

CSAT APL/16(No 3)

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

MONICA OYAS

Applicant

And

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Review Board constituted by

Mr D K Dabee SC; Mr Justice Seymour Panton OJ, CD; Mr Chelva Rajah SC; Mr David Goddard QC and Mr Arthur Faerua

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#### JUDGMENT ON APPLICATION FOR REVIEW

7 June 2013

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#### Introduction: the application before the Tribunal

1. The Applicant, Monica Oyas, has applied for a review of the Judgment of the Tribunal dated 26 August 2011 ("the Judgment"). The Judgment dismissed the Applicant's claims arising out of the restructuring of the human resources function at the Commonwealth Secretariat, except for declaring that the Applicant retained and retains a legitimate expectation of being granted a further fixed term contract running to the end of September 2013.

2. As required by the Statute establishing the Tribunal, the President of the Tribunal has convened a Review Board to consider the application for review, comprising five members of the Tribunal who did not sit on the initial panel that delivered the Judgment.

3. The Application for Review is made on the grounds that the initial panel erred in law and fact, and reached an unreasonable decision. The specific grounds relied on by the Applicant are set out in paragraph 35 below.

4. The Review Board has concluded that the grounds of review advanced by the Applicant have not been made out. The Review Board is not persuaded that the initial panel erred in law or fact, or arrived at an unreasonable decision on the basis of the material before it. The reasons for these findings are set out below.

#### The facts giving rise to the dispute

5. The relevant facts are set out in detail at [13] to [78] of the Judgment. None of the Applicant's criticisms of the initial panel's findings of fact call into question the factual findings in those paragraphs of the Judgment. Accordingly this review can, and must, proceed on the basis of these factual findings. We need do no more than summarise them here.

6. At the time the dispute arose, the applicant was employed by the Secretariat as Head of the Human Resources Section under a three year contract commencing on 1 October 2007. Her central complaint is that when the Secretariat restructured its human resources function in 2009, and decided that the human resources section should become a Division headed by a Director, she should have been appointed to that Director position. Instead, the Secretary-General decided that the position would be subject to open competition.

#### The Applicant's original application to the Tribunal

7. The Applicant made an application to the Tribunal on 4 August 2010. She challenged the Secretary-General's decisions on a number of grounds: breach of contract, infringement of legitimate expectations, abuse of power, unfairness, bad faith, discrimination and victimisation. She sought wide-ranging relief which is set out in full at [81] of the Judgment, and which included orders setting aside the decision to advertise the Director HR position, orders requiring that she be appointed to that position, and financial

compensation for the Secretary-General's failure to appoint her to that position and/or for his failure to renew her contract for a second three year term.

8. On 31 August 2010 interim orders were made requiring the Secretariat to suspend the recruitment process and the implementation of any decisions relating to the Applicant's contract of employment until the Tribunal made its final decision on the merits of the Applicant's claim.

9. By a further Order dated 8 April 2011 it was directed that the Applicant's contract was deemed to be extended until 31 July 2011 or until the Tribunal's judgment, whichever is the sooner.

10. A further Order was made on 1 July 2011 extending the continuation of the Applicant's contract until delivery of judgment. The Judgment was delivered on 26 August 2011, as noted above.

#### The Judgment of the initial panel

11. The initial panel said at [12] of the Judgment that the central issue before it was whether the Director post was a new post which the Respondent was entitled to advertise? Or was it the Applicant's post, or a post to which she had a prior claim?

12. We agree that this was the central issue raised by the Applicant's original application.

13. The initial panel noted at [84] that the Tribunal is governed by the principles of international administrative law. The initial panel identified, at [85] to [87], two principles that were relevant to its determination of the matter before it:

(a) in examining decisions made in the exercise of discretionary power, the Tribunal may not substitute its judgment for that of the organisation;

(b) an organisation is not in principle bound to accept advice or recommendations from advisers.

14. We agree with these propositions, the correctness of which has not been challenged by the Applicant.

15. The initial panel identified, at [89], 11 issues which it then proceeded to address. The issues, and the initial panel's findings, were as follows:

(1) Was the Applicant entitled to the position of Director, HR?

16. The initial panel found that the Applicant was employed as Head of HR Section, not as Director. It said that the Director role cannot fairly be described as the same job the Applicant is doing. Rather, it is a more senior role. The initial panel rejected the Applicant's claim that she is already doing the Director's job, or that the Director role is a mere relabeling of her existing job.

17. Because this issue is central to the Applicant's arguments on review, we set out in full the relevant paragraphs from the Judgment:

"91. Under her contract of employment, the Applicant was employed as Head of HR Section, not as Director. Her contract has never been varied so as confer on her the status of Director.

92. The Applicant says, however, that she has been doing the job of Director in all but name. She says the Director post is nothing more than a "re-labelling" of her existing job. To use her expression (e.g. Reply para. 6.29.12), she contends that the Director post is already "encumbered" by her.

93. We disagree. We do not consider that the Director role can fairly be described as the same job the Applicant is doing. It is a more senior role as "strategic partner" of the Secretary-General, ASGs and other Directors.

94. We recognise that job descriptions can never convey a complete picture of the job; that the accuracy and appropriateness of various job descriptions and proposed job descriptions in this case is a matter of debate; and that (whilst we cast no aspersions whatever) it is not difficult for anyone writing a job description to do so with a particular conclusion in view. Moreover, where the jobs being compared are at the apex of the same function (in this case HR) a good deal of similarity is to be expected in the description of the work.

95. In this case, however, the Applicant's job involved reporting to a Director. That line of reporting was withdrawn by agreement for the time being because of relationship difficulties, so that the Applicant then reported to a DSG. But the fact that the job was fashioned as a job reporting to a Director is a very

powerful indication that a lower level of authority and responsibility is involved. Moreover we think it plain that, as the Respondent has submitted, a higher level of strategic engagement (and with it a different level of performance) can be expected from a Director than from a Head of Section. The Director post could also be regarded also as requiring longer experience.

96. It is true that IPAC recommended that (subject to assessment of her performance) the Applicant could be appointed to the Director role. But this does not mean that she is doing it already.

97. The PwC job evaluation study suggests that her responsibility as Head of Section merited a "C" grading, the same as a Director. But this does not mean she is doing the Director's job. Leaving aside the question (see below) whether the evaluation outcome had to be accepted and implemented, a finding by a job evaluator that a "score" for job Y falls within the same grade bracket as a "score" for job Z does not mean that jobs Y and Z are the same job. Moreover, an employer who found that job Y was evaluated at a score yielding the same grade level as job Z when job Y was designed to report to job Z (which is comparable to the situation here) would immediately question the appropriateness of either the job evaluation or the grade structure.

98. The job of Director was conceived as a more senior job than the job of Head of Section and justifiably so.

99. We reject the Applicant's claim that she is already doing the Director's job, or that the Director role is a mere re-labelling of her existing job.

100. In conclusion, the Director HR job is not "encumbered". The Applicant is not "entitled" to the post of Director."

(2) Was the Secretary General bound by the recommendations of the consultants IPAC or PwC?

18. The initial panel found that the Secretary-General was not obliged to accept the recommendation of IPAC that the Applicant be appointed as Director HR, either in the qualified form in which that recommendation was given or at all. He was also entitled not to implement the job evaluation study of PwC. There was no abuse of power in the present case in the Secretary-General not accepting and implementing the recommendations of either group of consultants.

(3) Was the decision to fill the Director position by open competition in accordance with or contrary to the Staff Regulations, Staff Rules and applicable policy guidance?

19. As the initial panel said, it is an identifiable principle in the governing rules of the Commonwealth Secretariat that new positions at this level should be open to competition.

20. The initial panel noted that the Secretary General made clear from the start the importance he attached to subjecting new positions to open recruitment. In doing so, the initial panel found, he was embracing the principle of equal opportunity and not infringing it. The initial panel concluded that he was entitled to subject the Director role, as a new post, to outside competition, in the exercise of his discretion and in line with the Commonwealth Secretariat Staff Regulations ("the Staff Regulations") and the Guide to Human Resources Management Policies and Procedures in the Commonwealth Secretariat ("the HR Guide").

(4) Did the Respondent commit any breach of contract or duty in not implementing the job evaluation study outcome in relation to the Claimant?

21. The initial panel found that the Secretary General had a discretion whether to implement the evaluation made by PwC, and that he did not abuse his power or act outside the limits of his discretion in not implementing it.

(5) Did the non-renewal of the Applicant's existing contract, and the delay in deciding about it, amount to a breach of contract or duty?

22. The initial panel noted that the starting point for answering this question is the contract of employment, which is expressed to be renewable "by mutual agreement". The initial panel found that the Applicant had no contractual right to insist on renewal.

23. The general policy of the Secretariat is for a first contract at this level to be renewed, provided certain conditions are met. This policy is provided for in the Secretariat's rotation policy, which is referred to in the Staff Regulations, and set out in the HR Guide. In particular, Chapter 7 para 4.3 of the HR Guide provides that staff in grades CS1 - CS4 normally serve two three-year contracts in the

Secretariat, and staff in grades CS5-CS6 normally serve three three-year contracts in the Secretariat. Para 4.4 goes on to provide that:

"4.4 In all cases the granting of a new contract within these periods of tenure will be subject to fully satisfactory performance and the needs of the Secretariat. Staff can expect to be formally notified of their departure date between six months and one year before the end of their contract."

24. However the initial panel considered that there were special circumstances in the present case. The future of the Head of HR Section post was in doubt. Although the Applicant was told that the post would continue for the time being, on the appointment of the Director its future would then have to be considered. In these circumstances, the initial panel found, there was no abuse of discretion in not renewing her contract.

25. The initial panel said that the communication from the Secretariat to the Applicant about her future was not as clear or as direct as it might have been. But it did not consider that these imperfections amounted to a breach of the express or implied terms of her contract. Whilst the communication could have been simpler, clearer and more personal, the underlying decisions were communicated to her. The uncertainty of her situation reflected the continuing uncertainty about the shape of the HR function.

(6) Was there any obligation on the Respondent to renew the Applicant's contract?

26. This issue has already been addressed above: the initial panel found that there was no obligation to renew the contract.

(7) Did the Applicant have a legitimate expectation that her contract would be renewed?

27. The initial panel found that the Applicant did have a legitimate expectation of renewal of her contract for a further three year term. Because the Applicant complains that the initial panel's finding on this point is ambiguous, we set out the relevant extract from the Judgment:

"119. We accept that by virtue of the rotation policy, a person at the Applicant's grade holding a particular post under a first three year contract has a legitimate expectation that it will be renewed.

120. Where a restructuring is taking place and the post of the staff member is to disappear and the staff member is notified of non-renewal in good time, the expectation may not apply. To this extent we agree with the Management Committee's stance at the meeting of 2nd June 2009 ... Here, however, the Respondent did not give notice of non-renewal to the Applicant. It did not tell her that her post would definitely disappear. Instead, it confirmed that her position as Head of Section would continue for the time being subject to further consideration once the Director was in place. In these circumstances she retained and retains the legitimate expectation that she would be granted a further contract running to the end of September 2013. This legitimate expectation is unaffected by the grant of the injunction in her favour or by the lifting of that injunction by this judgment. We so declare."

(8) Did the Respondent act in bad faith?

28. The initial panel rejected the allegation of bad faith against the Secretary-General, finding that there was no basis for such an allegation.

(9) Did the Respondent victimise or discriminate against the Claimant or treat her unfairly?

29. The initial panel did not consider that there was any basis for an allegation of discrimination, breach of equal opportunities, victimisation or unfairness towards the Applicant.

(10) Did the Applicant suffer personal injuries in consequence of any breach of duty?

30. The initial panel did not find any relevant breach of duty to the Applicant, so the question of what injuries she had suffered and how they were caused did not arise for decision.

(11) What remedy, if any, should follow and in that connection, have internal remedies been exhausted and was there undue delay?

31. The initial panel did not consider that the Applicant was entitled to any remedy, and dismissed her claims, except that it declared that the Applicant retained and retains a legitimate expectation of being granted a fixed term contract running to the end of September 2013.

32. The formal orders made by the initial panel were that the claims were dismissed, except that (as noted above) it declared that the Applicant retained and retains a legitimate expectation of being granted a fixed term contract running to the end of September 2013.

33. The initial panel did not make any award of costs.

34. The initial panel noted, for the avoidance of doubt, that the injunction referred to in paragraph 10 above was at an end from the date of the Judgment.

The application for review

35. The grounds on which the Applicant says the initial panel erred in fact and law, and reached an unreasonable decision, are set out in her Application for Review as follows:

“2. The Tribunal erred in paragraph 93. The Tribunal failed to consider that under the International Administrative Law, a job’s responsibilities correspond to the grade of the job. The Tribunal examined the report of “IPAC” and PriceWaterhouseCoopers (“PwC”) consultants in paragraphs 23 and 53 of the Judgement respectively. The consultants evaluated that the Jobs in the HR Section including the head of HR was undervalued. It was acknowledged that the Head of HR position fell within the band of grade C even though the job was currently at grade D.

3. In the paragraph 95, the Tribunal applied wrong approach in evaluating the position of the director. A position is evaluated on the basis of its functions and performance and not on the basis on which it was/is conceived. In any event the Tribunal erred in facts leading to an error of law by not considering that the Head of HR has/had a similar role of reporting.

4. In reaching conclusions in paragraphs 98 to 100, the Tribunal erred in law by overlooking that the Applicant is seeking to be recruited on the basis that her qualification and experience had been considered satisfies the requirement. The Applicant claim is not entirely based of her already performing the same or similar functions but her entitlement is based on the legitimate expectations she has to be treated in a similar fashion as other members in HR section had been treated.

5. The Tribunal erred in law in the paragraph 110. The Respondent is bound to have a consistent, certain and transparent practice in implementing any recommendation and adopting any policy. The Respondent’s act of not re-evaluating the Head of HR position did amount to discrimination particularly when all subordinate positions were immediately re-evaluated on receiving recommendations.

6. The Tribunal erred in law by leaving ambiguity in terms of the Applicant’s entitlement to be granted a further fixed term contract by the end of September 2013. For the reasons observed in the paragraphs of the Judgement, the Applicant is entitled to the grant of further contract. Nevertheless the Respondent’s interpretation of legitimate expectation is somewhat arbitrary and different from the universally accepted definition of legitimate expectation. According to the Respondent’s construction of the term the Applicant has no contractual right on insistence for this renewal; this is contrary to the observations made in the paragraphs 66-72 of the judgment.”

36. The Applicant seeks review of the Judgment, and a direction to the Secretariat “to consider the Applicant as most suitable candidate for the position of the Director of HR.” In the alternative the Applicant seeks directions that the Applicant “is entitled to be granted one further contract on the basis of rotation policy.”

37. The other forms of relief sought by the Applicant before the initial panel, including financial compensation, have not been pursued on review.

38. The Applicant attached to her application for review a memorandum from the Assistant Secretary-General dated 6 September 2011, shortly after the date of the Judgment, advising her that the position of the Secretariat was that pending a decision on continuation or otherwise of her post, which will be advised following consideration by the Assistant Secretary-General and the incoming Director of Human Resources and a decision of the Secretary-General, her contract is extended in accordance with the provisions of Staff Rule 16. The memorandum said that this meant that her contract was extended until at least 26 February 2012 (6 months from the date of the Judgment).

39. The parties have not filed written submissions in relation to the review application. There was no request by either party for an oral hearing. Accordingly we have considered the application for review on the basis of the Applicant’s application for review, the material before the initial panel, and the further information requested by us referred to in the following paragraph.

40. Because the Applicant seeks relief in relation to her future employment by the Secretariat, we considered that we required information about her current employment status. We asked the Secretariat to provide that information to the Review Board, and we provided the Applicant with an opportunity to comment on the information provided by the Secretariat.

41. The Secretariat has advised us by letter dated 5 June 2013 that the Applicant continues to be employed by the Secretariat, and that her employment is due to end on 30 September 2013. The Director HR position has been advertised, and filled by another person. There have been discussions between the parties about entry into a new contract of employment that would run until 30 September 2013, but the outcome of those discussions is not clear from the information we have received.

The Review Board's approach to this application

42. The grounds on which a party to proceedings before the Tribunal can seek review of a decision of the Tribunal are set out in Article XI (5) of the Tribunal's Statute, which provides:

"5. A party to a case in which judgment has been delivered who challenges the judgment on the ground that the Tribunal has exceeded or failed to exercise its jurisdiction or competence, or has erred on a question of fact or law or both, or that there has been a fundamental error in procedure which has resulted in a failure of justice, or that the Tribunal has acted unreasonably having regard to the material placed before it, may apply to the Tribunal, within a period of 60 days after the judgment was delivered, for a review of the judgment."

43. Article XI (10) provides that a Review Board may affirm or rescind in whole or in part the judgment of the initial panel. Article XI (11) confers on a Review Board the power to substitute its own determination and make an order granting a remedy, to refuse to make any order granting a remedy, or to order a rehearing before a fresh panel.

44. The Review Board considers that it may review the initial panel's judgment, and rescind it in whole or in part, if and only if it is satisfied that one or more of the grounds in Article XI (5) has been established. The burden in review proceedings is on the applicant for review to persuade the Review Board that one or more of these grounds is made out. In the present case, that means that the burden is on the Applicant to satisfy the Review Board that the initial panel erred in law or fact, or reached an unreasonable conclusion on the material before it.

45. It is not the role of the Review Board to reconsider every aspect of the Judgment of the initial panel: rather, the role of the Review Board is to consider the specific errors alleged by the Applicant, to determine whether the Judgment of the initial panel is erroneous in those respects, and if so, to determine what orders should be made under Article XI (10) and (11).

Determination of the application for review

46. The central issue raised by the application for review is whether the initial panel was right to find that the Applicant did not already hold, and was not entitled to be appointed to, the Director HR position.

47. The Review Board is not persuaded that the initial panel made any error of fact or law in reaching this conclusion, or that it was unreasonable. The Review Board agrees with the approach adopted on this issue by the initial panel, and in particular agrees with the reasoning and conclusions at [91] to [100] of the Judgment, set out in paragraph 17 above.

48. The Applicant's arguments on review fail to distinguish between on the one hand an employment position established by the Secretariat and the requirements of that position, and on the other hand the incumbent in that position and his/her performance in that position. The Applicant argues that because she was performing to Director standard in her role as Head of Section, either she already was a Director, or she was entitled to be appointed to that position when it was created without the need for any competitive process. We consider that this argument is flawed. When the Applicant was initially employed it was as a Head of Section. Even if she is right to say that her qualifications and performance were at a higher level than would be expected of a Head of Section, that does not mean that she held a more senior position without the need for any formal decision by the Secretary General to establish such a position, or to reclassify her position as a Director position.

49. The decision that the Secretary-General made in early 2009 was a decision to create a new Director role, which as the initial panel found was a more senior role than the existing Head of Section role. It involved a higher level of authority and responsibility, and required more experience and a higher level of performance. The reporting lines were different. The Applicant did not hold that Director role at the time it was created: she was not a Director before the role was created, and the creation of the role did not automatically result in her appointment to that role without the need for any decision to that effect by the Secretary-General. Her experience and qualifications did not mean that she had any entitlement or

expectation that she would be appointed to this new senior role without any competitive process. If she was right that she was well qualified for the new role, then she could expect to be a strong candidate in the event that she applied. But she could not expect the Secretary-General to dispense with an open competitive process to find the best candidate for the new role, or that he would appoint her if she was not in fact the best candidate.

50. This disposes of the challenge to the initial panel's findings at [93], [95] and [98] to [100] of the Judgment, as set out at [2], [3] and [4] of the Application for Review.

51. Nor do we consider that there is any error of law in the initial panel's findings at [110] of the Judgment, as alleged at [5] of the Application for Review. It was open to the Secretary-General to decide that this new senior role should be the subject of an open competitive process, and that the Applicant should be appointed to it if and only if she was the best candidate. As we said above, her qualifications and experience would of course be relevant in the competitive appointment process. But the Review Board cannot see how her qualifications and experience, however impressive, could lead to the conclusion that it was not open to the Secretary-General to run a competitive appointment process for this role. Even if it was also open to the Secretary-General to appoint the Applicant without first undertaking such a process, an issue on which we express no view, it would not follow that it was not open to him to decide, in the exercise of his discretion, that it was desirable to run such a process. That is the high threshold that the Applicant would need to surmount in order to succeed in her argument, and she has not done so. Legitimate expectation of further appointment

52. Finally, we turn to the Applicant's argument that there was ambiguity in the initial panel's finding that she had a legitimate expectation of being granted a fixed term contract running to the end of September 2013.

53. We agree with the initial panel that the Applicant did not have a contractual right to a further term. Rather, she had an expectation based on the terms of her contract, the Staff Regulations, the Staff Rules and in particular the HR Guide that her contract would be renewed for a further three year term, subject to satisfactory performance and the needs of the Secretariat. If her contract was not renewed, she had the right to complain to a review board (an internal body, not a Review Board of the Tribunal) under the Staff Rules.

54. It follows that there was no error or ambiguity in the initial panel's finding that the Applicant had the legitimate expectation described above of being granted a further fixed term contract to the end of September 2013, but not a contractual right to such a grant. The finding accurately reflects the position under the Staff Regulations, the Staff Rules and the HR Guide.

55. In her Application for Review the Applicant seeks a direction that she is entitled to be granted one further contract on the basis of the Secretariat's rotation policy. The Secretary-General will need to consider any outstanding request by the Applicant for a further contract in the light of the legitimate expectation referred to above. It is not the role of the Review Board to make this decision, which is a matter for the Secretary-General.

#### Orders

56. We dismiss the application for review and affirm the Judgment of the initial panel.

57. The Secretariat did not make any application for costs. We order that each party bears its own costs in relation to this application for review.

Delivered on 7 June 2013

#### Signed

Mr Chelva Rajah SC, Presiding Member

Mr Justice Seymour Panton OJ, CD Member Mr D K Dabee SC, Member

Mr David Goddard QC, Member Mr Arthur Faerua, Member