



CSAT APPL/ 24, APL/25, APL 26

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

EFE OTOTAHOR

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

GIZELA ERASMUS

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

OLUSOLA AINA

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal Constituted by

Mr Christopher Jeans QC , President

Mr Dheerendra Kumar Dabee SC, Member

Mr David Goddard QC , Member

SECOND JUDGMENT

Introduction

1. The Tribunal's judgment of March 2015 ("the March judgment") dealt with the "receivability" of the Applications and the related grievance issues and complaint. It also resolved the pension gratuity claim.
2. One claim was left outstanding: the Applicants' claim that they were entitled to be re-graded following job evaluation from Grade (or "Pay-point") "N" to the (higher) Grade "K". We refer to this as the job evaluation /grading claim".
3. The Tribunal did not resolve this claim when delivering the March judgment because it did not have sufficient information. A key document was missing from the exhibits to the pleadings. The Tribunal needed to see that document and to receive the parties' respective submissions about it. So it made an order for the production of the document and for each party to make submissions upon the document.
4. The parties have complied with that Order.
5. The Tribunal has duly considered the job evaluation/ grading claim in the light of the document which has now been produced and the parties' respective submissions on it.

The context of the job evaluation/grading claim

6. We will not repeat the background description or findings of fact we set out in the March judgment. We take that description and those findings as our starting point for this judgment. This judgment therefore needs to be read with the March judgment.
7. We will however recapitulate sufficiently to set the job evaluation/grading claim in its context.
8. The Applicants were employed from various dates in the summer of 2011. They were employed as HR Assistants. They were initially employed on one year contracts. Their employment was continued thereafter on a succession of contracts (sometimes described as "contract extensions") for various short terms.

9. Under the (one year) contracts under which they were originally engaged and under the successive short term contracts the job was assigned the grade of "N". There was no ambiguity about the grade which each of the Applicants was being offered. It was at all times grade N.
10. As appears from paragraphs 29-31 of the March judgment the Applicants had inquired before the expiry of one contract whether, under the next contract, the job would be upgraded to grade K. The Respondent had told them it would remain at N.
11. In support of their present claim that they were entitled to be upgraded to "K", the Claimants relied on the email to "ALLSTAFF" from Marilyn Benjamin dated 15th June 2012 ("the ALLSTAFF email"). This forms Annex XI to all three of the Applications. The memo appeared to promise the implementation of recommendations for re-gradings which had been set out in a 2009 Job Evaluation. Moreover it appeared to promise back pay to 1st July 2011 for those whose jobs were to be upgraded.
12. We set out here the key paragraphs of the ALLSTAFF email (emphasis added):

"As many of you will know, a limited Job Evaluation was undertaken for the Commonwealth Secretariat by PricewaterhouseCoopers (PwC) Consultants in 2009. Management Committee has progressively considered the recommendations of the report.

In this regard, I can advise that the Management Committee has now made decisions on all the remaining recommendations of that 2009 Job Evaluation, affecting the positions listed **in the attached document**. The Management Committee has decided, exceptionally, **to backdate the implementation date of these decisions to 1 July 2011** to coincide with the recent TACOS package of reforms. CSD will effect these changes in the payroll as soon as possible...

...It is recognised that the implementation of the outcomes of the 2009 only addresses the limited roles considered and that in some cases, this may generate new challenges which we may need to manage as they arise.

Going forward ...we will need to consider any organisation-wide analysis of roles and job evaluation exercise. In the meantime, Management Committee does not expect to receive any individual requests to re-evaluate existing positions"...

13. Paragraph 19 of the respective Applications stated that the "*annex to the email identified the Applicant's job as a move from Pay point N to pay point K (Annex XII)*".
14. On examination at the hearing Annex XII to the Applications did not appear to be document attached to the ALLSTAFF email. It appeared that the Tribunal did not have the correct "attached document".

15. Hence the Tribunal's further Order requiring the production/identification of "the Attached document".
16. The "attached document" was clearly a central piece of the picture.
17. If, on the one hand, it did refer to the Applicants' job and did indicate (as the Applications all asserted) that this job was to "move" up "from Pay Point N to Pay Point K", then why did the Respondent say that the Applicants were not entitled to this upgrading and why were they not entitled to the corresponding back-pay?
18. If, on the other hand, the "attached document" did not refer to the Applicants' job, or did not provide for that job to be upgraded, then how did the Applicants advance their case?
19. Hence the Tribunal's order for further submissions on the "attached document", once identified.

The "attached document" and the parties positions about it

20. Pursuant to our Order the "attached document" was duly produced by the Respondent. It was not in any of the annexes to the pleadings previously before us. The Applicants have confirmed that the document produced by the Respondent is the correct document¹.
21. The "attached document" does *not* refer to the Applicants' job. This too is common ground on the further submissions from the parties².
22. It follows that the simple case put forward in each of the Applications that the "attached document" provided for the Applicants job to "move up" to Grade K is wrong.
23. Before moving to the case as now advanced by the Applicants we need to say a little about the jobs to which the "attached document" does refer.
24. Amongst the jobs listed on the "attached document" are two jobs which do include the title "HR Assistant". They are the jobs of "HR Assistant (CFTC Roster/Clerical)" and "HR Assistant (Head Office)", both of which are shown as having been graded at "M"

¹ Applicants' Response to Respondent's Additional Submissions ("ARRAS") para 4 confirms

² ARRAS para 5 confirms

under the job evaluation study. It is accepted by all sides that these roles were occupied by permanent members of staff and do not correspond to the Applicants' jobs³.

25. There are also various "HR Officer" jobs shown on the attached document. Of these three jobs are shown as "HR Officer (HQ Resourcing)", and are shown as being graded at K. These were, it is common ground, vacant posts. It is these posts which form the focus of the Applicants' further submissions.

26. The Respondent has produced⁴ with its Additional Submissions a memo from Nike Ajibowo, Human Resources Adviser, to ASG Steve Cutts dated 28 May 2012. This refers to the approval which had been sought to extend the fixed term contracts of "the 3 HR Assistants" (who are identified in the memo as Ms Erasmus, Ms Ototahor and Ms Aina) and goes on to refer to a plan separately to recruit HR Officers:

"...The new HR structure is now partially implemented with the successful recruitment of 3 HR Advisers [the Applicants]. The next stage of the restructuring process will be the recruitment of HR Officer level positions at pay point K...

The HR Officers positions, pay point K will be advertised in June 2012...

27. Pausing there, it is clear that the vacant HR Officers roles were seen by the Respondent as distinct from the positions held by the HR Assistants.

28. The Respondent explains in its further submissions that the vacant HR Officer posts were advertised in August 2012; that the Applicants applied for those posts; but that the recruitment process was suspended in September 2012 on the arrival of the incoming Director of Human Resources, who wished to review resource requirements.

29. As modified by their Further Submissions the Applicants' case is that, in the absence of appointments to the "HR Officer (HQ Resourcing)" positions, they were performing those roles "in all but name"⁵. They rely on the various accounts each Applicant gives of the tasks they respectively undertook as set out in the Replies (original pleadings).

30. The Respondent disputes that the Applicants were in fact doing the HR Officer (HQ Resourcing) jobs. It says that the Applicants' jobs under their job description were in the nature of an administrative support role; that this is the role they in fact performed;

³ ARRAS para 6 confirms

⁴ Annex II to Additional Submissions

⁵ ARRAS para 9

and that the Officer role involved higher level duties. It contends that the Applicants were not entitled to be treated as holding a higher position than the position of HR Assistant to which they had been appointed.

Analysis

31. In their respective Applications the Applicants advance their claim on several alternative bases, contending that the Respondent's "failure to implement the new job grade or pay the commensurate salary and benefits " amounted to any of the following⁶:
- (a) breach of legitimate expectation;
 - (b) breach of good faith;
 - (c) breach of a general duty to treat the employee fairly and equally with others in like situations;
 - (d) breach of the principle of equal pay for equal work;
 - (e) unjust enrichment.
32. The starting point for each of these contentions is that there was a relevant "failure" to implement the re-grading/job evaluation.
33. It is now clear to us that the starting point for the Applicants' case is wrong: the Respondent cannot fairly be accused of a relevant "failure" to implement the re-grading/job evaluation.
34. The Applicants job was not re-graded. The "attached document" to the ALLSTAFF email shows that their job of HR Assistant was not one of those which was re-graded.
35. The apparent promise to staff to implement the re-grading (and to pay back pay where jobs were re-graded) therefore had no application to the HR Assistant role held by the three Applicants.
36. We certainly do not suggest that there was any deliberate intention to mislead the Tribunal. However paragraph 19 of each of the Applications was both inaccurate and seriously confusing in asserting that "[t]he annex to the email identified the Applicant's job as a move from Pay Point N to pay point K "and then identifying the wrong

⁶Applications para 23

document as the attachment. We are also surprised that, for its part, the Respondent did not meet this assertion by providing the correct “ attached document” as an annex to its original pleadings and pointing to the absence of the Applicants’ jobs from the list of re-graded positions.

37. In the light of the true position as it now appears, the analysis is relatively straightforward.

38. It is for the Respondent as employer to determine its own grading system.

39. The allocation of individual jobs to grades within such a grading system is also a matter for the Respondent as employer.

40. The Tribunal has a limited jurisdiction to interfere with the assignment of grades to jobs, in particular where there has been a procedural unfairness, an error of law or some other fundamental and self-evident error. But under international administrative law the employer enjoys considerable latitude in the operation of its grading system and the use of job evaluation in that connection: see eg Sunder Singh v Commonwealth Secretariat CSAT Appl /27 esp at para 51.

41. There is no basis for the Tribunal’s intervention here.

42. There is nothing unlawful, erroneous, or even questionable in ranking an HR Assistant’s job lower than that of an HR Officer. It is clear that the job of an HR Assistant as shown by the job description⁷ is a support role. It involves a range of day-to-day administrative tasks. It ranks lower than that of an HR Officer. Indeed the job description shows the position as “reporting to” a Human Resources Officer.

43. No doubt the HR Assistants would report to a more senior officer if the relevant Human Resources Officers had yet to be appointed. But the fact that the job is showing as “reporting to” a Human Resources Officer is a very telling indication that an Assistant position ranks lower. The job evaluations shown on the “attached document” which show HR Officers of various types consistently graded above HR Assistants of various types is itself consistent with this picture. There is no reason to question the Respondent’s assertions⁸ that the job of HR Assistant carries lower demands than the unfilled position of HR Officer (HQ resourcing).

⁷ Answer Annex IV

⁸ Eg at para 26 of the Answer

44. What of the Applicants' assertion that they were in fact doing the HR Officer (HQ Resourcing) role in "all but name"?
45. It is extremely difficult for the Tribunal to resolve questions as to the extent to which tasks undertaken by the Applicants could be said to involve work above HR Assistant level.
46. We note that each of the Applicants was very highly qualified (degree-level and above) and it would not be surprising that they would be able to undertake and perform successfully tasks well beyond the kind of straightforward administrative support envisaged by the HR Assistant job description. However, the fact that they are each very highly qualified does not assist in evaluating the level of work they in fact undertook.
47. The Respondent states that degree level qualifications were not required for the role and the job description bears this out.
48. Many of the tasks the Applicants list in their respective Replies⁹ as having been undertaken by them are expressed at a level of generality which makes it difficult to calibrate the complexity or level of the Applicants' respective input. For example the function of providing draft letters (eg on maternity leave – Ms Aina) could involve (at one end of the scale) the issuing of a standard document with dates and other basic data inserted or (at the other end of the scale) the interpretation of complex rules or policies (eg about maternity absence). Similarly Ms Erasmus' responsibility for "collating" information on length of service and redundancy entitlement at the Youth Centres could involve anything from (at one end of the spectrum) simply extracting information through a standard computerised process to (at the other end of the spectrum) skilled organisation and presentation of material and the application of complex rules.
49. Moreover, as the Respondent suggests, some of the tasks which the Applicants list in paragraph 22 of their respective Replies (at least in the cases of Ms Ototahor and Ms Aina) could fairly be described as administrative support functions which are in line with their job descriptions: for example Ms Ototahor and Ms Aina state that they "provided

⁹ See para 22 of the Respective Replies

preliminary chronological information” to HR Advisers, which might appear to be exactly the sort of administrative support envisaged by the HR Assistant role

50. It is equally difficult for us to assess which, if any elements, of higher level work they may have undertaken pertained specifically to the HR Officer (HQ Resourcing) position, as distinct from any other position in the hierarchy. We do not appear to have been provided with a job description for the HR Officer (HQ Resourcing), although the Respondent appears to quote from it¹⁰. (The Respondent refers us to Annex IV to the Answer but the job description there relates only to the HR Assistants’ job.)

51. Even if, however, the Claimants did in fact regularly undertake tasks which:

(a) were at a higher level than their own jobs as HR Assistants; and

(b) were tasks would have fallen to the HR Officers (HQ Resourcing) if those positions had been filled,

it does not follow that the Claimants are to be treated as *holding* those HR Officer (HQ Resourcing) jobs or that a grade announced specifically as being for the HR Officer (HQ Resourcing) jobs then became applicable to the HR Assistant job.

52. It is commonplace when a post is unfilled that tasks which would be associated with that post may be undertaken by others, both higher and lower in the hierarchy, on an interim basis. However, the nature and standard of input into those tasks - and the nature and standard that may legitimately be demanded by the employer - may differ according to the level at which the person doing the task was appointed; and the fact that such tasks are undertaken says little about the extent to which the job holder was nonetheless performing the tasks of her or his “ordinary” role.

53. In short the Applicants’ experience, performance and high qualifications may have made them strong candidates for the three HR (HQ Resourcing) Officer posts when advertised; but did not mean that they had already been appointed to these posts or that they were entitled to have their existing positions re-graded at the level of those posts.

¹⁰ Answer paragraph 26

54. We now understand the analogy which the Respondent draws with the case of Oyas v Comsec CSAT APPL/16 (Original Tribunal and Review Board) and the reliance it places on the rulings in that case. Even if it is assumed in their favour that each of the Applicants performed tasks which would have been appropriate for the higher role of HR Officer (HQ Resourcing), the Applicants did not thereby become entitled to be treated as if they had been appointed to the higher role or to have their jobs re-graded accordingly. In this respect the Applicants' position can be compared with that of the Applicant in Oyas.

55. In the light of this conclusion, the various heads of argument advanced by the Applicants can be answered shortly. The Applicants' re-grading/job evaluation claim falls at the first hurdle. There was no relevant "failure" to implement a grade K. The Applicants had never been promised such a grading or given to understand that it would be applicable; and the Respondent was entitled to maintain their existing grade. It follows that the various strands of the Applicants' argument lack the necessary foundation on the facts.

Breach of legitimate expectation

56. The Applicants had no legitimate expectation that their jobs would be upgraded.

57. The ALLSTAFF memorandum and its "attached document" did not raise any such expectation. Those documents said nothing about their job of HR Assistants.

58. The Claimants were appointed at Grade N and their successive contracts were at grade N. When they inquired as to whether their jobs would be re-graded at "K" the Respondent told them expressly that they would continue to be graded at N.

59. The Respondent was clear at all times that their grade was "N". The Applicants were unhappy about that grading, but there was no legitimate expectation of any higher grade.

Breach of good faith

60. There was no breach of any duty of good faith. The Respondent was clear about the grade to which the Applicants were appointed under their successive contracts. There was no breach of good faith in observing the express basis of their engagement.

Breach of the general duty of fairness and equal treatment

61. It is not necessary for the purposes of this judgment to explore the scope of general duties in relation to fairness and equality. On the facts we have found there is no scope for any breach of such a duty here.
62. The Claimants were graded in accordance with the terms of their engagement and there was no promise or right or legitimate expectation that they would be upgraded.
63. The Applicants refer¹¹ to the treatment of other employees whose grades are said to have been changed.
64. In each case the employee in question held an entirely different position from that of the Applicants. The mere fact that there was a change in grade for someone holding an entirely different position does not raise a case of unequal treatment of the Applicants for the Respondent to answer. We do not think it is necessary, therefore, on the basis of the bare facts put forward by the Applicants to explore further the situations of these other employees. We have from the Respondents only the briefest of outlines¹² of the history of these other cases; but the Applicants do not raise a case to answer here.
65. No question of unequal treatment therefore arises.

Breach of equal pay for equal work

66. There is no basis on the facts found for any possible breach of this principle, which normally concerns discriminatory pay by comparison with a person of the opposite gender. The Applicants were paid correctly in accordance with their contracts and assigned grade. There is no basis for them to assert that the Respondent discriminated against them on the grounds of gender or any other protected characteristic.
67. The Tribunal re-iterates that the comparisons made with the treatment of other employees raise no basis for any claim of unequal treatment on any ground.

¹¹ Eg at Applications paras 21 and 22

¹² Eg at Answer Para 31, Rejoinder para 27 and Reply to ARRAS

Unjust enrichment

68. On the findings and conclusions already reached there is no basis for any claim of unjust enrichment. The Applicants were paid the rate applicable to their contracts.

69. It is not necessary or appropriate in the circumstances for the Tribunal to embark on an analysis as to the circumstances in which an unjust enrichment claim might be asserted in international administrative law.

Costs

70. There will be no order as to costs.

Given this 27th day of May, 2015

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Christopher Jeans Q.C., President

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David Goddard QC

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Dheerendra Dabee SC