



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

JUDGMENT

Introduction

1. The three Applicants have very similar job histories. The claims they bring are virtually identical. So are the Respondent's defences.
2. It was therefore decided to hear their cases together.
3. Each of the Applicants was employed by the Respondent as a Human Resources Assistant until 31st December 2013. In each case, the latter period of their employment was under a succession of what the Respondent deemed "temporary" contracts or extensions.
4. The Applicants each make two complaints about the benefits they were granted.
5. First they say that they have been wrongfully denied a "pension gratuity". The Respondent says that this benefit did not apply to them whilst they were employed under "temporary" contracts.
6. Secondly, they say their job was upgraded following a job evaluation. They contend that they should have been upgraded and paid at the higher grade. The Respondent says that the job they performed did not correspond to the upgraded job. The Respondent maintains that it was entitled to pay them at the lower grade and to offer the "temporary" contracts and extensions at the lower grade.
7. The Respondent contends that in any event the Applications cannot be entertained by the Tribunal because internal remedies have not been exhausted. In particular, the Respondent says grievances had not been progressed to a formal stage.
8. The Applicants contend that they did exhaust internal remedies. They go further. They suggest that the Respondent failed to deal properly with the grievances they brought. They bring a separate complaint about this. They are however "willing to forgo" this

further complaint about the grievance process if their complaints about the gratuity and the job evaluation are satisfactorily resolved.

9. The Tribunal has been able to resolve the question whether the claims are receivable. It has been able to deal with the claims about the grievance process and about the pension gratuity. As regards the job evaluation claim, however, it has found that further information and submissions are needed from the parties. We deal with this in the course of the judgment and by way of separate Orders.

The facts and background in more detail

10. The Applicants first became employed by the Respondent in the Summer of 2011: Gizela Erasmus on 6th June 2011, Efe Ototahor on 13th June 2011 and Olushola (Shola) Aina on 5th July 2011
11. Each was offered and accepted a contract as “HR Assistant, Human Resources” for one year¹.
12. Their respective letters of appointment expressly incorporated the Respondent’s Staff Rules and Regulations and specified their pay grade (also described as “pay point”) as “N”. The Appointment letters enclosed a “*summary of terms and conditions for pay point N*”. Amongst the terms listed as applicable to “N” was a term concerning “Pension/Gratuity”.

“Staff are eligible to join the Secretariat’s Group Stakeholder Pension plan (GSSP)...
.... Alternatively, staff who do not wish to join the GSSP, may opt to join the gratuity scheme, whereby each month the Secretariat will pay the equivalent of 15 per cent of gross salary into an interest bearing account. At the end of the contract, the staff member will receive an ex gratia payment of the cumulative amount including interest. This payment is subject to the Secretary-General’s discretion...”

13. The provision about this “gratuity” derived from Staff Rule 50. This states that staff offered appointments in established positions have the option of joining a pension scheme or “being considered for the Secretariat’s gratuity scheme”. Sub-rule 50(iii) explains the gratuity by providing that staff outside the relevant pension scheme

¹ EO Application Annex VI GE Application Annex II SA Application Annex VI

“may, at the Secretary General’s discretion, be paid at the end of each contract , a gratuity of 15% of gross salary earned during the contract.”

14. Two observations need to be made about “entitlement” to pension gratuity at this stage.
15. First, it will be noted that the language of both Staff Rule 50 and of the summary attached to the appointment letter describe the payment as being at the “discretion” of the Secretary-General. The expressions “gratuity” and “ex gratia payment” might appear, at first sight, to re-inforce the discretionary nature of the payment. However the summary of terms provides that the 15% “will” (not may) be paid into the account. Once the 15% has been paid into the account, we suppose that the Respondent would ordinarily expect to pay it over to the employee. The Respondent does not suggest that any discretion retained by the Secretary-General has any relevance to the present case. In the circumstances we do not propose to say anything more as to circumstances in which any discretion might legitimately be exercised against the employee in circumstances where the benefit would otherwise be payable.
16. Secondly, it is important to note that there was a relevant change to the Staff Rules in 2006. Rule 50, with its provision for pension gratuity, ceased to be applicable to “persons appointed under a temporary contract of service”. The relevant amendment (to Rule 84) listed Rule 50 amongst a list of provisions which were no longer to apply to temporary appointments².
17. The Rules do not define a “temporary” contract of service for this purpose.
18. Until 2012 there appears to have been some internal confusion about the length of appointment required to qualify for a pension gratuity.
19. As noted above, the terms sent to the Applicants (with their letters offering appointments for one year from summer 2011) included the provision about being paid the pension gratuity. It appears that they were not alone³ amongst staff appointed for a year in being offered the gratuity.
20. Ms Monica Oyas, Human Resources Section, queried the matter with the legal department in June 2012. She pointed out that the normal period of appointment to an

² EO Answer Annex 1

³ SEE eg EO Annex VIII

established post was three years. She suggested that pension gratuity would normally apply only to those appointed for a three year term “or for fixed term contracts where Management Committee has agreed that a gratuity benefit would apply”⁴.

21. The legal advice Ms Oyas received appears⁵ to have been that the Respondent was contractually bound by virtue of having offered the appointment on terms which included the reference to pension gratuity.
22. The same view appears to have been taken by ASG Steve Cutts when he enquired in October 2012 why another staff member on a one year contract was to receive a gratuity⁶. He noted that a distinction had been made between a one year appointment “and other shorter temporary appointments”. He was already aware that what he described as a “good faith error”⁷ had been made in offering gratuity terms to “the HR Assistants”. He was clearly surprised that gratuity had been offered in the context of a one year appointment but concluded that “*as it is in her contract, payment of gratuity is unavoidable now*”.
23. The pension gratuity was duly paid to the Applicants in respect of their one year contracts. This was paid because it had been offered in their appointment documentation.
24. At the expiry of the Applicants’ one year contracts in summer 2012, the Respondent decided to offer further short-term contracts to each of the Applicants.
25. By this point the HR section was fully alive to the question whether gratuity should be offered. As was recorded by the Applicants in the course of the subsequent grievance process (which we describe below) they were told by an HR Adviser in May 2012 that they would definitely receive what they describe as a contract extension; but they were also told that Ms Oyas would speak with them about it. When Ms Oyas spoke to them “she informed us that we will be getting a new contracts (sic) on the same grade (Pay Point N) but without pension or gratuity (even though we received pension/gratuity in our first contract)”⁸

⁴ EO application annex IX

⁵ We have only the latter part of the relevant email from the legal adviser EO Annex IX

⁶ EO Application Annex VIII

⁷ EO Answer Annex III

⁸ EO annex III

26. So the Applicants knew (when their one year contracts were about to expire) that the Respondent was intending to offer them further employment on terms which did not include the pension gratuity.

27. The quotation at para 25 above also shows that Ms Oyas was explicit in telling the Applicants that their pay grade under the anticipated new contracts would be “N”. This was the same grade at which they had previously been employed. But, for the Applicants, this pay grade was contentious. On 15th June 2012 a message to “all staff from the ASG” had announced as follows:

“The management committee has now made decisions on all the remaining recommendations of [the PwC] 2009 Job Evaluation, affecting the positions listed in the attached document. The Management Committee has decided, exceptionally, to back date the implementation date of these decisions to 1st July 2011...CSD will effect these changes in the payroll as soon as possible.”.

28. What was “the attached document”? What might be its implications for the Applicants? These are questions to which we return.

29. Suffice it to say for the present that the Applicants’ case is that their job was upgraded to K and that they ought to be paid accordingly – both for the past and under the new contracts extending their employment which were about to be issued. A memo⁹ from Nike Ajibowo, HR section, to Ms Aina dated 10th July 2012 reflects an earlier exchange which must have taken place with Ms Aina:

“I have been instructed to offer you a three month temporary extension at Point N. The contract was issued on instruction by the Head of HR, Ms Oyas after consultation with the ASG. I note that you had initially expressed that a pay point K HR Assistant contract should be offered to you. Unfortunately I am unable to grant this wish.”

30. It appears from a later memo from the Applicants¹⁰ that all three Applicants had been asking if the anticipated “contract extension” would be at the upgraded level (K rather than N) and that Ms Ajibowo had told them that it would not.

⁹ EO Application Annex XIII

¹⁰ 3rd July 2013 EO Annex III

31. So, in summary, the Respondent was adopting a considered stance as regards the future: the pay grade would be “N” and there would be no gratuity.
32. The Respondent sent Ms Erasmus¹¹ and Ms Aina¹² letters dated 21st June 2012 which were in identical terms except as to the period of appointment. Each letter began:
- “I am pleased to offer you temporary employment at the Commonwealth secretariat as HR Assistant, Human resources. The temporary appointment is for a period of three months...
33. In Ms Erasmus’s case this was to run from 6th June to 5th September 2012. In Ms Aina’s case this was to run from 5th July to 4th October 2012. The letters continued
- “Since your employment is of a temporary nature, termination of employment may be effected within that period by either side giving one week’s notice in writing.
34. The letters go on to specify paid annual leave and state that sickness absence benefit will be as detailed in Staff rule 34. The grade was identified as Pay Point N , hours of work were specified and a confidentiality obligation set out; but there was no general reference to Staff Rules or Regulations and no summary of terms was attached. The letters were countersigned by way of acceptance.
35. Between September 2012 and May 2013 there were a series of subsequent letters¹³ (also countersigned by the employee by way of acceptance) offering “an extension to your temporary employment as HR Assistant, Human Resources” for successive periods of months. The final extension in each case was for six months from 1st July 2013 to 31st December 2013.
36. We have not been provided with the letters relating to Ms Ototahor’s employment from summer 2012 to December 2013. It is common ground, however, that her employment was similarly prolonged and there is no suggestion that her appointment letters were in materially different terms from those of the other two Applicants. We proceed on the basis that they were materially identical.
37. The Applicants were unhappy that the contracts issued from summer 2012 onwards placed them at grade N when they said they should have been at grade K. They also

¹¹ EO Answer Annex II

¹² EO Application Annex XV and Answer Annex II

¹³ Ms Aina EO Answer Annex 1; Ms Erasmus EO Reply Annex 2

considered that they should have been paid back pay at grade K. They were also discontent with the lack of pension gratuity in connection with their employment under the contracts from summer 2012 onwards.

38. On 16th January 2013 they sent a joint memo to Zarinah Davies, Director of HR. It was headed

**“Non-implementation of new job grade after 2009 Job evaluation
Non Payment of back-dated pay after implementation of job evaluation exercise**

Pausing there, the memo is clearly directed towards the grading issue rather than the gratuity issue.

39. It is appropriate to quote substantially from this memo. We interpolate that the annexes mentioned as being attached to the memo are not attached to it in the papers provided to us. Some, if not all, appear to correspond to documents in our papers but unfortunately we cannot be certain whether a particular annex corresponds.

40. Key passages in the memo are as follows:

“We the HR assistants (Shola, Efe & Gizela) on temporary contacts ...would like to appeal to Management Committee on the issue of non-payment of our back-pay and non-implementation of the new pay point to our roles.

[A quotation from the 15th June memo about the implantation and backdating of job evaluation is then set out]

“Consequently the outcome of the job evaluation was implemented in August 2012 and back-payments made accordingly. However, the HR Assistant roles, which we are currently occupying, were not upgraded nor did we receive back-payment.

Based on the attached PWC Report (Annex B) and list of positions affected in the job evaluation (Annex C) which were sent from the ASG’s office to all staff members we believe that all HR roles (Annex F) were included in the job evaluation exercise in 2009 and that the HR Assistant (General) roles were upgraded from Pay point N to Pay point K and consequently became HR Officer positions.

When we raised the issue with the former Head of HR Monica Oyas, we were given the following explanation as to why management decision to implement the job evaluation outcome did not apply to the HR assistant roles

- The HR Assistant roles are temporary roles
- On the basis that the roles are temporary, the contractual agreement has been fulfilled and no back-payment applies
- The HR Assistant roles were not included in the evaluation

[The applicants then raise a series of points about the treatment of others and of other role and concludes by asking for grade K and full back-payment.]

41. Ms Davies, Director of HR had been shown the 16th January 2013 memo in draft. She responded to the draft by email on 15th January. In her response¹⁴ she drew the Applicants' attention to the Handbook in Annex 2 of the Staff Rules commenting:

"You will see that you need to write to meas part of the informal grievance procedures before matters can be escalated to the Director of the Corporate Services Division (now the responsibility of the ASG). Informal mechanism has to be used before the formal route is taken.

42. The email invited the Applicants to "resubmit" their case "as I will not be able to approve sending this off as it is addressed". We do not know how far the version sent on 16th January differs from the draft which Ms Davies had seen, though we infer that it was changed (Ms Davies' email states that the Applicants were asking the Staff Management Team to hear their case: this does not appear from the finalised memo) Ms Davies does not appear to have raised any objection to the format of the 16th January memo once it had been sent.
43. In the event, the Respondent held a series of meetings with the Applicants. Paragraph 37 of the Answer records these as having taken place on 14th February 2013, 13th March 2013, 29th May 2013 and 17th October 2013. There was also a meeting with the interim ASG on 11th December 2013.
44. No minutes or other record have been produced in relation to those meetings. There appear to have been no letters or memos to the Applicants setting out the position the Respondent proposed to adopt or had adopted at any of the meetings, or responding to matters raised by the Applicants. Ms Davies did state in an email on 5th February to the three Applicants that she was reviewing documentation. A response from Ms

¹⁴ EO Reply Annex II

Ototahor on 5th March 2013 sought an update but none appears to have been forthcoming in writing.

45. On 3rd July 2013 the Applicants sent Ms Davies an email. It was headed in the same way as the 16th January memo. It referred to the 29th May meeting and outlined a “chronology” covering “non-payment of the back pay after our evaluation”. As we record in paragraph 25 above the chronology refers to Ms Oyas telling each of them in Summer 2012 that the new contracts would be “*without pension or gratuity (even though we received pension/gratuity in our first contract)*”.
46. We take it from paragraph 37 of the Respondent’s Answer that the four meetings between February and October and the final meeting in December with the ASG covered both the complaints about pay grade and those about pension gratuity
47. In the absence of any notes of the meetings we take it from the Respondent’s Answer that the Respondent’s position was conveyed in firm and unequivocal terms.
48. Paragraph 36 re-iterates Ms Ajibowo having “unequivocally stated” in the 10 July 2012 email (above) that the new contracts would be on the N grade.
49. Paragraph 37 records the organisation’s conclusions that provision for gratuity had been “erroneously issued” in the earlier contract and that the “*second contract did not include gratuity*”.
50. The Respondent further asserts in paragraph 37 that each Applicant was informed at the 13th March 2013 meeting “*that her post could not be regraded as it was considered part of a generic pool of Administrative Assistants and that the Management Committee did not approve a re-grade that would impact on the rest of the Administrative Assistants across the organisation who were not re-graded*”.
51. As to the 29 May 2013 Meeting Paragraph 37 records that each Applicant “*was informed again that the reasons given for the non-re-grading and non-payment of gratuity stood.*”
52. As to the 17th October 2013 meeting Paragraph 37 states in the case of each Applicant that she was “*informed that the requests ...in the grievance could not be granted based on available information and documentation reviewed.*”

53. There is no account as to what was said at the meeting of 11th December 2013 attended by the ASG. His involvement at that meeting, and the absence of any change of position by the Respondent after that meeting, could reasonably have been understood by the Applicants to imply that the end of the line had been reached.

54. The employment of the three Applicants ended at the expiry of their contracts on 31st December 2013 without resolution of the issues.

55. On 28th March 2014 the Applicants instituted the current proceedings before the Tribunal. In each case they claimed

(1) that the failure to pay the gratuity was a breach of

- (a) the contract of employment
- (b) a legitimate expectation
- (c) good faith
- (d) the general duty to treat the employee fairly and equally with others in like situations

alternatively

- (e) that the Respondent was estopped
- (f) that there had been unlawful deductions
- (g) that the Respondent had been unjustly enriched.

(2) that the failure to implement the job grade K and to pay the commensurate salary was a breach of

- (a) legitimate expectation
- (b) good faith
- (c) the general duty to treat the employee fairly and equally with others in like situations
- (d) the principle of equal pay for equal work

alternatively

- (e) that the Respondent was unjustly enriched

- (3) that the Respondent had breached its duty under the Grievance procedure to ensure that action is taken on the complaint, no substantive response having been received.
56. Each Application states that the Applicant is “willing to forgo” complaint (3) on satisfactory resolution of complaints (1) and (2).
57. The Respondent resists each claim on its merits and takes the preliminary point that the Claim may not be entertained by the Tribunal because, it contends, internal remedies have not been exhausted. In particular, it contends that the Applicants ought to have instituted and exhausted a formal grievance before starting proceedings.
58. We deal first with what has been labelled the “receivability” question: that is to say whether the claims can be entertained or whether they are barred through a failure to exhaust internal remedies.

Receivability

59. Article II Paragraph 3 of the Tribunal Statute provides, so far as relevant :
- “... the Tribunal shall only consider an application if
- (a) in relation to a contract of service, the applicant has exhausted all other remedies available within the Commonwealth Secretariat ...including the redress of grievance procedures specified in the contract or in relevant Staff Rules;
- (b) [Not relevant]
- (c) ...Notwithstanding the provisions of paragraph 3 (a) the Tribunal may consider an application where all remedies have not been exhausted where the Tribunal determines that the remedies available cannot adequately address the issues raised in the application.
60. Staff Rule 8 incorporates into the Rules the procedures for handling “grievances relating to contractual and administrative matters” specified in Annex 2.
61. Paragraphs 2 to 5 of Annex 2 set out an informal process involving mediation.

62. Paragraphs 6 to 15 then set out a formal process. Paragraph 6 provides that this is to be initiated by a complaint in writing to the Director of Corporate Services detailing (amongst other things) the nature of the complaint and details of the informal efforts made to resolve the grievance. Paragraph 6 further provides that formal procedures may only be used where the informal processes have proved ineffective.
63. There are potentially two questions for the Tribunal
- (1) Had the Applicants exhausted the remedies available, in particular the grievance process?
 - (2) If not were the circumstances such that the remedies available under the grievance procedures could not adequately address the issues raised?
64. The Respondent does not suggest that there was any failure to pursue the *informal* processes in relation to either or both substantive complaints (pension gratuity and pay grade). The Applicants had articulated their complaints to the appropriate person (Ms Davies, Director of HR). There had been discussions extending throughout 2013. No mediator had been appointed but the Respondent never suggested that this was appropriate or necessary.
65. The Respondent's argument is that the applicants should have pursued a formal grievance. It contends that the memoranda of 16th January 2013 and 3rd July 2013 do not constitute notifications of a formal grievance and that the Applicants ought to have initiated a formal process before applying to the Tribunal.
66. In the circumstances of the case the Respondent's argument is an unattractive one.
67. On the one hand, it is clear from paragraphs 36 and 37 of the Answer that the Respondent adopted over the course of the meetings in 2013 a firm stance that the claims could not succeed. It did not apparently consider them worthy of mediation. In the March meeting it had gone so far as to say that the "Management Committee did not approve" a re-grade. In the 11th December 2013 meeting the Respondent involved the ASG to whom it would have fallen to determine a written formal grievance. It is difficult to see how the Applicants could have been expected to entertain even the remotest expectation of any change of outcome by pursuing the matter further internally.

68. On the other hand it is not apparent from the Respondent's submissions at what point it says the formal process should have been initiated. A period of almost a calendar year was to pass without the Respondent ever providing the Applicants with a proper written response to their complaints or even recording the positions each side had taken at meetings. Nor did the Respondent ever indicate that the informal process was at an end or that the Applicants should now resort to the formal process.
69. As regards the two questions posed above we have concluded
- (1) that the Applicants did not exhaust all remedies, in particular the formal stage of the grievance process, for the purposes of Para 3(a) of Article II;
 - (2) that the circumstances were such that the remedies available could not adequately address the issues raised, and that the proceedings are accordingly receivable by virtue of para 3(c) of Article II.

Para 3(a) of Article II

70. As to (1) it seems to us that neither the memo of 16th January 2013 nor that of 3rd July 2013 (nor any other communication from the Applicants) satisfies the requirements of paragraph 6 of Annex 2.
71. The 16th January 2013 memo is not addressed to the Director of Corporate Services (whose function was being undertaken by the ASG) as paragraph 6 requires. In her email of 15th January 2013 Ms Davies had flagged the Director of Corporate Services (now the ASG) as the person to whom the complaint should in due course be escalated. The 16th January memo was clearly being deliberately directed to Ms Davies because the time for "escalation" had not arisen.
72. Furthermore the 16th January 2013 memo does not detail "informal efforts to resolve the grievance", as required by paragraph 6 of Annex 2.
73. Additionally, so far as the gratuity issue is concerned, this is not mentioned at all in the 16th January 2013 memo.
74. The 3rd July 2013 memo is also directed to Ms Davies and not the Director of Corporate Services, as required by paragraph 6 of Annex 2.

75. It is moreover in the nature of a chronology rather than a formal complaint, though it certainly alludes to the substance of the complaints.
76. Furthermore whilst it does refer to conversations with members of HR it cannot easily be understood as detailing “informal efforts to resolve the grievance”, which paragraph 6 requires.
77. So we have concluded that neither memo satisfies the requirements of paragraph 6 of Schedule 2 so as to bring the formal process into play.
78. We considered whether by pressing their informal complaints to a point where it had become clear that the Respondent would not yield, the Applicants might be said to have exhausted internal remedies (including the grievance process) “in substance”, despite the deficiencies of the documents relied on as triggering the formal stage. However we ultimately rejected this view. It is important that the distinction is maintained between formal and informal grievance processes. It is important that the formal process should be recognisable as such. It is important that, as a general rule (subject to Para 3(c) which we consider below) the requirements of the formal process be strictly observed before proceedings are started.
79. Accordingly we concluded that the grievance process had not been exhausted under Para 3 (a) of Article II and that it is necessary to consider para 3(c).

Para 3 (c) of Article II

80. Although internal remedies were not exhausted we have concluded that this is an exceptional case where remedies available under the grievance procedure “cannot adequately address the issues raised”. The claims are accordingly receivable by virtue of paragraph (3) (c).
81. We consider the question whether the remedies available “cannot adequately address the issues raised” should be approached by reference to the practical circumstances of individual cases.
82. It will, we anticipate, be a rare case where the formal stage of the grievance procedure cannot adequately address the issues raised. The mere fact that a firm view has been taken at the informal stage would not be sufficient. Nor would it ordinarily suffice that

the issue involves “legal” questions or that officers at all levels in the Respondent might be expected to receive and act upon the same legal advice.

83. In the present case however it seems to us that the interplay of several features means that the formal process could not “adequately” address the issues raised.

84. In particular

(a) It is clear from paragraphs 36 and 37 of the Answer that, as an organisation, the Respondent had reached and communicated a settled view on the issues raised by the Applicants; there was no serious prospect that escalation to the formal stage could affect the outcome or that there was any scope for compromise;

(b) It had been made clear in the 13th March 2013 meeting that the Respondent’s position on re-grading had the imprimatur of the Management Committee of the Respondent (see paragraph 37 of the Answer);

(c) The Respondent had ultimately involved the ASG in the informal procedure and it was the ASG to whom any formal complaint would have been addressed. There was no reason to suppose he would take a different view at a formal stage;

(d) The Respondent had neither answered the substance of the Applicants complaints in writing, nor invited them, after any of the meetings in 2013, to proceed to the formal stage; unusually, therefore, this was neither a case where the informal stage could be seen to be progressing, nor one in which it had officially finished;

(e) The termination of the Applicants’ employment on 31st December 2013 meant that there was realistically insufficient time (after a very protracted informal process which continued on 11th December 2013) to complete any formal process whilst they remained employed.

85. It is the combination of these factors which leads us to the view that the Applications are receivable under Para 3 (c) of Article II

The Grievance Complaint

86. It is convenient to deal with this first, in the wake of our determination that the claims are “receivable”.
87. It will be apparent from our observations on the “receivability” issue that we have concerns about the handling of the Applicants’ grievances.
88. The Respondent accepts that the Applicants’ complaints are properly characterised as grievances. It so describes them at paragraphs 36 and 37 of the Answer.
89. In the context of grievances it is surprising that in the period from 16th January 2013 to the termination of the Applicants’ employment, the Respondent never once set out its reasoned position in writing to the Applicants; and that it never provided any note or record of any of the five meetings held, one of them involving the ASG.
90. However we think it unnecessary to decide whether the Respondent breached any legal duty to ensure that “action” is taken on a grievance.
91. There was no prospect of any more favourable outcome if the grievance procedure had been handled differently. Moreover we have decided (partly as a result of that feature) that the claims are receivable. In the circumstance the Applicants have not suffered any loss as a result of any defect in the grievance process.
92. They do not in any event claim damages in relation to the grievance complaint.
93. The Applications state that the Applicants are “content to forgo” the complaint about the grievance if their other complaints are “properly and satisfactorily resolved”. In other words, if the Tribunal considers their substantive claims (as to gratuity and grade) are receivable they do not seek a formal ruling on whether the handling of the grievance infringed any legal standard. This seems a sensible approach. We accede to it. Accordingly we say nothing more about the grievance.

The pension gratuity

(a) The contractual position

94. By virtue of the amendment to the Staff Rules made in 2006 the pension gratuity did not apply to “persons appointed under a temporary contract of service”.
95. Even though the pension gratuity was not in principle applicable to those on temporary contracts, there is no apparent reason why an employee who was expressly offered a pension gratuity as part of his or her terms of employment would not be entitled to it on ordinary contractual principles.
96. So when certain individuals on short-term contracts - including the Applicants themselves under their original one year contracts - were offered pension gratuity as one of their terms, it would not avail the Respondent to argue that such contracts were “temporary”. The offer had been made and accepted and the Respondent was bound by the express terms. Hence the advice given by the Legal Department and the view frankly expressed by ASG Cutts that payment was unavoidable because of the terms it had offered. The Respondent duly honoured the obligation to the Applicants under their one year contracts.
97. When it came to offering further short-term contracts to the Applicants at the expiry of their one year contracts in the summer of 2012, the Respondent was careful not to repeat the mistake it had made previously.
98. When the Applicants inquired about the prospect of further employment, Ms Oyas told them it would be “without pension or gratuity” (see the Applicants’ memo of 3rd July 2013 discussed in relation to the grievance process above)
99. The letters to the Applicants in June and July 2012 expressly offered “temporary employment” for three months emphasising that the appointment was “of a temporary nature”. The letters did not purport to incorporate any Staff rule (with the exception of one relating to sick absence). In contrast to the letters offering the earlier one year term, the summer 2012 offers did not append any terms referring to pension gratuities (or any separate terms).
100. The subsequent “contract extensions”, each for a period of months, were similar but more abbreviated. Each was careful to describe the offer as “an extension to your temporary appointment”.
101. The Applicants seek to advance a breach of contract case in various ways.

102. One strand of the argument is to suggest that their contracts from summer 2012 were not appropriately classified as “temporary”.
103. We disagree. The Respondent was entitled to classify the three month contracts offered in Summer 2012 and the subsequent “extensions” as “temporary”.
104. As a matter of ordinary language, “temporary” is a relative term. It is often used in the employment context to contrast definite and indefinite terms of employment. However the word “temporary” must take its meaning from its particular employment context. In the case of employment with the Respondent, where three year fixed terms are usual, “temporary” naturally refers to an appointment for a materially shorter period than the three year norm. At the very least , the Respondent was entitled to classify appointments for “” a matter of months as being “temporary”
105. It follows that we do not consider that “temporary “ was in any way an artificial or inappropriate label for the contracts offered to the Applicants from summer 2012 onwards. Different considerations could, of course, arise in a case where an artificial label (at odds with the reality) is applied.
106. It does not matter, in our judgment, whether the offer is classified as an “extension”. Nor (in the absence of some improper attempt to contract out of, for example, fundamental rights), is it relevant to see whether successive short terms of a few months last, in aggregate, for years. The individual engagement, at least if specified as temporary, is plainly intended to be “temporary” for the purposes of ascertaining contractual entitlements which depend on temporary status. That is sufficient for present purposes.
107. We conclude that all the offers made to and accepted by the Applicants from summer 2012 onwards were on terms which did not include provision for the pension gratuity. They were carefully drafted to avoid offering any such provision and the categorisation as “temporary” placed the contracts in a category to which pension gratuity did not in principle apply. Furthermore Ms Oyas had explained to the Applicants orally that the pension gratuity would not apply. There is no basis whatsoever for implying that the pension gratuity would apply to the new contracts offered from summer 2012 onwards.
108. The Applicants advance their contractual case in alternative ways.

109. They argue that they never accepted any “variation” in their terms in the summer of 2012 (see Reply paragraph 18) and thus continued to be employed on the terms which had been applicable to their one year contracts (which included provision for pension gratuity).
110. This argument breaks down at each stage. First, the Applicants were not varying existing contracts in the Summer of 2012. . They were agreeing new contracts. No question of variation arose. In any event even if the Respondent had offered to vary the terms of their existing contracts, that offer could have excluded the pension gratuity.
111. In paragraph 19 of the Reply the Applicants seek to invoke Staff Rule 16 which provides for the extension of contracts of one year or more where staff members have not been informed in writing whether they will be offered a new contract. Even if such an extension would otherwise have been triggered in the Applicants’ case (as to which we make no determination) any such deemed extension would be superseded by an express contract such as each of the Applicants agreed in summer 2012.
112. We are satisfied that the Applicants have no contractual claim to the pension gratuity.

Legitimate expectation

113. The Applicants had no legitimate expectation that further contracts would be offered on terms which provided for pension gratuity.
114. The mere fact that provision for pension gratuity had been included in their one year contracts did not confer any legitimate expectation that subsequent contracts would contain similar provision.
115. Moreover, since the Staff Rules, as amended, provided that pension gratuity was not applicable to offers of temporary contracts, no one on a temporary contract could have any legitimate expectation that such a benefit would be included, unless informed that the benefit was (exceptionally) going to apply to them.
116. Here, on the contrary, the Applicants were expressly told by Ms Oyas that pension gratuity would not be included in the contracts to be offered in summer 2012.

Good faith

117. The Respondent was not in breach of any duty of good faith in offering further contracts which did not include the same benefit contained in the previous contract.

Fair and equal treatment

118. The Respondent was not in breach of any duty to treat the Applicants fairly and equally with others in like situations.
119. We do not think it appropriate in the present case to explore the nature and extent of any such duty.
120. On the facts here, the Applicants were being treated fairly and equally with temporary employees by being accorded the usual benefits applicable to temporary employees.
121. There is nothing intrinsically unlawful in maintaining more limited benefits for temporary, as distinct from permanent, staff.
122. The Applicants cannot properly compare themselves for this purpose to individuals whom the Respondent would ordinarily classify as temporary but whose contracts were erroneously drafted to incorporate express provision for pension gratuity. The Respondent had to pay such individuals because of what had been erroneously included in their contracts. The Applicants themselves appear to have benefitted from such an error under their one year contracts. There is no breach of duty in not perpetuating the error in their later contracts.

Unlawful deduction

123. There was no unlawful deduction of wages in not paying the pension gratuity. This is because the Applicants were not entitled to the pension gratuity.

Estoppel

124. No estoppel, or similar principle of international administrative law, was in play. There was no representation to the Applicants (and no understanding with the Applicants) that they were or would be entitled to pension gratuity under their temporary contracts. Indeed Ms Oyas expressly told them the opposite.

Unjust enrichment

125. The Respondent legitimately offered the Applicants contracts which did not provide for pension gratuity. The Respondent was not unjustly enriched by its actions.

Conclusion on pension gratuity

126. The Applicants' claims in relation to pension gratuity, though receivable, are unfounded in international administrative law and are dismissed

The Job Evaluation/Grading Claim

127. The Tribunal requires further information and submissions in order to determine the job evaluation/grading claim. Separate Orders are being issued to deal with this.
128. We will briefly explain how the need for further information and submissions arises. In doing so we naturally seek to avoid making any finding or determination except in so far as is necessary to contextualise the Orders.
129. At the centre of the Applicants' case is the email of 15th June 2012¹⁵ announcing that the Management Committee had made decisions on all the remaining recommendations of the 2009 Job evaluations "*affecting the positions listed in the attached document*" and announcing the backdating of these decisions to 1st July 2011.
130. We are unsure what the "attached document" is and whether it is one contained in the papers before us. Paragraph 15 of the respective Applications suggest that the attachment is Annex XII to the Applications. This document does not however "list positions" but appears to set out pay points and salary ranges. So we doubt this is the document which was attached.

¹⁵ EO Application Annex XI

131. We have found it impossible satisfactorily to progress the analysis of the job evaluation issue, first without having the “attached document”, and secondly without having submissions directed to its content and effect.
132. We need to understand first whether the Applicants’ job title “HR Assistant Human Resources” is listed on the document.
133. If there is some ambiguity about whether it is listed or not, we need to understand the arguments in each direction.
134. If it is listed, on what basis does the Respondent resist the claim to backdating of grade and salary?
135. If it is not listed, on what basis do the Applicants make such a claim?
136. The Applicants’ memo of 16th January 2013¹⁶ attributes various contentions to Ms Oyas: that the roles were temporary and that the contractual arrangement has been fulfilled and/or that the roles were not included in the evaluation. We are unsure how far the Respondent adopts these points.
137. The Respondent’s pleadings to date appear to focus on the proposition that there is “no automatic entitlement to a new higher grade job after a re-grading exercise” and extensive reference is made to Oyas v ComSec CSAT APL/16.
138. Our preliminary view is that the Oyas case is unlikely to provide much assistance in the present case, at least as to the back-pay claim.
139. It seems to us that if the title of the Applicants’ job was shown on the “attached list” a key question (though by no means the only question) is whether the Respondent was promising to pay back pay to all holders of jobs carrying that title. This was not an issue in the Oyas case which concerned (on the face of it) the rather different situation where a person appointed to one job asserted an entitlement to be appointed to a higher post because, she maintained, she was already performing the functions of the higher role.
140. As regards the contracts concluded from summer 2012 onwards, we understand the Respondent’s case to focus on an alleged difference between the tasks evaluated by PwC and the tasks performed by the Applicants. Here again, we think it is at least

¹⁶ EO Application Annex II

relevant to understand whether it is being said that the Applicants' job has a different title from the one evaluated. If not, we would want to have the Respondent's explanation as to what was being announced in the 15th June 2012 memo and as to why, in the light of that explanation, the Applicants' jobs were not assigned the status and pay of K.

141. If, as we anticipate from the pleadings to date, the answer would be that the tasks undertaken by the Applicants do not correspond to those evaluated by PwC, we would want to understand whether the Respondent had similarly declined to implement re-gradings for other job-titles shown on "the attached document" or whether the Applicants' job-title had been subject to different treatment, and if so why.
142. Our Order sets reasonably tight timescales for providing the necessary information in order that the Tribunal can reach a prompt decision on the outstanding issue.

Costs

143. The Tribunal makes no order for costs in relation to the claims so far determined. The Tribunal reserves its decision on costs relating to the job evaluation/grading claim until after that claim has been finally resolved.

Given this 25th day of March, 2015

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Christopher Jeans Q.C., President

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David Goddard QC

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Dheerendra Dabee SC