



CSAT APL/22 (No 2)

**THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL
IN THE MATTER OF**

CARMALINE RAVINDRANI BANDARA

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

**Before the Review Board constituted by
Mr Chelva Rajah SC; Mr D K Dabee SC; Mr Justice George Erotocritou; Mr
Arthur Faerua; and Mr David Goddard QC**

JUDGMENT ON APPLICATION FOR REVIEW

Introduction: the application before the Review Board

1. The Applicant, Ms Carmaline Bandara, has applied to review the Judgment of a 3 member panel (“the Initial Panel”) of the Commonwealth Secretariat Arbitral Tribunal (“CSAT”) dated 18 July 2014 (“the Judgment”). The Judgment dismissed the Applicant’s claims arising out of the circumstances surrounding the re-grading of her position at the Commonwealth Secretariat.
2. As required by the Statute establishing CSAT, the President of CSAT has convened a Review Board to consider the Application for Review comprising five panel members of CSAT who did not sit on the Initial Panel that delivered the Judgment.
3. The Application for Review was made on the basis that the Initial Panel erred in law on two specific grounds, and in law and fact on a further ground. The grounds, which are set out in [40] below, raise questions concerning the lawfulness of the reduction in the Applicant’s total pay as a result of the re-grading, the process undertaken by the Respondent in relation to the grievance raised by the Applicant, and the job evaluation process which gave rise to the re-grading.
4. The Review Board has granted the Application for Review in so far as it relates to the Applicant’s claim for compensation arising out of serious defects in the grievance process. The Review Board has awarded compensation of £3,000 to the Applicant in respect of this claim. The other grounds on which review was sought have not been made out, and the Application for Review in relation to those matters has been dismissed.
5. The reasons for these findings are set out below.

The facts giving rise to the dispute

6. The Initial Panel’s findings in relation to the relevant facts are set out at [18] to [65] of its Judgment. The Applicant challenges some of the Initial Panel’s findings of fact. Those challenges are discussed below, in the course of discussing the grounds of review. This section of our judgment summarises the uncontested background facts giving rise to the dispute.

7. The Applicant had initially been employed by the Respondent in October 1973 as a shorthand typist. She was promoted many times, and from 1993 worked in the Political Affairs Division.
8. From around 2002, the Applicant took on, in addition to her normal administrative responsibilities, responsibility for producing documentation for the Commonwealth Heads of Government Meeting (CHOGM). Subsequently, in 2007, the Applicant also took on responsibility for vetting archival reviews at the Secretariat. These responsibilities will be referred to as, respectively, “the CHOGM duties” and “the Archival Review duties”.
9. In 2004, the Applicant’s job had been evaluated under a Price Waterhouse Coopers (PwC) Job Evaluation and allocated grade “L”. Both the CHOGM duties and the Archival Review duties pertained to a grade higher than grade L. On 29 February 2008, the Applicant applied for a Higher Responsibility Allowance (HRA) to cover her performance of these higher grade duties.
10. Rule 52 of the Staff Rules, which are incorporated into the contracts of employment of all staff members, provides that a Secretariat employee is eligible for an HRA where he or she is “required to undertake duties and responsibilities conspicuously greater than the staff member’s own grade for a continuous period of not less than 3 weeks”. The amount of the HRA is to reflect the “percentage of duties and responsibilities of the higher grade being undertaken”.
11. The Applicant’s then Director, Mr Neuhaus, sought approval of an HRA for six months from 1 June to November 2008. The request was approved for that period at grade H. The amount of the HRA was calculated on the basis that 100 per cent of the duties and responsibilities of the higher grade were being undertaken by the Applicant. The addition of the HRA increased the Applicant’s pay significantly: it constituted approximately one third of her total pay.
12. In November 2008, Mr Neuhaus recommended that the HRA be extended to May 2009. Payment of the HRA was extended for four months, to March 2009, but was then terminated.

13. The Applicant sought reinstatement of the HRA. After communications with Human Resources proved ineffective, she registered a grievance in relation to the matter on 11 November 2009. The Applicant did not obtain any response to her grievance until May 2010, when she met with the Assistant Secretary-General, Mr Cutts, who supported reinstatement of the HRA.
14. As a result, the HRA was reinstated at the level of 100 per cent of grade H, with retrospective effect from 1 April 2009. The memorandum recording the decision to reinstate, dated 20 May 2010, states that the HRA was to continue “until further notice”.
15. The Applicant ultimately received the HRA from 1 June 2008 to 30 June 2012, at which time payment of the HRA was terminated.
16. The background to the termination of the Applicant’s HRA lies in a further PwC Limited Job Evaluation, pursuant to which managers were invited to put forward particular posts for review. The Applicant’s position was one of those put forward for evaluation in 2009. The job description submitted set out her usual tasks as well as the CHOGM duties and the Archival Review duties. This was consistent with an “all staff” email which requested that the job descriptions reflect “the actual tasks as they are being performed currently”.
17. The PwC evaluation was undertaken from 5 to 9 October 2009, but implementation of the evaluation’s findings did not occur until 2012. As a result of the job evaluation, the grade of the Applicant’s position (including the CHOGM duties and the Archival review duties) increased from L to K.¹ However, the higher grade of K did not actually result in an increase in the Applicant’s basic salary. This is because, in 2004, when the Applicant’s job had been allocated the L grade, the pay for grade L was significantly less than the Applicant had been receiving. At that time, her pay was at a level corresponding to the higher pay grade of “I”. Her pay was, however, protected at the 2004 level by the Secretariat’s pay protection policy, so she was not subject to a reduction in salary as a result of the 2004 grading process. Similarly, in 2012, the assignment of a K grade to the Applicant’s

¹ The Judgment states at [48] that Ms Bandara’s grade “went up from K to L”. The relevant grades appear to have been transposed, but nothing turns on this, as the correct position is set out elsewhere.

position would actually have resulted in a slight decrease from the Applicant's basic salary. But the pay protection policy entitled the Applicant to retain her existing protected base salary.

18. The Respondent then decided to terminate payment of the Applicant's HRA. The Applicant's job had been graded by reference to the Applicant's additional duties as well as her original duties. Because the additional duties were now covered by the Applicant's basic salary, there was no basis for payment of an HRA. Human Resources notified the Applicant on 17 July 2012 that HRA payments would cease "from 1 July 2012", the date at which the new evaluations and re-gradings were to be effective.
19. The loss of the HRA was significant for the Applicant, because of the amount of money involved and because, having received it for a number of years, she had come to depend on it.
20. The Applicant registered a further grievance, seeking to have the HRA reinstated. An investigator was appointed to investigate the grievance.
21. The Initial Panel recorded that "the detailed course of the grievance process was not a happy one". Records of the interviews undertaken by the investigator were not retained. The Respondent initially chose not to disclose the investigator's report to the Applicant, but had done so by the time the Initial Panel delivered its decision.
22. The investigator's report was critical of management for not taking the Applicant's claims seriously enough and for not communicating better, but concluded that the termination of the HRA did not breach the Staff Rules. These conclusions were communicated in writing to the Applicant on 4 March 2013. The investigator recorded a commitment to "learn lessons" about "responsiveness in future cases".
23. The Applicant appealed to the Secretary-General on 15 March 2013 and he subsequently met with her. By letter dated 7 May, he directed that, having regard to shortfalls in communication, the Applicant be paid the amount of the HRA in full from 1 July 2012 until 30 April 2013, but that the higher duties should be assigned to other staff. The sum due was eventually paid, although the money was withheld until late September 2013 while legal

advice was taken. The Initial Panel observed (and we agree) that this delay does not reflect well on the Secretariat.

The Applicant's original application to CSAT

24. The Applicant made her original application to CSAT on 20 May 2013.²
25. The crux of the Applicant's case was that her performance of the higher duties for more than four years had resulted in a "de facto" permanent promotion to grade H. That, she contended, afforded her a legitimate and reasonable expectation to continue in that grade.
26. On that basis, the Applicant sought an order that the Respondent grant her a permanent promotion with retrospective effect to June 2009, permanent remuneration from that date at grade H, and pay her damages for denying her a permanent grade commensurate with the work she performed which would have entitled her to a pensionable salary or gratuity.
27. She also sought an interim injunction restraining the Respondent from reassigning her higher duties to someone else. This request was denied by the President for reasons given in his judgment of 28 May 2013.
28. In addition, the Applicant raised issues in relation to the 2009 job evaluation process and the treatment of her two grievances by the Respondent.
29. She requested that CSAT order full disclosure by the Respondent of her personal file containing information relating to the 2009 job evaluation and the full investigator's report relating to her 2012 grievance together with the relevant interview records.
30. Additionally, the Applicant sought an order that the Respondent pay her damages in the sum of £1,000 for failure to conform to the relevant Staff Rules, as set out in the Sutherland Handbook, in its conduct of the grievance procedure.
31. The Applicant also sought compensation in the sum of £15,000 for moral injury caused by the Respondent. The moral injury was attributed to the reassignment of the higher duties she had performed to someone else, the

² The Applicant left the employment of the Respondent on 30 June 2014 on a voluntary severance package.

excessive delays in the Respondent's conduct of the two grievance procedures, and the numerous and serious breaches of the Staff Rules in the course of both grievance procedures.

The decision of the Initial Panel

32. The Initial Panel rejected the Applicant's primary argument that her performance of the higher duties over more than four years constituted a de facto permanent promotion, and that she therefore had a legitimate and reasonable expectation to continue in that position. The Panel concluded that there was no basis for finding that the Applicant was entitled to a permanent promotion. These conclusions are not challenged by the Applicant on this review.
33. The Applicant attempted to invoke the principle of equal pay for equal work, but the Initial Panel rejected this argument, finding that the principle had no application to her case. This finding also is not challenged before the Review Board.
34. Additionally, the Initial Panel rejected the Applicant's challenge to the Secretary-General's decision to reallocate her higher duties. This finding also is not contested by the Applicant on review.
35. The Initial Panel considered, and dismissed, the Applicant's argument that there exists a general principle of international administrative law which precludes an employer from reducing an employee's total pay. Because this finding is the subject of a challenge before us, we set out in full the relevant passage from the Judgment:

[84] ... It is implicit in the award of a temporary allowance that it may be withdrawn and that total pay will then go down. There is nothing unlawful about that.

[85] The case of *Pinto* (WBAT Reports 1988 Part 1 Decision no 56) on which the Applicant relies, was one in which specific internal rules of the respondent employer were infringed by a failure to apply salary increases to a "frozen" salary. It does not lay down any principle that allowances must be maintained indefinitely, irrespective of the terms on which they were conferred.

36. Turning to the Applicant's complaints about 2009 job evaluation process, the Initial Panel did not deal expressly with the issue of whether information relating to the 2009 job evaluation should have been disclosed to the Applicant. The Initial Panel's conclusions as to whether the Applicant was "entitled to complain about the job evaluation" are challenged by the Applicant on review, and so are set out in full:

[86] The Applicant's problem would not have arisen if her job including the higher duties had been assessed at "H". She would then enjoy Grade H salary and would not need it as an allowance. However the job was assessed at K, with the salary consequences we have described.

[87] We do not know what internal procedures were available to challenge the 2009 evaluations but it does not appear that any challenge was made.

[88] In the course of her present claim the Applicant does however seek to impugn the 2009 evaluation of her job.

[89] She argues specifically that the job evaluation panel should have been made aware that the Archive Vetting and CHOGM Duties were grade H duties and that the panel was, or may have been, misled by the fact that "Grade L" appeared on the job description submitted.

[90] With respect, we think that Ms Bandara, has here misapprehended the nature of the exercise undertaken by a job evaluation panel. Such a panel is specifically not concerned with current gradings, allowances paid for particular duties, or where the job sits at present in the hierarchy. It is concerned with the demands of the job as a whole and how that whole job should be ranked for the future. So we do not consider that the panel should or would have been interested in the grade associated with the current job or with the grade associated with additional duties. This concern is misplaced.

[91] Nor can it be maintained, as the Applicant has suggested, that the 2009 panel was bound to interview Ms Bandara. Job evaluations are frequently, indeed typically, conducted without any interview between - 9- job-holder and panel. The panel here clearly reserved the right to speak to job-holders or managers for clarification but it does not follow

that they were remiss, let alone legally in error, in not discussing the Applicant's job description with her. It was for them to decide whether clarification was needed from the Applicant. The presence of Ms Bandara's existing grading on the job-description was not a matter which would require discussion. As stated above, it would not have been relevant to the panel's deliberations at all.

[92] There is nothing to suggest that the job evaluation panel failed in any respect to do its job properly.

[93] Job evaluation was a matter for the panel and the decision whether to implement it was one for the Secretariat as employer. Even if it were a decision for us, we have no basis whatever for concluding that some different grading ought to have been assigned to the Claimant's job.

37. The Applicant's complaints relating to the grievance process were commented on by the Initial Panel in the course of its review of the facts, as summarised above at [21]. However there is no discussion of the claims for compensation for process defects and moral injury in the section of the Judgment headed "The Issues". This omission is considered below.
38. The Initial Panel concluded at [108] by dismissing the Applicant's claim.
39. No order for costs was made.

The application for review

40. The grounds on which the Applicant says the Initial Panel erred are set out by the Applicant in her Application for Review as follows:³
 - i. [CSAT] erred in law regarding the Respondent's duty of good faith to ensure that the Applicant was not disadvantaged by promotion.
 - ii. [CSAT] erred in law and in the exercise of its competence in failing to address the Applicant's pleas relating to the Respondent's non-disclosure of the investigation report and non-compliance with the minimum legal requirements for dealing properly with a grievance.
 - iii. [CSAT] erred in law and fact in its findings relating to the propriety of the 2009 Job Evaluation."

³ References omitted.

41. The Applicant seeks review of the Judgment. She asks the Review Board to make findings that the Respondent was precluded from lawfully reducing her total pay, that the Initial Panel erred in failing to remedy the failures of the process relating to the Applicant's grievance, and that the Initial Panel erred in its findings in relation to the propriety of the 2009 Job Evaluation.
42. The parties filed written submissions in relation to the application for review. There was no request by either party for an oral hearing. The Review Board considers that an oral hearing is not necessary. We have considered the application for review on the basis of the material before the Initial Panel, and the parties' submissions to us.

The Review Board's approach to this application

43. Article XI (5) of the CSAT Statute sets out the grounds on which a party to proceedings before CSAT can seek review of a judgment of CSAT. It 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.”
44. Under Article XI (10), 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.
45. The Review Board may review the Initial Panel's judgment, and rescind it in whole or in part, only if it is satisfied that one or more of the grounds in Article XI (5) has been established. The applicant for review bears the burden in review proceedings 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:

- (a) the Respondent was precluded from lawfully reducing her total pay;
- (b) the Initial Panel erred in failing to address, and provide a remedy in respect of, the process defects relating to the Applicant's grievance;
- (c) the Initial Panel erred in its findings in relation to the propriety of the 2009 Job Evaluation.

46. It is not the role of the Review Board to reconsider the entirety of the Initial Panel's Judgment. The role of the Review Board is, rather, 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

Ground I: findings in relation to whether the Respondent was precluded from lawfully reducing the Applicant's pay

- 47. The Applicant's complaint is that the Initial Panel erred in concluding that there was no principle of international administrative law precluding the reduction of an employee's total salary upon promotion. She says that this follows from the Respondent's duty to act in good faith.
- 48. The Applicant does not seek to challenge the Initial Panel's finding that she was not temporarily promoted prior to the re-grading of her job, nor its finding that she was not entitled to a promotion to grade H. Rather, the Applicant contends that the re-grading of her job from grade L to grade K constituted a promotion, and a reduction in her salary as a consequence of that promotion was inconsistent with the relevant principles of international administrative law. She says that the Initial Panel never ruled on the particular point of whether she was promoted from grade L to grade K.
- 49. The Applicant argues that two decisions of the International Labour Organisation Administrative Tribunal (ILOAT), *Rombach*⁴ and *Miss D.D. et al*,⁵ articulate a principle of good faith that prevents employees of

⁴ ILOAT Judgment No 460 (European Patent Organisation (EPO)).

⁵ ILOAT Judgment No 2770 (World Intellectual Property Organisation).

international organisations from being financially disadvantaged on promotion. The Applicant says that the reduction in her total pay following the re-grading breached this principle.

50. On the issue of whether the Applicant was promoted, the Respondent emphasises the Tribunal's finding that the HRA could be, and was, lawfully withdrawn. The Respondent submits that the re-grading of the Applicant's position as a result of the Limited Job Evaluation is not the same as a re-grading following promotion. It supports the Initial Panel's conclusion that the Applicant was not promoted.
51. The Respondent also supports the Initial Panel's finding that the *Pinto* case (WBAT Reports 1988 Part 1 Decision 56) does not provide support for the Applicant's argument that there exists a principle of good faith that prevents employees of international organisations from being financially disadvantaged on promotion/re-grading. The Respondent submits that *Rombach* and *Miss D.D. et al* flow from the specific practices and rules of the respective institutions, and do not set out general principles of international administrative law.
52. We consider that the Initial Panel was right to dismiss this aspect of the complaint. The Initial Panel held, and we agree, that the HRA was in its nature an impermanent allowance that was able to be withdrawn by the Respondent. It was the withdrawal of this allowance that brought about a substantial reduction in the Applicant's remuneration, not any promotion or regrading of her position.
53. The regrading of the Applicant's position in 2012 from L to K was accompanied by an offer of the opportunity to be paid the basic salary of the higher K grade. But as the Applicant explains in her Application for Review at [9], because this would involve the loss of a further benefit to which she was entitled under her existing terms and conditions of service, she chose to remain on her existing grade and retain her existing entitlements. Thus she was neither advantaged nor disadvantaged by the regrading.
54. We agree with the Initial Panel's view at [84] that there is no general principle of international administrative law that total pay (including temporary allowances) can never be reduced. None of the authorities

referred to by the Applicant supports an argument that a temporary allowance cannot be withdrawn, or that as a matter of international administrative law the employer's obligation to act in good faith requires a temporary allowance to be "locked in" permanently if a person is promoted, or their position is regraded.

55. In summary, we consider that the withdrawal of the HRA and the effect of the regrading need to be addressed separately. The withdrawal of the allowance was lawful. There was no disadvantage as a result of the regrading, as distinct from the withdrawal of the HRA. So this claim cannot succeed.

Ground II: findings in relation to disclosure of the Investigation Report and the conduct of the grievance procedure

56. The Applicant's complaint is that the Initial Panel erred by failing to address her right to a remedy for the Respondent's breach of its obligations relating to the conduct of the grievance procedure, including its failure to disclose the Investigator's Report. She says that the Initial Panel addressed the failures in the grievance process only in the account of the facts, and failed to explore the subject further as a "key issue" potentially calling for a remedy.
57. As noted above at [30] to [31], in her initial Application to CSAT the Applicant sought compensation in the sum of £15,000 for moral injury caused by reassignment of her higher duties, delays in the Respondent's conduct of the two grievance procedures, and breaches of the Staff Rules in the course of both grievance procedures. Additionally, she sought damages in the sum of £1,000 for failure to conform to the relevant Staff Rules, as set out in the Sutherland Handbook.⁶
58. The breaches of the Staff Rules allegedly committed in the Respondent's conduct of the investigation into the Applicant's grievance are particularised in the Applicant's Second Written Statement dated 17 March 2014, and

⁶ At a late stage in the process before the Initial Panel, in her Further Written Statement dated 21 April 2014, the Applicant sought to increase the claim for moral damages to £175,000, and the claim for damages for breach of the Staff Rules to £5,000. These increased sums were not referred to in the Application for Review, from which we infer that they are no longer being pursued. The compensation we have decided to award to the Applicant falls within the original amounts claimed, so this increase would in any event have been irrelevant.

further explained in her Response dated 29 October 2014. The breaches were said to arise from:

- (a) a delay of 133 days from the time the Applicant first sought redress for her grievance until the first substantive response to her complaint;
- (b) following an investigation into her complaint, the Respondent's refusal to disclose the full results of that investigation for 12 months;
- (c) the Respondent's announcement that disclosure would not be possible because there were no records of the interviews;
- (d) the investigator's use of his personal iPhone to record the interviews;
- (e) the investigator's failure to write up each interview for the purpose of "detailing all findings in a written report with all supporting documentation (interview records, etc)"; and
- (f) the Respondent's admission that a "vital error of fact" was made in the report. The investigator's report stated that the Applicant was informed by the Assistant Secretary-General that "the HRA would continue until the outcome of the 2009 job evaluation is known and implemented." However as the Respondent accepted, there was no evidence to this effect.

59. The Initial Panel observed, as noted above, that the course of the grievance process was not a happy one. The Initial Panel recorded the process failings at (b) and (c) above (which were not contested by the Respondent). The failures at (a), (d) and (e) also were not disputed by the Respondent. In its response of 13 March 2014 the Respondent did dispute alleged failure (f): the Respondent accepted that the statement in the investigator's report was inaccurate, but argued that this error did not detract from the validity of the report (ie it was not "vital").

60. The Initial Panel recorded that the investigator's report had been disclosed to the Applicant in response to her Application. The Applicant disputes this finding on the basis that full disclosure of the report would require disclosure of interview records. Interview records were not retained, making full disclosure of the report impossible. We consider that the factual position is

clear: the text of the report itself was eventually disclosed, but interview records were not. We proceed on that basis.

61. The Initial Panel did not make an express finding in relation to whether alleged failure (f) was made out. As noted above, the existence of a factual error in the investigator's report is not disputed. We consider that it is implicit in the conclusion reached by the Initial Panel on the Applicant's primary complaint that this error was not vital to the conclusions in the report about the Applicant's entitlement to payment at a higher rate. We proceed on the basis that the error was established, but the Initial Panel did not accept the characterisation of the error as "vital".
62. The Initial Panel did not make any findings as to whether the various process failures amounted to a breach of any relevant duty owed to her by the Respondent.
63. The Applicant contends that the Initial Panel's failure to remedy the Respondent's treatment of the Applicant in some form contravenes the recently established CSAT precedent of *Addo*.⁷ In *Addo*, the applicant was awarded compensation in part due to the Respondent's failures in connection with the grievance process.
64. The Respondent records that it has accepted the unfortunate failings of the investigatory process. But it says that these failings did not give rise to a moral injury for which compensation should be awarded in this case.
65. The Respondent argues that the context of *Addo* was important to CSAT's decision to award compensation in that case. In *Addo*, the applicant's underlying grievance was upheld, whereas in the present case the Applicant's underlying grievance was not made out. Additionally, the context of *Addo* was that CSAT agreed with the investigator's finding that the applicant had been subjected to harassment, discrimination, bullying and marginalisation and that there was a longstanding lack of engagement with management. CSAT found that the principal injury in the case was moral injury and decided to look at events as a whole rather than ascribing figures to particular awards. The Respondent submits that these circumstances do not apply in the present case.

⁷ CSAT Judgment No 22.

66. The Respondent argues that it is clear from [52] to [56] of the Judgment that the Initial Panel took the Applicant's complaints into account. The award of compensation by CSAT is discretionary; there is no entitlement to it. Additionally, this discretion is only triggered on a finding that the Application in question is well-founded, and compensation comprises only one of several remedies available to CSAT.
67. The Respondent submits that there is nothing to suggest that the Initial Panel failed to exercise its discretion, nor that the decision not to award compensation was "anything but intentional".
68. The Respondent contends that, in light of the fact that the Applicant had been remunerated for the HRA, and that the Initial Panel had dismissed her core grievance, the Initial Panel exercised its discretion lawfully in deciding that compensation was not appropriate.
69. The Respondent also argues that even if moral injury could be shown, the sums claimed by the Applicant should be rejected as excessive.
70. In response, the Applicant argues that damages for moral injury have been awarded in numerous cases in other tribunals on the basis of procedural irregularities. She refers to further cases which she says support the proposition that the totality of an applicant's claims need not be upheld before she can be awarded damages for moral injury on one particular issue. She argues that if CSAT wishes to depart from multiple precedents setting out the appropriate procedure for grievance investigations, it should give a good reason for doing so. Finally, she argues that even if the sum requested is excessive, this should not prevent CSAT from considering the claim.
71. We agree with the Applicant that the Initial Panel should have addressed the claims she made for remedies for moral injury arising out of the significant process failings that occurred in the course of considering her complaint. The Initial Panel's failure to do so establishes a ground for review within Article XI (5). We consider that we should proceed to determine these claims, rather than order a rehearing. This is particularly so as there was no oral hearing before the Initial Panel. The Review Board is therefore equally well placed to determine these claims.

72. The Initial Panel found that the Respondent was entitled to reassign the higher duties performed by the Applicant, and there is no challenge to that decision on Review. So the issue for the Review Board is whether the process failures set out in paragraph 58 above give rise in and of themselves to a claim for damages for breach of contract, or damages for moral injury even though the substantive complaint, to which the process failures relate, was found to be unjustified.
73. The Staff Rules form part of the contract of employment of staff members. But the specific provisions that the Applicant identifies as having been breached in her various statements to the Initial Panel, and in particular in her Further Written Statement dated 17 March 2014, are provisions of the “Guidelines for Investigators”. Those “guidelines” are just that: they do not amount to contractual provisions non-compliance with which gives rise to a right to damages, without more.
74. However it is the responsibility of the Respondent to conduct a timely and effective grievance process, including investigating and responding to grievances in a timely and appropriate manner. This follows from the well-established obligation of the Respondent to have a care for the dignity and reputation of the employee and not to cause unnecessary stress: *Sita Ram*.⁸ As this Tribunal held in *Addo*, this is similar to the implied term recognised by national law that the employer will not without proper and reasonable cause conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence between employer and employee.⁹ We consider that serious defects in the conduct of a grievance process may amount to breaches of this obligation, and that damages for moral injury can be awarded to compensate a staff member for the unnecessary stress caused by unacceptable delays and/or serious process failures. That was the basis on which moral damages were awarded in, for example, the case of *Ms HL*.¹⁰
75. Does this case cross that line?

⁸ ILOAT Judgment No 367.

⁹ CSAT APL/21 at [80] - [81].

¹⁰ ILOAT Judgment No 3347.

76. We consider that the failures in the process set out above amounted to serious and continuing failures to respond in a timely and effective way to the concerns raised by the Applicant. They seriously damaged the relationship of trust and confidence between the Respondent and the Applicant, and caused her unnecessary stress.
77. We have considered whether the payment referred to in paragraph 23 above of an amount equivalent to the HRA for the period 1 July 2012 to 30 April 2013 (an amount of approximately £10,000) is sufficient to remedy these failures. That payment was described by the ASG as being made in light of factors including “regrettable shortfalls in communication on the organisation’s part at times in the handling of your complaint”. The payment goes some way to responding to the earlier breaches. But even after this payment was offered in May 2013 there were ongoing failures to make timely disclosure of relevant documents, in particular the investigator’s report (provided in December 2013, some 7 months after the ASG’s letter, and only after an application was made to the Tribunal) and supporting information (some of which was never able to be provided, as proper records of interviews were not kept).
78. The Review Board does not accept the argument advanced by the Respondent that there was no duty to provide the Applicant with the investigator’s report and the interview records on which that report was based. It was necessary for the Respondent to provide this material to the Applicant in order to enable her to understand the basis for the Respondent’s decision in relation to her grievance, and to provide her with a meaningful opportunity to challenge the factual assertions and reasoning on which that decision was founded. We agree with the views set out in the following passages from the decision of the ILO Administrative Tribunal in *Miss HL*:

19. It is well settled that a staff member must have access to all evidence upon which a decision concerning that staff member is based. As the Tribunal observed in Judgment 3264, under 15:

“It is well established in the Tribunal’s case law that a ‘staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him’. Additionally ‘[u]nder normal circumstances, such evidence cannot be

withheld on grounds of confidentiality' (see Judgment 2700, under 6). It also follows that a decision cannot be based on a material document that has been withheld from the concerned staff member (see, for example, Judgment 2899, under 23)."

It is equally well settled that a statement in a staff regulation or other internal document that a report is confidential will not "shield a report [...] from disclosure to the concerned official". Moreover, "[i]n the absence of any reason in law for non-disclosure of the report, such non-disclosure constitutes a serious breach of the complainant's right to procedural fairness" (Judgment 3264, under 16).

20. ... it is not an answer to say that the complainant was given a summary of the report. In addition to the fact that she was entitled to the entire report, the summary did not contain any of the evidence upon which the conclusion was based. It simply stated that "[t]he IAOD investigation has not found facts that support the complainant's allegations or that show she was entitled to have matters requested by her approved or that she was subjected to harassment, whether through a single incident or as an on-going pattern". The complainant was effectively precluded from challenging the factual assertions and credibility of the witnesses interviewed and was left not knowing what evidence if any should be marshalled to counter the investigator's conclusions.

79. The payment offered by the Respondent in May 2013¹¹ was not intended to respond to concerns about non-disclosure of the investigator's report and supporting material, and deficiencies in the investigation process. At that stage, the Respondent was still insisting that it was not required to provide any of this material, and had not disclosed the deficiencies in the manner in which the investigation was carried out. And as a matter of logic, it cannot have been intended to address delays on the part of the Respondent in providing information and responding to the ongoing grievance after May 2013.
80. We consider that the Respondent breached the obligations set out at [74] above in connection with the conduct of the grievance process, and that this will undoubtedly have caused the Applicant unnecessary stress. She provided evidence confirming that she had in fact suffered such stress. Taking into account all of the relevant circumstances, including the payment

¹¹ Though not, as noted above, made until September 2013.

referred to in [79] above, we consider that an award of compensation of £3,000 is appropriate.

Ground III: findings in relation to the 2009 job evaluation

81. The Applicant submits that the Initial Panel erred in concluding that the 2009 job evaluation was conducted properly because there was no evidence to support the fact that the evaluation was conducted properly, if at all. Nor was there evidence to support a finding that the correct grade for the Applicant's job was determined in the re-grading. The Applicant argues that the Initial Panel's ruling violates the precedent set out in *TK* on the need for disclosure of information in relation to a challenged evaluation.¹²
82. The Respondent says that the case of *TK* is not authority for the proposition that "lack of transparency and fail[ure] to disclose" in relation to a job evaluation process gives rise to liability. Rather, *TK*, is authority for the principle that CSAT cannot substitute its own assessment for that of the assessors and the employer.
83. The Respondent further contends that the absence of disclosure of information in the Applicant's personal file did not negate the process or findings of the Initial Panel. As a result, the Initial Panel did not err in law and the matter did not give rise to liability.
84. We consider that the Initial Panel was right to dismiss the specific criticisms of the job evaluation process advanced by the Applicant, which proceeded on the basis of misapprehensions about the nature of that process. We also agree that there was nothing before the Initial Panel to support any challenge to the job evaluation process.
85. We have some concerns about the limited disclosure provided by the Respondent in relation to this aspect of the Applicant's claim. Before the Initial Panel the Applicant sought, as a preliminary measure, disclosure of her personal file containing (among other things) information relating to the job evaluation as it affected her. The Respondent eventually advised, in its Additional Statement of 11 March 2014, that there was no material relating to the job evaluation on her personal file. If the Applicant had sought

¹² ILOAT Judgment No 3272 (EPO).

preliminary disclosure of further material relevant to the decision about regrading of her role, not confined to her personal file, she would have had a strong case for disclosure of such information. Indeed it seems to us that this material should have been provided in the course of the grievance process to enable the Applicant to understand the basis of the decision that had been made, and to enable her to effectively present her complaint about that decision, without the need for an express request. The way in which the Respondent dealt with the Applicant's requests for disclosure during the grievance process contributed to the "unhappy" course of that process, discussed above. The Respondent's failure to make full disclosure about the basis of the regrading decision in the course of the proceedings before the Initial Panel is also unfortunate.

86. But none of this can alter the basic requirement that the Applicant make out her claim before the Initial Panel. The Initial Panel was right to decline to draw adverse inferences about the conduct of the job evaluation process simply on the basis of non-disclosure of material relating to that process.
87. As the Initial Panel noted, job evaluation was a matter for the panel, and the decision whether to implement it was one for the Respondent as employer. It is not the Tribunal's role to review such decisions on the merits. There is only limited scope for a challenge to the outcome of a job evaluation process before the Tribunal, for example where there has been a material procedural irregularity or abuse of power. It seems unlikely that a successful challenge could have been mounted in this case, even with access to full information about the process. None of the specific complaints made by the Applicant could have succeeded, even with the benefit of additional background information. There is no reason to think that there were any other defects in the process, and it was not for the Initial Panel to speculate about such matters in the absence of relevant information. Thus the challenge was not made out.

Orders

88. The Application for review is granted in relation to the claim for compensation for serious failures in the grievance process. The Review Board has decided to substitute its own determination on this claim pursuant

to Article XI(11) of the CSAT Statute, and awards compensation of £3,000 to the Applicant.

89. The other grounds on which review was sought have not been made out. The balance of the Application for Review is accordingly dismissed.
90. The Applicant was not legally represented, and has not made (or provided evidence to support) a claim for costs before the Review Board. The Respondent has not sought an award of costs. In these circumstances, and having regard to the overall outcome of the Application for Review, we make no order as to costs.

Delivered on 1 April 2015

Signed



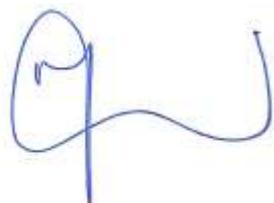
Mr Chelva Rajah SC, Presiding Member



Mr D K Dabee SC, Member



Justice George Erotocritou, Member



Mr David Goddard QC, Member

Mr Arthur Faerua, Member