



CSAT APL/27

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF:

SUNDER SINGH

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Mr Christopher Jeans QC, President; Mr Chelva Rajah SC, member and Justice Sandra Mason QC, member.

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JUDGMENT

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### **Introduction: the case in a nutshell**

1. Mr. Sunder Singh was employed by the Respondent for almost 37 years. He worked at the Commonwealth Youth Programme, Asia Centre, in Chandigarh India. He was made redundant on the closure of the Centre.
2. During the later period of his employment he was one of several employees who were assigned extra duties.
3. He sought additional payment for the additional duties.
4. He was told that there was no money for the extra duties. A new job evaluation was however anticipated. It was made clear that continuing extra duties could be included in his job description for this job evaluation. Back pay would be paid on the upgrading of the enlarged job.
5. The job evaluation was delayed for years, without good reason. When, some years later, it was finally completed, there were two unwelcome surprises for Mr Singh.
6. First, his job had not been upgraded, even with the inclusion of the additional duties.
7. Secondly, the salary deemed appropriate for his grade was *lower* than the salary he was already receiving. Although his existing salary continued to be protected he received no increase and, consequently, no back pay.
8. Having pursued internal remedies without success, he now seeks redress from the Tribunal.
9. There are several strands to his case which we will address individually. But in substance he says that he should be compensated either by means of higher responsibility allowance, re-grading or some additional payment, for which he has suggested a formula.

### **The facts in greater detail.**

10. There is very little dispute about the facts. However, the Tribunal has been presented with a somewhat fragmentary picture of the background history. This may be due at least in part to record-keeping problems at the Centre in Chandigarh. We will refer to these problems shortly. We have drawn inferences where it seemed appropriate to do so. We make our findings of fact on the balance of probabilities.
11. We will refer to Mr Singh at times as “the Applicant” and to the Commonwealth Secretariat as “the Respondent” or “the Secretariat”. We will use the shorthand “CYP” to refer to the Commonwealth Youth Programme
12. Until the end of February 2014 the Respondent maintained four CYP Centres: the Africa Centre , the Asia Centre , the Caribbean Centre and the Pacific Centre.
13. On 6<sup>th</sup> March 1979 Mr Singh joined the Respondent as a messenger at the Asia Centre. His letter of appointment specified his salary as 70 rupees per month plus an allowance of 20 rupees a month for performing the duties of duplicating machine operator<sup>1</sup>.
14. We are concerned with the period from 2002. By this time Mr Singh held the position of Administrative Assistant. In May 2002 the Establishment Officer (“EO”) left. He was not replaced. Instead his duties were re-assigned amongst some of the existing staff.
15. A chart<sup>2</sup> apparently produced by Mr Singh and two of the other staff concerned (which appears to be annotated by the Regional Director) sets out, in immense detail, the individual duties re-assigned and the days, hours or minutes attributed to the various re-assigned duties and the identity of the person to whom those duties were passed. At the foot of the table the overall proportion of re-assigned duties undertaken by each of seven members of staff is set out. Mr Singh is shown as having taken on an overall proportion of 20.73% of the duties: that is to say, 20.73% of the EO’s duties measured by the estimated relative proportions of the EO’s time taken to perform those duties. The table also suggests how the former EO’s salary would be divided between those who had taken on his duties using the proportions shown in the chart.
16. It is neither necessary nor realistically possible for us to make any detailed findings about this chart and to what extent the extra duties entailed longer or more intensive hours or more challenging responsibilities for Mr Singh. Even assuming that the details

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<sup>1</sup> Annex I to Answer

<sup>2</sup> Annex X to Application

on the chart are accurate in every respect, time spent by the EO on a task may not equate to the time spent on the task by the employee who succeeds to it. Time spent on a task is in any event only one possible measure of the demands it entails in the context of the job as a whole. Some tasks are inherently more responsible than others and the degree of responsibility (or standard of performance to be expected) may differ according to the level of the job-holder. We are not in a position to assess any of this.

17. But it does not appear to have been seriously disputed that significant additional responsibilities were passed to Mr Singh and we accept that this was the case.
18. We also accept, in the absence of any challenge, that (as he puts it<sup>3</sup> in his Application to the Tribunal) Mr Singh “kept on requesting the Regional Director CYP Asia Centre for matching or extra remunerations for higher duties”. It is not clear to us when these requests began. We infer that it was soon after the EO’s departure, though there is no documentary evidence from that period. It appears<sup>4</sup> to have been an issue when Mr Raj Mishra took over as Regional Director in 2006. Mr Singh was not alone in seeking payment for additional responsibilities.
19. Around the time of Mr Mishra’s appointment there were also problems about the introduction of new terms and conditions of service (“TACOS”) for CYP staff following a review. Some staff, including Mr Singh, were facing a reduction in their salaries if the review was fully implemented.
20. In the event, it was decided that existing salaries of staff including Mr Singh would be protected at the former level and that additional duties undertaken would be reflected in job descriptions for the purpose of a job evaluation study which was to be undertaken.
21. The key decisions appear to have been communicated to CYP staff in early October 2007. A memo dated 5<sup>th</sup> October 2007<sup>5</sup> from Dr Fatiha Serour, Director of the Respondent’s Youth Affairs Division records decisions announced to a staff meeting of CYP Asia the previous day. It states, so far as relevant, as follows:

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<sup>3</sup> Application para 7(i)

<sup>4</sup> See eg the Respondent’s email correspondence with Mr Mishra Annex II to Respondent’s Additional Statement

<sup>5</sup> Annex 4 to Application

“...3. Staff who have seen their salaries reduced as a result of the implementation of TACOS on 1<sup>st</sup> January 2007 will see their salaries re-instated to the pre-January 1 2007 level with immediate effect.

4. Seven staff...will undergo a job evaluation to complete the process started by HRS/FMIS in December 2006 to reflect new tasks, functions and/or the combination of new functions. They were also informed that once the evaluation and grading is complete, their salary will be adjusted accordingly and backdated to the time they assumed the new functions. The HR officer, Regional Director and Director (YAD) are working on these job reviews prior to return to home base.”

22. Mr Singh was one of the “seven staff” mentioned in paragraph 4 of the memo. This announcement was no doubt designed to be of comfort to the staff concerned, including Mr Singh. It held the prospect of “job reviews” which were apparently seen as so urgent that they were being undertaken by the senior officers before they returned to home base. The announcement also promised that adjusted salary which resulted from the reviews would be backdated.

23. The next stage of the story we derive mainly from an email<sup>6</sup> to senior Officers from Monica Oyas, Human Resources, dated 31<sup>st</sup> October 2008. It appears that job evaluations were done but the relevant documentation was discarded or lost at the Asia Centre and not copied to the Respondent centrally. Some new job evaluations were undertaken at the Asia Centre but these were judged insufficient by the Respondent’s HR team to enable fresh evaluations to be completed. What are described as attempts to “retrieve/reconstruct the necessary information” had “yielded no fruit”. It was proposed that a fresh exercise would be undertaken using “benchmark information from UN –India”.

24. However, this plan too, bore no early fruit.

25. Meanwhile the new TACOS which came into force on 1<sup>st</sup> January 2007 provided for the possibility for a Regional Director to approve the payment of a responsibility allowance where a staff member is required to undertake “duties and responsibilities greater than the staff member’s own grade” for a period of three weeks or more. (We set out the provision more fully below).

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<sup>6</sup> Annex V to the application

26. In a memo<sup>7</sup> dated 19<sup>th</sup> February 2009 to Mr Mishra, Regional Director Mr Singh and a colleague, Mr Parkash Chand recorded that they were “each doing some extra jobs”. The memo attached “office orders” dated 2002 and 2006 relating to the extra jobs. The memo referred also to extra work being done by another colleague Hari Krishan for which he was being paid a “responsibility allowance”. It concluded by stating that Mr Singh and Mr Chand were also doing extra duties and were requesting “reasonable responsibility allowances” for themselves.
27. Mr Mishra recorded his response in a manuscript note dated 26<sup>th</sup> February 2009. We infer that the whole of what Mr Mishra records on the front of the memo is what he said to Mr Singh and Mr Chand. He records that he had “discussed the matter” with both men that day. He had explained that there was “no extra monetary benefit” for “additional works entrusted to staff from time to time”. Duties performed by a member of staff “over a long period” would, however, “naturally” be reflected in the job description. Since the job descriptions were “under evaluation”, it was
- “expected that any additional duties being performed by them would be duly recognised and reflected in their grade /pay point.”
28. So the answer from Mr Mishra in February 2009, no doubt with full authority, was, so far as it went, a very clear one. It was in line with Dr Serour’s announcement in October 2007 (above). Extra duties would be taken into account in the (still) ongoing job evaluation process but there would be no allowance for additional duties in the interim.
29. As Mr Singh would already have known from Dr Serour’s announcement, salaries adjusted to take account of the additional tasks would be backdated.
30. If the underlying message given by Dr Serour in 2007 and by Mr Mishra in 2009 was that Mr Singh and other affected colleagues should be patient, it transpired that much further patience was to be required.
31. The matter was discussed at a meeting of the four CYP Regional Directors in Colombo in August 2010. A memo<sup>8</sup> to the Secretary General dated 8<sup>th</sup> August 2010 signed by all four Regional directors records the discussion. It notes that staff were on protected salaries with the benefit of annual increments but received no Market Rate Adjustment

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<sup>7</sup> Annex III to Application

<sup>8</sup> Annex VI to application

("MRA"). An HR officer had visited and advised staff on how to write their job descriptions, collected the completed job descriptions and brought them back

"with the promise that a re-evaluation...would be carried out by the HR and that they would be placed in suitable grades. This was in the latter half of 2007 but nothing has been done on this since and those staff who were adversely affected continued to suffer."

The memo concluded with an "appeal" on behalf of the staff to consider the issues "with empathy and objectivity"

32. The Regional Directors appear to have been oblivious at the time of the memo of the mishaps and the loss of documentation recorded in Ms Oyas communication of October 2008 or of the fact that a further initiative to "benchmark" relevant jobs by reference to UN-India information had supposedly been undertaken.
33. What became of the UN-India information initiative is unclear. Eventually however the Respondent commissioned in 2011 a survey from the Birches Group comparing the pay of CYP Asia to that of the local market in India. This was intended, as would be normal in any market testing exercise, to assist<sup>9</sup> the Secretariat as an employer. The Secretariat did not commit itself to match salaries with any ranges identified by the Birches Group.
34. Finally in August 2012 there was a further job evaluation for CYP India staff. The jobs were analysed between job holder and manager before a formal evaluation from the Human Resources Adviser<sup>10</sup>.
35. The result of the evaluation was that Mr Singh's job was assigned its existing Grade of GO 4. In selecting the salary level for that job, the Respondent fixed it at a level which was well below the 50<sup>th</sup> percentile point for similar local jobs shown in the Birches Group survey. Moreover the level was below that of Mr Singh's existing salary.
36. The upshot was that Mr Singh's pay would be reduced, unless once again it was protected.
37. In the event, the Respondent did protect his pay level once again. But Mr Singh was, naturally, very disappointed. He had been long awaiting a pay-rise, with back pay, to

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<sup>9</sup> See Answer, first-numbered para 10

<sup>10</sup> Answer para9

reflect the extra duties he had long performed. The job evaluation process had continuously been held out to him as the means by which his extra work fell to be recognised in financial terms. His hopes had been kept up through the many years it had taken for the Respondent to carry out the re-evaluation process promised in 2007. Now he was to receive no extra payment at all.

38. What he continued to receive, as the Respondent records<sup>11</sup> was an annual salary of 405,336 Rupees. This reflected the pay protection he enjoyed on the coming into force of the new TACOS in 2007. Without such protection, the salary for his grade (including an MRA allowance) would have been 332, 204 Rupees per annum.
39. We record that the 50<sup>th</sup> percentile salary for administrative assistants was shown in the Birches Group report as 526,396 Rupees per annum.
40. It is not necessary to record the course of complaints and appeals by which Mr Singh escalated the matter through the Secretariat, culminating with an email to the Secretary-General on 28<sup>th</sup> March 2014 to which the Secretary General responded on 23<sup>rd</sup> May 2014. Suffice it to say that he properly, but unsuccessfully, pursued internal remedies before making the present application to the Tribunal on 16<sup>th</sup> June 2014.
41. The position taken by the Respondent and endorsed by the Secretary-General was simple: Mr Singh's grade and remuneration were in accordance with contractual terms and conditions<sup>12</sup>.
42. By the time of the exchange with the Secretary-General the Asia Centre, in common with all three other CYP centres, had closed on 28<sup>th</sup> February 2014. Mr Singh and the other staff were made redundant.
43. We should record that there was no complaint from Mr Singh about the termination of his employment or the redundancy payment he received. We should also record that the Secretariat – and the Secretary General personally – have expressed their appreciation of Mr Singh's long and valuable service. A copy of a certificate of appreciation<sup>13</sup> signed by the Secretary General is in the materials before us.

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<sup>11</sup> Rejoinder para15

<sup>12</sup> Annex III to Answer

<sup>13</sup> Annex XIV to Application

44. In his Application to the Tribunal Mr Singh seeks financial remedies. His contentions over the course of his Application, Reply and Additional Statement are presented attractively but diffusely and without legal assistance. He contends, in essence, that he should be compensated for the extra work he did and the treatment he has received (seen in isolation or relative to others) whether by additional payment, responsibility allowance, re-grading or recalibration of salary. He has provided some clear and elaborate calculations to assist the Tribunal in valuing his claim.

45. The Respondent's position is that Mr Singh was treated lawfully at all times and that his treatment has throughout been in accordance with the applicable terms and conditions.

46. We deal in turn with the issues which arise. It is convenient to deal with the issues in the following order:

- (1) Grading
- (2) Fixing of salary to grade
- (3) Responsibility Allowance
- (4) Equality of treatment
- (5) Overall contractual position
- (6) Remedy
- (7) Interest
- (8) Costs

**(1) Grading**

47. Mr Singh questions<sup>14</sup> the correctness of the salary and grading determined in 2012.

48. It is appropriate in this case to deal discretely with the separate exercises of grading and salary.

49. It was for the Respondent as employer to determine its own grading scheme.

50. In assigning jobs to particular grades the Respondent was entitled to undertake a job evaluation process. Indeed this represents good practice.

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<sup>14</sup> Eg at para 7(v) Application

51. The exercise of judgment in applying the job evaluation process to a particular job is a matter for the employer. Under the principles of International Administrative Law the Tribunal has very limited jurisdiction in relation to such decisions. As noted by the ILOAT in Ayyangar (Judgment 529) the application of job evaluation entails a value judgment requiring relevant training and expertise. As Ayyangar indicates, there are limited grounds on which enquiry can be made into such judgments, but it is not sufficient that the employee questions the correctness of the outcome. There must be some real basis for supposing that, for example, an unlawful or a legally impermissible principle has been applied or that there has been an abuse of authority or at least some demonstrable irrationality. Nothing of this kind arises here. So the Tribunal did not call for further papers to explore the matter further.
52. We recognise that Mr Singh might naturally feel that the addition of extra duties to an existing job (especially duties formerly performed by a higher graded individual) should tend to inflate the grade. Clearly, however, it will not always do so. It is the total job which has to be evaluated. It is impossible to say that the addition of some new duties must necessarily take the job to the next level. Whether the amalgamation of the old and new duties lifts the job to a higher level is a matter for the experienced assessment job evaluator who will have a refined understanding of the grade boundaries and relative demands of the relevant jobs.
53. The Respondent did not act unlawfully in fixing the grade of Mr Singh's job.

## **(2) Salary**

54. The assignment of salary levels (or salary bands) to grades (or to points within grades) is also a matter within the discretion of the employer. The employer is not obliged to use a market rate, or any similar formula, unless it promises the employee it will do so.
55. For the staff of CYPs, changes of salary were expressly stated (in paragraph 46 of the New TACOS") to be subject to "periodic review" and to be "at the discretion of the Secretary General". There was no commitment to market rates or anything of that kind.
56. The Respondent was entitled to obtain an analysis of the local market from the Birches Group in order to inform its decision making. By doing so it did not bind itself to matching salaries to the market, or any part of the market spectrum. It was not obliged to offer, say, salaries at or near the 50<sup>th</sup> percentile of the bracket shown by the Birches Group survey. The fact that the employer enlists guidance from a third party does not

constrain it to follow that guidance in any way: See Oyas v Commonwealth Secretariat at para 87 and the case there cited of BA v International Bank for Reconstruction and Development World Bank Tribunal Decision no 423.

57. There is no basis for suggesting that the Respondent was obliged to *increase* Mr Singh's salary by virtue of having undertaken the job evaluation process.

58. If instead of protecting his existing salary, the Secretariat had attempted to *reduce* the salary Mr Singh actually received to the level it now determined as appropriate for his job, then other considerations would have arisen. But it did protect his existing salary.

59. So the fixing of the salary was lawful.

60. We reject the contention, in so far as Mr Singh advances it, that he was entitled to a higher salary than he was paid.

### **(3) Responsibility Allowance**

61. Paragraph 51 of the TACOS for CYP staff provided as follows (emphasis added) :

“Where a staff member is required to undertake duties and responsibilities greater than those of a staff member's own grade for a continuous period of not less than 3 weeks, he or she is eligible for responsibility allowance.

In these circumstances the Regional Director may approve a responsibility allowance, after satisfying him/herself that the proposed allowance is reasonable in terms of the level of extra work, the duration of any staff member absence or the expected timing for additional staffing.

The provision goes on to indicate broadly how the allowance should be computed, using the difference between the salaries of the relevant grades.

62. Four points need to be made about this provision.

63. First the allowance is at the Director's discretion: he may approve it, but is not always bound to do so (though we accept that there will be rational limits to his discretion).

64. Secondly the duties must be “greater” than those of the staff member's own grade. Not all duties done by a person of higher grade are necessarily greater than duties performed by a person of lower grade. The grade for the job will reflect the totality of duties but within many jobs there will be some more onerous duties and some less

onerous ones. Some less onerous tasks at the higher grade might, taken alone be appropriate for, or similar to those done at, a lower grade.

65. Thirdly, before approving any allowance the Director is to have regard to the “level” of extra work. There are clearly questions of degree for him to assess.

66. Fourthly, there is normally some requirement of flexibility in any job whereby the job-holder may be required, within limits, to undertake tasks which are additional to his core responsibilities. In the case of the Applicant’s job description<sup>15</sup> there is for example a provision that he is to carry out other tasks “assigned for the purpose of ensuring the effective functioning of his section”. This is no doubt subject to some implied limits; but it is relevant in assessing whether the employer was, on given facts, rationally obliged to award a responsibility allowance.

67. Mr Singh seeks to argue that the Secretariat – in effect Mr Mishra - was legally bound to award him a responsibility allowance.

68. We disagree.

69. Fundamentally, we are not satisfied that the additional duties are necessarily to be regarded as “greater” than those of Mr Singh’s own grade. Reviewing the list on the chart produced by Mr Singh and his colleagues, they do not stand out as being of a completely different nature or of a strikingly different order of responsibility from the other duties shown in the job description which was finally used.

70. We accept the difficulty of making judgments from the written documents about the practical content of each and every duty. But we think that the onus here is on the Applicant to show that the additional duties were such that Mr Mishra was obliged to grant the allowance. He has not discharged it.

71. Putting it another way, we are not satisfied that the scale of such duties as may be “greater” is so marked that any fair and rational regional director must have awarded a responsibility allowance..

72. We note moreover that Mr Singh pursued no formal grievance about the matter when his application for extra payment was rebuffed by Mr Mishra in February 2009. This may well have been because Mr Mishra assured Mr Singh that the extra duties would

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<sup>15</sup> Annex XII to Application

count for the supposedly imminent job evaluation exercise. We return later to this aspect.

**(4) Equality of treatment**

73. Mr Singh makes reference to the treatment given to two colleagues who were compensated for additional duties: Mr Verma and Mr Krishan. He alludes to “discrimination” in reference to them<sup>16</sup>
74. If he seeks to make any case based on discriminatory treatment we do not think it is established.
75. As regards discrimination in the ordinary sense, it is only unlawful if it is done on a prohibited ground or by reference to a protected characteristic such as gender or race. That is not alleged here.
76. The expression is sometimes used to denote unequal and unfair treatment between employees. We do not need to analyse the circumstances in which such inequality or unfairness might give rise to a claim, since we do not consider that there was any such unfairness or inequality in relation to the treatment of Mr Singh in comparison to either Mr Verma or Mr Krishan.
77. So far as Mr Verma is concerned, it appears that he was covering a higher graded role than his normal job from January 2009 and was paid at the higher grade accordingly<sup>17</sup>.
78. In the case of Mr Krishan, as the Tribunal was to find at paragraph 81 of its judgment (Krishan v Commonwealth Secretariat CSAT APL/19), his contract was varied so that he was required to perform certain additional duties in return for reasonable additional remuneration. The only dispute was as to what constituted reasonable remuneration. The Tribunal found that the amount proffered by the Secretariat was too little. But it was for work for which the Secretariat had agreed to pay.
79. Neither of these cases is comparable to Mr Singh’s. No case of unequal or unfair treatment is established in comparison to either of them.

**(5) Overall contractual position**

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<sup>16</sup> See eg Application para 6.1

<sup>17</sup> See Answer paras 16 and 17

80. We have concluded that there was no breach of contract in the fixing of Mr Singh's grade or salary level or in the fact that he was not paid a responsibility allowance.
81. Our primary findings of fact do lead us to conclude that Mr Singh was poorly treated in one respect. Having performed additional duties at the Secretariat's direction, he sought additional payment over a period of years. He was led to believe that an imminent job evaluation process would provide the remedy, or at least the answer, in relation to his claims. The intention to acknowledge additional duties through such a process had been announced to staff in 2007 and was reiterated to Mr Singh personally by Mr Mishra in 2009. He could expect back pay if and when the job was upgraded. But for year after year the evaluation process did not materialise. First the documentation was lost. Supposedly urgent plans to restart the process came to nothing. Regional Directors were left to complain in 2010 that no progress had been made. Still no evaluations took place until 2012 when it was decided, in effect, that no increase in grade or salary was appropriate in the Applicant's case, despite the additional duties.
82. The gravamen here is the delay. If a claim for additional payment for continuing additional work is to be met by fresh job evaluation, the process needs to be undertaken quickly, at least if there is any possibility that individual salaries may not be increased. Here the delay was extreme. The consequential disappointment and frustration at being awarded nothing after years of expectant waiting must have been correspondingly great.
83. Does this entail a breach of contract?
84. We conclude that it does.
85. We must have regard to the implied duties in the contract of employment. As this Tribunal has noted in Keeling v Commonwealth Secretariat CSAT /14 (para 61) there is an implied obligation on employers in international administrative law to treat staff members with dignity. Such an obligation can also be expressed as a duty not to act in such a way as would seriously damage trust and confidence between employer and employee.
86. In the circumstances of this case, where Mr Singh, a loyal and long-serving member of staff was left in a state of anxious expectation for several years, we conclude that it

was injurious to dignity and unjustifiably damaging to trust and confidence to delay in resolving the issue and then award nothing by way of redress.

87. Had the evaluation been undertaken promptly the outcome would still have been disappointing to Mr Singh but we do not consider it would have entailed a breach of contract.

**(6) Remedy**

88. In accordance with our statutory obligation we order rescission of the decision not to make any award to Mr Singh.

89. What sum is appropriate? After much reflection the Tribunal has concluded that the appropriate figure to reflect the injury to dignity, frustration and hurt feelings is the sum of 200,000 Rupees. In fixing this figure we have had regard to all the circumstances of the case, including the amount of the annual salary, the period over which Mr Singh continued to do the additional duties whilst his claim remained unresolved and the subsequent delay in recompense.

**(7) Interest**

90. We have taken account of the delay in recompense in fixing the amount of the award. So we make no separate award of interest.

**(8) Costs**

91. No award of costs to either side is appropriate.

**Given on this 8<sup>th</sup> Day of May 2015 in London**

Christopher Jeans QC, President

Mr Chelva Rajah SC

Judge Sandra Mason QC

