

CSAT/3(No.2)

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the matter of

SELINA MOHSIN

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

JUDGEMENT ON QUANTUM OF DAMAGES PURSUANT TO DECISION DATED 6TH SEPTEMBER 01

ORDER DATED 9 NOVEMBER 01

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1. The Tribunal delivered its decision on the merits of the Applicant's claim on 6th September 01. The Tribunal ordered that both parties present submissions on quantum of damages by 28th September. The Respondent submissions were received by the Tribunal on the 27th September. The Applicant's then Solicitors Mishcon de Reya made a request for a 7 day adjournment which was granted by the Tribunal. On the 3rd October the Secretary to the Tribunal received a letter from Tasselli & Co stating that the Applicant has recently instructed them to act on her behalf. In that letter the Applicant's Solicitors requested a 14 day extension of time to present their final submissions. The Tribunal granted this. (In addition to this request the Applicant sought other relief which do not affect the issue of quantum of damages). The Tribunal ordered that the Secretary receive all final submission on 29th October. The Applicant requested an extension of time to the 5th November. The Tribunal granted that extension. The Tribunal is grateful to the Respondents for their patience in this matter and took into account their objections to the Applicant's various request for extensions of time. The Tribunal granted the Applicant the above extensions of time in order to ensure that she had reasonable time in which to instruct her new Solicitors on the matter of quantum of damages. It is regrettable that the Respondents have had to wait almost 2 months for a decision on quantum of damages since filing their submissions. It was necessary and in the interest of a fair hearing that the applicant was given reasonable time and every opportunity to present her arguments to the Tribunal on this important matter.

2. The Tribunal has received detailed submissions from both parties on the question of what compensation should be awarded in respect of the Tribunal's decision to rescind the decision of the Review Board of the 20th February 1997. The said Tribunal decision is set out in paragraph 8.3 of the judgement and is principally based upon the Respondents failure to observe the audi alteram partem rule. In addition the Tribunal found that but for the procedural error the Review Board had sufficient grounds on which to recommend a renewal of contract for a shorter term of 2 years instead of 3. In the light of this finding the Tribunal must now decide firstly whether compensation is payable and if it is so payable what is the reasonable sum to be awarded.

3. First it is necessary to briefly set out the legal basis upon which the Tribunal can award compensation for a decision based upon procedural irregularity where the Tribunal has rescinded that decision. Secondly the legal basis upon which a Tribunal can award compensation where there is procedural irregularity but such irregularity has not affected the decision in question. In respect of the decision rescinded, the power of the Tribunal to award compensation is clearly set out in Article X paragraph 1 of the Statute. There are 2 options, rescission or specific performance. International Tribunals do not always grant compensation where a decision based upon procedural irregularity is rescinded. When compensation is granted it is

sometimes awarded for moral injury only. Sometimes for both material and moral injury. In this case the Tribunal concludes that the Applicant has not suffered material loss particularly as the Tribunal has found that but for the procedural irregularity the Review Board could have arrived at the same decision. Compensation will be awarded for moral injury only.

4. The question of compensation for procedural irregularity, which does not affect any decision, is not so straightforward. In the final paragraph of the judgement the Tribunal referred to Article X paragraph 2 of the Statute. The Tribunal notes the contention of the Respondents in paragraphs 28-30 of their written submission that the Tribunal has no jurisdiction to grant such remedy, or that the Applicant has failed to demonstrate that she has suffered injury. It is clear that the statute sets out a remedy if there is failure to observe procedures prescribed in the rules of the Secretariat. The statute is silent upon other forms of irregularity, and does not cover all eventualities. Paragraph 2 cannot assist the Applicant at this stage, as she is no longer in the employment of Commonwealth Secretariat. The rules are silent as to whether compensation can be awarded if the aggrieved staff member is no longer in the employment of the Commonwealth Secretariat. The Tribunal notes that the statute does not say in terms that compensation is not to be awarded for procedural errors, where an employee is no longer in employment. The Tribunal does not accept that those responsible for the wording of the said paragraph of the statute intended that an Applicant who suffers serious procedural errors at the hand of her/his employer will have no redress or remedy if their claim is heard by a Tribunal when they are no longer in employment. If that were right then an unscrupulous employer could commit procedural errors against an employee knowing full well that the employee would have no redress before the Tribunal. This would undermine the importance of procedural rules, which are designed to protect both employer and employee and to ensure good working relations between both. Is it possible then to consider an award of compensation for procedural irregularity outside the terms of the statute? The answer to this question is yes on the basis that it is fair and right to do so. The Applicant should not be denied her right to compensation simply because a statute is silent on the matter.

Article X1V of the statute states

"In dealing with all cases before it relating to contracts of service. the Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual members countries"

The Tribunal has not found a stated international principle of administrative law governing the award of compensation of procedural error not affecting a decision but has found it helpful to look at the developing jurisprudence of other international Tribunals who have made awards of compensation for such irregularity. It is clear from those decisions that other international Administrative Tribunals frequently consider procedural errors arising from claims before them, and do award compensation for such errors. The Tribunal is grateful for the assistance given by both parties in providing copies of decisions of other international tribunals. The Tribunal has read and finds helpful the following decisions; In re Viannev ILOAT no. 1158 (Jan 1992) In re Matthews ILOAT no. 2004 (Jan 2001)

In re Schimmell ILOAT no. 1380 (Feb 1995) In re Chawla ILOT no. 195 (Nov 1972)

In addition the Tribunal has read and finds helpful "procedural irregularity" at pages 34-47, 148--149 and "Remedies" at pages 140--149 of volume 2 of Dr Amerasinghe's The law of the international civil service. 2nd edition.

At page 148 to the said volume Dr. Amerasinghe makes reference to a number of decisions where the UNAT has awarded compensation for procedural irregularities where non renewal of a fixed term contract is found to be lawful.

From the above authorities it is clear that an administrative Tribunal may award compensation for procedural irregularity. Such an award can be made even though the irregularity does not affect the decision taken. An award for compensation may be made simply because a procedural irregularity had to be compensated for. (para (d) page 46-47 of The law of the international civil service.)

The Tribunal therefore concludes that compensation will be awarded for procedural irregularities listed under 2, 3 & 4 of paragraph entitled "decision" in the judgment.

5. When considering how much to award the applicant for the procedural irregularity in respect of the Review Boards 1997 decision, the Tribunal must bear in mind the finding that but for the procedural

irregularity the decision of the Review Board could have been the same. In respect of the other 3 procedural errors the Tribunal notes that the lack of consultation before taking the decision to closely supervise was the most serious of the 3. The other 2 errors can be classified as minor procedural errors. The Tribunal has read carefully the Applicant's submissions dated 23rd October and 5th November and finds no merit in the submissions that she is entitled to damages for loss due to her medical condition and stress. In addition the Tribunal rejects the submission that the Applicant is entitled to loss of salary and increments totalling £55,495.00.

The Tribunal awards the Applicant the sum of £15,000 in compensation for moral injury for rescission of the Review Boards decision and 3 procedural irregularities as referred to in the judgement.

6. COST

The Applicant requests an order for cost in terms set out in paragraph 15 of the application. In addition the submissions on medical condition and quantum at paragraph 10 claims a sum of £108,812.50 representing legal cost. (Solicitors and counsel fees and other disbursements).

The Tribunal in deciding an award of cost in this case has regard to the Article V paragraph 4, which states that the Tribunal "may take into account the means of the parties". In addition the Tribunal has read and has found helpful chapter 32 on "cost" of Dr. Amerasinghe Volume 1 on The Law of The International Civil Service.

The Tribunal was assisted by the arguments presented by the Respondents on this issue set out in paragraph 42-43 of the written submissions. The Tribunal found the decisions of In re Bakker ILOAT no. 931 (Dee 1988) and In re Ghattar no. 320 (Nov 1977) of assistance.

From these authorities it is the accepted practice of International Administrative Tribunals to award cost on a discretionary basis "where they see fit" (page 545 vol 1 Amerasinghe).

The Tribunal does take into account the means of the parties in particular the submission of the Respondent that the funds available to the Commonwealth Secretariat are limited. It is also relevant to the Tribunal's consideration that the Applicant was successful in only a small part of her claim. Her substantial claim relating to contract renewal is dismissed.

Nevertheless the Applicant is entitled to an award of cost. The Tribunal awards a sum of £10,000 for cost to the Applicant.

The total sum awarded in this case is therefore £25,000.

All other claims are therefore dismissed.

ANESTA WEEKES QC.

9TH NOVEMBER 01

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ORDER DATED 9 NOVEMBER 01

SELINA MOHSIN -V- COMMONWEALTH SECRETARIAT ORDER-9TH November 01.

The Applicant by a letter dated 3rd October claims the following relief:

1. that Ms Weekes judgment/award be set aside and that you pay our clients cost of and incidental to the hearing itself on an indemnity basis.
2. That new Rules are made which are ECHR compliant.
3. A new Tribunal be composed (if necessary by appropriate amendments to the rules that are ECHR compliant) comprising of one member appointed by our client, one member appointed by the Secretary General and another appointed by the two judges themselves.
4. That independent Secretarial machinery be set up with appropriate resources that is not staffed by Commonwealth Secretariat staff.

As both parties are aware the Tribunal granted an extension of time which was also a request contained in the said letter.

In respect to 1 above the Tribunal do not and cannot set aside its judgment in this matter. The Applicant is familiar with the Statute of the Arbitral Tribunal particularly Article 1X paragraph 2, which states *The judgment of the Tribunal shall be final and binding on the parties and shall not be subject to appeal, Request under 2, 3 and 4 are all matters outside of the jurisdiction of the Tribunal. Therefore no order can be made. A copy of this letter has been sent to the President. He will no doubt give consideration to the content of the said letter.*

In a further letter dated 23 rd October the Applicant seeks to adduce further evidence pursuant to Article X 1 and Rule 23.

This application is rejected.

ANESTA WEEKES QC