought not to have taken place after the expiry of the Applicant's notice when he was no longer an employee .

67. We now address in turn the heads of claim advanced by the Applicant.

THE HEADS OF CLAIM ADDRESSED

(a) Lawfulness of disciplinary panel hearings

68. In paragraph 7 of his Application the Applicant seeks (a) an order staying the disciplinary panel hearings and (b) a determination that it is unlawful to hold these hearings.

69. As regards (a) above, the hearing has already taken place and conclusions have been reached. It is therefore too late to consider this aspect of the application.

70. However as to (b) above the Applicant is, we consider, entitled to resolution of his the underlying question raised by him as to whether it was unlawful to proceed with the hearings because his employment had ended.

71. The Applicant relies (in his correspondence and pleadings, in particular paragraph 10 of the Reply) on Paragraph 1 the Staff Rules which states that the Rules apply to "all staff employed in London". His point is that the word "employed" connotes present, not past employment.

72. A similar point can be made about the Staff Regulations which state in an introductory provision that they too apply to "all staff employed in London".

73. The Respondent places reliance on the Definition of "Member of Staff" in the Statute of the Tribunal governing our jurisdiction. Clause 4 (a) (i) of Article II states that "member of staff" means "any current or former member of the Headquarters staff of the Commonwealth Secretariat" (emphasis added).

74. We do not derive particular assistance from any of the above provisions.

75. The provisions whereby the Rules and Regulations respectively apply to staff "employed in London" is essentially directed at identifying geographically the staff who are subject to the Rules and Regulations respectively. We do not think this provision carries any clear implication that the Rules and Regulations (or for that matter the policies of the Respondent) can only extend to current staff.

76. The Tribunal Statute makes clear that the Tribunal's jurisdiction covers former members of staff. . (Indeed clause 4(a) (ii) extends the definition to personal representatives of deceased employees). Such provisions are necessary to ensure that members of staff who wish to complain to the Tribunal about the termination of their employment, or monies owed to them at termination, are able to bring proceedings. Clause 4 of the Statute does not provide any guidance on the separate question whether or to what extent the rights, obligations, powers duties and policies of the Respondent towards its employees continue after termination of employment.

77. Clearly there are many rights, obligations, powers duties and policies which are only applicable during employment. The duty to attend for work is an obvious example. Other duties (such as aspects of confidentiality) can survive termination.

78. But what of disciplinary procedures?

79. We are concerned not to make a wider ruling than is necessary for the purposes of this case.

80. Addressing the narrow point raised by the Applicant, we have concluded however that the mere fact that the employment had come to an end did not render subsequent disciplinary proceedings unlawful or invalid.

81. The purpose of disciplinary procedures is to uphold and enforce discipline in a fair manner. This may be of primary importance whilst the employment is continuing but it is not necessarily irrelevant after the termination of employment. If there are sanctions which may be applicable after termination the employer may have an interest in pursuing them. Moreover, an employee may wish to have the benefit of disciplinary procedures to avoid such a sanction being imposed on him administratively without procedural safeguards.

82. We note that the disciplinary procedures of the Respondent prescribe a number of possible sanctions where a disciplinary charge is upheld. For the most part these are sanctions which are only relevant to continuing employment (eg downgrading, suspension, reprimand) but they do include "non payment of gratuity" which would be relevant at, and after, termination of employment. We take this as an indication that the termination of employment was not envisaged as a complete bar on disciplinary proceedings.

83. The proposition that disciplinary procedures are not necessarily unlawful or ineffective after termination derives some support from the case of *Manson v Secretary- General of the United Nations* UNAT Judgment 742 where the Tribunal found nothing in the applicable internal staff rule which barred the Organisation from proceeding with disciplinary hearings after termination. The Tribunal said that if the staff member

"departs the organization before proceedings are concluded, or declines to participate in them, this would not prevent the Secretary-General from taking proper interim measures to protect the interests of the Organization. Subsequently, he could record a valid disciplinary decision, should that be appropriate. If the Secretary-General deems that it is in the interests of the Organization to conduct a disciplinary proceeding his ability to do so is not automatically nullified by a decision of the staff member to absent himself or herself"

84. We note the guarded terms of this judgment. Regard must be had to the organization's internal rules. A valid disciplinary decision can be recorded post-termination if "appropriate" and the ability to conduct disciplinary proceedings at this point is not "automatically " nullified by the employee's departure.

85. We share the reluctance of the Tribunal in Manson to lay down any wide-ranging rule.

86. We do, however, note and follow the conclusion in Manson that the mere fact that the employment has terminated does not, of itself, render the continuation of disciplinary proceedings unlawful or invalid.

87. Other considerations will arise in cases (and these are examples only) where there has been undue and culpable delay, or where the disciplinary charges are not raised (or disciplinary action is not put in chain eg by a suspension) in any form during the employment, or where the employee's participation in the proceedings is necessarily impractical or where the proceedings are in some way oppressive or disproportionate.

88. We do not consider that any such considerations arise in the present case. The Applicant had been suspended during employment from 22nd March 2012 and allegations had been raised against him in a formal manner on 24th February 2012, in both cases well before the expiry of his notice in May. The Applicant's absences from February would have made it very difficult to progress the matters to a hearing before the expiry of his notice period, so we do not consider this to be a case of culpable and undue delay. In this case it does not appear to us oppressive or disproportionate to pursue the issues to a hearing after termination.

89. So, without laying down hard-and-fast rules for other cases, we are simply deciding two things.

90. First we are deciding that the mere fact of termination of employment does not of itself render unlawful or ineffective a process of disciplinary hearings which has been laid in train by complaints raised during the employment. The Applicant's contention to the contrary is accordingly not well founded.

91. Secondly we are deciding that there were no factors in the present case which made it unlawful to progress the disciplinary process after the Applicant's notice expired.

92. In so far as the Applicant's attack on the disciplinary process consists of a challenge to the original suspension we deal with this separately below.

93. The Applicant's claim that it was unlawful to progress disciplinary procedures after termination fails.  
(b) Withholding of gratuity

94. As recorded in our findings of fact, the Applicant agreed to the reduction of the gratuity to reflect sums owed by him to the Respondent and the Respondent paid the balance of the gratuity with interest. This occurred after proceedings were started.

95. This disposes of this aspect of the claim. It is neither necessary nor appropriate for us to express views on the scope of the contractual discretion in relation to the gratuity which appears from the term quoted in paragraph 15 above. Nor do we need to comment on any other point canvassed by the parties in relation to the gratuity.

(c) Constructive dismissal

96. The Applicant claims that he was constructively dismissed and claims the value of his salary and benefits to the date when his contract was due to expire in January 2013.

97. International Administrative Tribunals recognise the principle of "constructive dismissal".

98. The principle is that if an organisation behaves in such a way as to indicate that it will no longer be bound by the contract of employment, the staff member may treat this as a "constructive" dismissal with all the consequences which flow from an unlawful termination of contract: See *Keeling v Commonwealth Secretariat* CSAT/14 at para 60 adopting the formulation in *ILOAT Judgment No 2602*.

99. We think it is implicit in this principle that it must be the impugned conduct of the employer which causes the employee to resign – it must be his real reason for doing so, or at least one of the reasons.

100. In the present case we conclude that the reason for resignation was not any conduct of the Respondent. Rather, the reason was the Applicant's wish to run for political office in Kenya. His resignation letter of 6th February 2012 says so in clear terms. Moreover, this is entirely in line with what he told the Director at the meeting of 17th January 2012, as recorded in the Director's note. At that meeting he specifically stated that he intended to resign shortly (probably by April/May) in order to run for election. We note that he accepts in his Application that he announced his intention to run on 1st January 2012 – so there is no question of this being an uncertain course at the date of his resignation. Whatever dissatisfactions he may have held at the date of resignation were not the cause or reason for resignation.

101. In any event, we conclude that there was no conduct of the Respondent to indicate that it would no longer be bound by the contract.

102. At the meeting of 17th January 2012 the Director (Mr Everest-Phillips) recorded legitimate concerns about the Applicant's conduct relating to the recent mission. The fact that (as appears from the Director's note of the meeting) the Applicant had declared his candidacy and set up an electoral website around the time of a visit by him to Kenya as a representative of the Respondent raised inevitable concerns about whether this was "political activity" which "might reflect" on the "independence and impartiality" required of him as a Secretariat servant so as to contravene Regulation 7. The Director's note faithfully records the Applicant's case that his conduct to date involved merely an intent to engage in future activity rather than a breach of Regulation 7. There was also a potential conflict of interest under Regulation 5; but the Director's note faithfully records the Applicant's position on that also. The note further records the conclusion of the meeting in a way which reflects a courteous and considered approach on the part of the Director:

"I thanked Julius for his explanations and wished him well, We then discussed Kenya's bright future and his interesting political hopes for the country's prosperous future"

103. We find no basis for asserting that the Director "sided" with Mr Newman unreasonably or in a discriminatory fashion. In, for example, his formal grievance of 12th February the Applicant observes without any serious attempt at particularisation that he has "noticed" that the Director "always sides" with the opinion of particular individuals who are "British like himself". This betrays the ease with which he makes allegations of discrimination

104. There were serious matters of concern which the Director rightly (and courteously) addressed at the

meeting and there was no discrimination in raising and discussing these concerns.

105. Any suggestion that the Applicant was being punished for CSSA activities seems far-fetched and we reject it.

106. On a general level relations between management and CSSA appear to have been good and productive and indeed they were recognised as such for the time of the Applicant's Chairmanship. His letter of resignation of 6th February singles out his collaboration with the Secretary General whilst Chairman of CSSA as a career highlight. There is no obvious motive for management to have a hostile attitude to him as Chairman.

107. The Applicant suggests he might have made himself unpopular when he brought to the Secretary General's attention some derogatory articles by a former member of staff. This was an occasion on which he was taking a "management line" specifically in support of the Secretary General himself. It is difficult, at first blush, to see why that should make him unpopular with authority. The Applicant may be inviting the implication that Mr Cutts was angered at the criticism of his former colleague but no animosity is suggested in Mr Cutts' contemporaneous email which simply invites the Applicant, in even-handed terms, to indicate what he considers to be the "insider knowledge" which has been used by the writer of the articles and the Applicant appears not to have pursued the matter from there (see paragraph 18 above)

108. The Applicant's relations with Mr Cutts in connection with the CSSA appear to have been mutually respectful and appreciative. This is shown by the exchanges on the Applicant's resignation from the Chairmanship of CSSA (see para 20 above) and by the appreciation expressed by the Applicant to Mr Cutts personally and to "senior management" in general for their handling of negotiations on terms and conditions (see paragraph 25). The Applicant may not have achieved all he wished to achieve at CSSA (in particular for administrative staff) but the tone and content of the exchanges with Mr Cutts suggests only warm and respectful co-operation.

109. The Applicant's change of attitude towards Mr Cutts after the Applicant's resignation was extreme; but we do not consider that this provides any evidence of a pre-existing problem between the two. Still less does it demonstrate any misconduct by Mr Cutts towards the Applicant.

110. In the end the suggestion that Mr Cutts or anyone else in authority at the Respondent did anything to undermine his position as CSSA Chairman is speculation which is wholly unsupported by evidence.

111. There was no conduct which would have entitled the Applicant to treat himself as constructively dismissed.

#### (d) Suspension

112. The Applicant contends that his suspension was unlawful and led to discrimination and victimisation.

113. The power to suspend is set out in Regulation 19. It is satisfied where the Secretary General is satisfied that a prima facie case is established. The clear implication is that this must be a prima facie case of misconduct.

114. Here there was a prima facie case of misconduct. The detail was properly set out in the letter from DSG Ransford Smith of 24th February 2012 and in the suspension letter of 22nd March which referred back to Mr Smith's letter.

115. As regards grounds provided for his suspension we note that in relation to the Kenya Diaspora Forum, the material indicating that he had sought ComSec monies on behalf of the Forum without prior authorisation did not appear to be disputed by him, even when he replied in detail to the accusations on 28th March 2012. His case that no money actually changed hands was, even once articulated, not a self-evident answer to concerns based on conflict of interest and the need for clearance by a line manager. We express no conclusion on the matter beyond saying that there was certainly a prima facie case here.

116. As regards political activity the most basic facts appear to have been undisputed: that he had announced his intention to run for Governor around the time of a visit to Kenya on behalf of the Respondent and had set up a website for the purpose. We need not concern ourselves with such questions as whether he was campaigning in Kenya whilst on sick leave from the Respondent (as might be inferred from reports in the Nairobi Star). Leaving aside such matters, the mere fact of declaring oneself a candidate in the wake of a mission on behalf of the Respondent raises serious issues and a prima facie case of breach of Regulation 19.

117. If, as we infer, the reference to derogatory emails is a reference to the email accusing Mr Cutts of taking an improper or unauthorised salary increase, then there would appear to have been no factual dispute that such emails were sent. The accusation was a serious one which should not be made lightly. Here also there was undoubtedly a prima facie case.

118. There is no reason to suppose that the decision to suspend was not the decision of the Secretary-General even though it was conveyed by Mr Maurel in the letter of 22nd March. The letter makes clear that the decision was the Secretary-General's. We do not understand, if an issue is being raised here, why a letter conveying the Secretary General's decision should not come from an "Acting" Director.

119. The Tribunal's powers of review over such decisions are limited in any event, as the Respondent points out, but we do not need to explore those limits because we have no doubt that the Secretary General had a clear prima facie case to suspend the Applicant.

120. The Applicant's contention in correspondence that hearing procedures had to be observed before suspension has no basis in the Regulation

121. Nor can we identify any other basis on which the suspension could possibly have been unlawful. The Respondent's officers acted in good faith and within their authority.

122. We can see no basis on which the suspension could be said to have led to "discrimination and victimisation". We deal above and below with various aspects of alleged discrimination and unequal treatment and we conclude that there was none. We suspect that in the present context the Applicant means simply that his good name suffered as a result of suspension. That is a wholly understandable concern but the Respondent acted within the scope of its lawful powers in suspending and the claim in relation to suspension fails accordingly.

(e) Unfair discrimination and unequal treatment  
CSSA Chairmanship

123. We do not accept that there was any hostility on the part of relevant officers of the Respondent in consequence of the Applicant's chairmanship of CSSA.

124. We have dealt with the position in the context of the constructive dismissal claim above and will not repeat our findings.

125. Fundamentally, the Respondent's treatment of the Applicant in suspending him and following a disciplinary course is fully explained by the fact that such a course was properly available to the Respondent and was properly followed.

126. The withholding of pay during suspension was also within the Respondent's powers though it relented and restored full pay.

Other discrimination?

127. We also reject any suggestion of discrimination on any other prohibited ground such as race or nationality.

128. We have rejected above the wide and barely particularised suggestion that the Director, Mr Everest Phillips, sided with English people as a matter of course or maltreated the Applicant in his dealings with him.

129. For completeness we should deal with one free-standing allegation which features in the correspondence. It is the suggestion that the Applicant was treated unequally in relation to standing for election. He draws comparison with two cases in which he suggests the Respondent took no action

130. First a Ms Mould took a position as a Minister in the Ghanaian Government on resignation from the Respondent. Secondly Ms Cooper stood as a Liberal Democrat at a General Election poll which took place (the Applicant says) only a month after she was a ComSec employee.

131. Without knowing how Ms Mould was appointed, what advance notice was given of her appointment and whether she campaigned for the ministerial post, the brief narrative put forward by the Applicant does not afford a serious basis for comparison between his situation and Ms Mould's.

132. The narrative he provides in Ms Cooper's case comes closer to the Applicant's situation. We remind ourselves, however, that Regulation 7 does not impose an absolute ban on political activity but does prohibit political activity which is inconsistent with or might reflect on independence and impartiality as a Comsec employee. With this in mind the issues raised by his case and Ms Cooper's are not identical. The Applicant was declaring his candidature in Kenya in the wake of a Comsec mission to Kenya which he had conducted.

133. We do not feel able to draw an inference of discrimination on a prohibited ground from this material.

134. We reiterate that in any event the action taken against the Applicant in the present case was taken on proper grounds and for good reason. We will not repeat all our previous findings in this respect. One member of the Tribunal considers that the Respondent may have been a little oversensitive on the question of the Applicant's political candidature; but agrees that the action taken by the Respondent by reference to the several allegations which formed the background to the suspension was indeed justified.

135. The claim as regards equal treatment and discrimination fails. The Applicant's case on this aspect is diffuse. But we have found no evidence raising a serious case under this heading.

#### COSTS AND OTHER RELIEF

136. The Tribunal has decided that no award of costs should be made to either party. The Respondent, which has succeeded on all the "live" issues, does not seek costs. The Claimant, has not succeeded in any "live" claim and has accordingly no basis for being awarded costs.

137. No other relief is necessary or appropriate, the Tribunal having dismissed the extant claims

CHRISTOPHER JEANS Q.C., President  
ROSE UKEJE, Justice  
GEORGE EROTOCRITOU, Justice

Dated 26th July 2013

CSAT/20  
THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL  
IN THE MATTER OF:

JULIUS NDUNG'U KABERERE  
Applicant  
and

THE COMMONWEALTH SECRETARIAT  
Respondent

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JUDGMENT

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