CSAT APL/43

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF:

THE COMMONWEALTH SECRETARIAT

Applicant

AND

RAM VENUPRASAD

Respondent

Before the Review Board constituted by

Mr George Erotocritou
Mr Arthur Faerua
Ms Justice Aruna D. Narain
Ms Justice Marva McDonald-Bishop CD and
Ms Catherine Callaghan QC

JUDGMENT ON APPLICATION FOR REVIEW

The Background and the brief facts of the case

1 We have before us two Review Applications, one on liability and one on compensation. The Applicant in both Applications is the Commonwealth Secretariat and the Respondent is Mr Venuprasad, who was one of the Applicant's high ranking members of staff.

2 The facts of the case are long and complex. The Tribunal in its Interim Judgment has extensively outlined them with admirable detail. Before proceeding to deal with the grounds of Review, we shall deal briefly with the basic facts of the case and the process before the Tribunal, that led to the two Review Applications.

3 The Respondent was employed by the Commonwealth Secretariat from 1 November 2001 to 31 December 2016. His fifteen year employment came to an end when his contract expired in 2016.

4 In 2016, after the appointment of the new Secretary-General, Baroness Scotland QC, tension arose between the Secretary-General and the Respondent. In May 2016 confidential information was leaked to a British newspaper and Mr Venuprasad came under suspicion as the source of the leak and on 27 June 2016 was suspended from his position. Also, in August 2016, disciplinary proceedings were initiated against him for breaching the Secretariat's confidentiality policy and for inappropriately handling confidential and highly sensitive information.

5 On 31 October 2016, the Disciplinary Board met in the absence of the Respondent, while he was on sick leave and found that the two allegations were substantiated, despite its conclusion that there was no direct evidence that it was the Respondent who leaked the e-mails. The Board, just before the Respondent's employment was due to end and whilst he was on sick leave, decided to recommend issuing to the Respondent a final written warning on 2 December 2016.

6 Immediately after 8 December 2016, the Respondent pursued his internal right of appeal which was unsuccessful. That decision was notified to him on March 2017.

7 As a result of the above, the Respondent applied to the Tribunal complaining that the various decisions of the Secretariat, the Disciplinary Board and the Panel that dismissed his internal appeal, were in breach of a number of obligations owed to him by the Secretariat and claimed among other remedies, compensation for loss of earnings and the costs that he incurred, amounting to a total of £662.101,61.

8 The Tribunal on 16 April 2018 concluded (Interim Judgment), amongst other things, that:-

(a) The decision of the Secretariat made on 22 June 2016 to suspend the Respondent, was in breach of the Secretariat's obligations under the Respondent's contract of employment.
(b) The decision of the Disciplinary Board dated 10 November 2016 was flawed and had to be set aside.
(c) The decision of 2 December 2016 to issue a written final warning to the Respondent had to be set aside.
(d) The decision dated 28 February 2017 to dismiss his internal appeal also had to be set aside.
(e) The Secretariat breached its obligation to the Respondent by making adverse statements about him to the media, which were calculated to discredit him and harm his reputation.
(f) The Respondent was entitled to costs in respect of his successful application and the parties were given time to agree the amount.

9 The Tribunal considered that the Respondent was entitled to compensation for loss caused by the Secretariat's above breaches of its obligations to the Respondent and ordered that the parties be heard further on the issue.

10 After considering the further submissions of the Parties, on 21 September 2018, the Tribunal for the serious breaches of the obligations of the Secretariat, by its Compensation Judgment, awarded to the Respondent compensation for the total amount of £292,700 as follows[1]:-

(a) £133,300 for loss of earnings before delivery of the Interim Judgment;

(b) £100,000 for loss of earnings after delivery of the Interim Judgment;

(c) £30,000 for moral injury;

(d) £20,000 for injury to health;

(e) £2,000 for medical costs (not disputed);

(f) £6,000 for travel costs associated with the proceedings;

(g) £1,400 for legal costs incurred in October 2016.

[1] Para 124, Compensation Judgment.

11 The Tribunal further awarded to the Respondent interest at the rate of 3% per annum on the sum of £133,300 from 1 September 2017 to the date of the Compensation Judgment (21 September 2018), which is not disputed[2].

12 Furthermore, it decided that in view of the Respondent's success of his claim for compensation, he was entitled to recover his actual and reasonable costs of making his claim and encouraged the parties to agree these costs, failing which the Tribunal reserved the right to fix these costs, on the application of either party.

The two Applications for Review and Stay

13 On 10 July 2018, the Secretariat filed an Application for Review of the Tribunal's Interim Judgment. The Secretariat also filed an Application for a Stay of the compensation process, pending determination of the Secretariat's Application for Review of the Interim Judgment. That Application for Stay was dismissed on 26 July 2018.

14 After the Tribunal issued on 21 September 2018 its Compensation Judgment, the Secretariat filed an application for Review of compensation and for stay of execution of the Judgment on compensation.

15 The Tribunal in its Judgment on Stay, dated 25 January 2019, considered that the interests of justice would not be served by denying the Respondent access to any of the compensation awarded to him until the two applications for review were determined. Taking into account all matters raised by the parties, the Tribunal ordered immediate payment of £150,000 of the compensation, in order for the Respondent to have access to some funds to meet past and current living expenses. Simultaneously, it accepted an undertaking from the Respondent to repay any amount that is ultimately found to be repayable by him to the Secretariat.

16 However, the Tribunal considered that it was appropriate to grant a stay of the balance of the compensation award, until further order. This, it considered, would provide substantial protection for the Secretariat's financial interests, in the event that its review applications are successful in whole or in part.

17 Having already given a brief outline of the relevant facts, we consider that it is not necessary to repeat any other facts, for the purpose of this review. Such a course will not serve any useful purpose. All the necessary facts as outlined in the Interim Judgment are before us and will be borne in mind when considering the present review. In any event,

[2] Para 10, Review Application on Compensation.

we believe that the best way to proceed is to go into those facts that we consider relevant and in as much detail as we consider necessary, when we discuss the background to each ground of review.

18 In the instant case, in effect we are deciding two Review Applications in one Judgment. This somewhat explains the length of this judgment. We shall deal first with the Review Application on Liability and then with the Review Application on Compensation. In doing so, we shall have in mind the Pleadings and Submissions filed.

Nature and scope of Review Board's powers

19 Article XI of the CSAT Statute provides, in relevant part:

> "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.
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> 8. The President, if satisfied that the requirements of paragraph 5 have been met, shall constitute a panel comprising the five members who did not sit on the initial panel that delivered the judgment in question, to sit as a Review Board to review the judgment.
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> 10. In determining an application for revision or review, the panel or the Review Board, as applicable, may affirm or rescind in whole or in part the judgment in question."

20 Article XI.5 makes clear that there are a limited class of grounds on which a review may succeed. It is well established that the Review Board may review the initial panel's judgment and rescind it in whole or in part, if and only if it is satisfied that one or more of the grounds in Article XI.5 has been established.[3] The burden in review proceedings lies on the Applicant for review to persuade the Review Board that one or more of these grounds is made out.[4]

21 As evident from Article XI.5 and XI.8, the task of the Review Board is to review the judgment of the initial panel. It is not the role of the Review Board to retry or rehear the

[3] *Oyas (No.3),* CSAT APL/16 at [44]. See also *Kaberere,* CSAT APL/20 (No.2) at [35]-[38]; *Bandara,* CSAT APL/22 (No.2) at [43]-[46] and *Shah,* CSAT APL/39 at [32]-[35].
[4] Ibid.

case before the initial panel. That means that it is not its function to substitute its own view of the merits for that of the first instance Tribunal. The Review Board will focus on the judgment of the initial panel, and consider the specific errors alleged by the Applicant in order to determine whether any of the established grounds for review are satisfied. It therefore goes without saying, in the context of this case, that it is not the role of the Review Board to review the merits of the decisions taken by the Disciplinary Board or Secretariat in relation to the Respondent's employment.

22 The Review Board has carefully considered and applied these principles when considering the two applications for review in this case.

PART A – The Review Application on Liability

The Grounds of Review

23 In paragraphs 29-31 of the Review Application, the Applicant formulates its eight grounds of review as follows:-

> "29. Pursuant to Article XI.5 of the Tribunal's Statute, the Respondent contends:
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> a. Decisions of 22 June 2016 and 12 August 2016
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> (i) That the Tribunal erred as a matter of law' and fact in finding that the Suspension Decision was a breach of the [Respondent's] employment contract and failed to provide adequate reasons for this decision. In the alternative, the Tribunal erred in law by failing to consider the merits of the Suspension Decision as a prerequisite to determining that the Secretariat breached the Applicant's employment contract;
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> (ii) That the Tribunal erred as a matter of fact in finding that the Suspension Decision was not reviewed by the [Applicant];
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> (iii) That the Tribunal erred as a matter of fact and law in finding that Ms. Lolita Applewhaite should have given evidence as to the reasons for the Suspension Decision.
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> b. That the Tribunal erred as a matter of law and fact in finding that due process was not followed and that the Disciplinary Decision should be set aside;
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> c. That the Tribunal erred as a matter of fact in finding that the Final Warning should be set aside; and
>
> d. That the Tribunal erred as a matter of fact and law in finding that the Appeal Decision should be set aside.
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> 30. In addition, the Respondent further contends that:

a. The Tribunal erred as a matter of law and fact in finding that the Respondent's statements to the media in October and November 2016 were inappropriate;
b. The Tribunal erred as a matter of law and fact in failing to apply its own conclusions on the Applicant's allegations of ulterior purpose; and
c. That the Tribunal failed to make the case management directions required for the proper and efficient administration of the case.

31. Further or in the alternative to the grounds set out above, the Respondent contends that the Tribunal has acted unreasonably in reaching each of the conclusions in paragraphs 29 and 30 above based on the evidence available."[5]

Ground 1 - The suspension decision

The relevant facts from the judgment[6]

24 The Respondent, Mr Venuprasad, was first employed by the Secretariat as a temporary officer in 2001 and became permanent in 2004. He was employed under a series of contracts, until 2014 when the previous Secretary-General, Mr Sharma, with whom he had an excellent working relationship and enjoyed his full confidence, offered him appointment as his Deputy Chief of Staff. His new contract would run from 16 November 2014 to 30 April 2016, when Mr Sharma's tenure was to come to an end. In March 2016 Baroness Scotland QC, as Secretary-General designate, approved an extension of that appointment from 1 May to 31 October 2016 and in October, his contract was further extended to 31 December 2016[7].

25 From an early stage the working relationship between the newly appointed Secretary-General, Baroness Scotland QC and the Respondent encountered difficulties. The reasons for these difficulties, as given by the Respondent, are summarised in paragraph 14 of the Interim Judgment, which is under review.

26 In June 2016, a large number of internal Commonwealth e-mails and other documents concerning various issues relating to the Secretariat, were leaked to the Daily Mail.

27 The Secretariat investigated the matter. A fact-finding Report revealed that the Daily Mail had access to confidential information that had been provided to a small number of staff members. The head of IT reported that there was no record of any e-mail traffic between anyone within the Secretary-General's Office and the Daily Mail. However, the investigation revealed that the Respondent had undertaken recent activity on three of the

[5] Not pursued separately by the Applicant.
[6] Paras 12-37 of the Interim Judgment.
[7] Para 12, Interim Judgment.

documents that were in the possession of the small group of staff in that office and which were in the possession of the Daily Mail.

28 The Respondent came under suspicion. A more detailed assessment of the Respondent's e-mails identified 11 instances where the Respondent had sent documents from his Secretariat e-mail address, to his personal e-mail address. Some of these documents contained sensitive confidential matters. Mr Garry Dunn, the Deputy Secretary-General who led the investigation, was advised by the IT Department that in some instances the Respondent appeared to have deliberately attempted to conceal his actions by hard deleting the relevant e-mails. Mr Dunn was advised that to the user this would appear to remove all trace of sending an e-mail, although the system administrators could recover these e-mails if they wanted[8].

29 On the evening of Sunday 12 June, just before the Respondent was to fly to his home in India, an urgent meeting was arranged between Mr Dunn and the Respondent in the presence of Lord Kamlesh Patel who was attending at the request of the Secretary-General. Lord Patel was the only member of the management team in the Secretary-General's office, who had not received a copy of some of the documents under investigation.

30 On questions put by Mr Dunn, the Respondent admitted that he regularly forwarded emails to his personal email account to review, read or work on at home and he further considered that this was a regular way of doing things. He further stated that it was his practice to regularly delete his sent box as well as his inbox. Finally, he denied that he talked or had been in touch or shared any mails with any member of the media.

31 Mr Dunn requested access to the Respondent's email account and the latter originally agreed to co-operate, but wanted first to speak to a lawyer friend. Eventually he did not consent to give access, indicating that his email account contained a large number of confidential emails relating to family matters and further that he was concerned about "improper access to, or use of, his account"[9].

32 Mr Dunn also questioned other staff of the Secretary-General's office about their handling of one particular document, but it appeared that none of them had sent the document electronically outside the Secretariat.

[8] Para 17, Interim Judgment.
[9] Para 28, Interim Judgment.

33 Further investigation was conducted to check the answers the Respondent had given at the meeting of 12 June. A further fact-finding Report, prepared by Mr Dunn and dated 15 July 2016, records that he was told that the Respondent "rarely deleted his mail boxes as he had thousands stored in his sent box. There was no pattern of deletions. The hard deletions of documents on 13 May were selective, as there were other documents on 13 May not deleted"[10].

34 On 22 June 2016, while the Respondent was still on leave, a decision was taken to suspend him with pay with effect from Monday 27 June 2016, which coincided with the date he was due to return from leave. The decision to suspend was made by his line manager, Ms Applewhaite.

35 The letter of the same date that was addressed to the Respondent communicated the suspension decision and set out the allegations against him as follows:-

> "The allegations against you are that you forwarded confidential and sensitive information from your official email to your personal email from the Secretariat's IT systems. You then made a deliberate attempt to conceal the fact that you had forwarded specific confidential emails to your personal email by deleting the electronic record of the email or any trace that it had been forwarded from your official email account.
>
> In taking these actions, it is alleged that:
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> 1. You have acted in breach of the Secretariat's confidentiality policy particularly its IT policy in Section 12 of the Staff Handbook …
> 2. You inappropriately handled confidential and highly sensitive information you had access to in your position as Deputy Director of the Office of the Secretary-General."[11]

36 The letter further informed the Respondent that under Part 5, Section 8 of the Staff Handbook, a decision was taken to conduct a further fact-finding mission to ascertain whether there was a need to hold a formal investigation or if the matter could be resolved otherwise.

[10] Para 30, Interim Judgment.
[11] Para 31, Interim Judgment.

37 On 12 August 2016, the Applicant, by a letter informed the Respondent that the allegations against him would be referred to a Disciplinary Board under Section 5.12 of the Staff Handbook.

The contract of employment and what it incorporates

38 After summarizing the facts, the Tribunal endeavoured to examine what the Respondent's contract of employment incorporated[12]. In trying to define the terms of the Respondent's contract of employment, it noted that the Respondent "was employed under a written contract of employment entered into in November 2014, which had been extended on a number of occasions on the same terms and conditions. The contract expressly provided that it incorporated the Commonwealth Secretariat Staff Regulations and Staff Rules as amended from time to time." The Tribunal specifically referred to Rule 4 of the Staff Rules, which provides that:-

> "4.1. All employees will be subject to disciplinary measures for misconduct and/or acts or omissions in violation of the Regulations or Rules. The Disciplinary Procedure is set out in Part 5 and forms part of these Rules."

39 The parties agreed that the Disciplinary Procedure in Part 5 of the Staff Handbook that relates to disciplinary matters, is, in view of Rule 4 above, incorporated in the Respondent's contract of employment. Part 5 also includes Section 6 which relates to staff members who are unwell during a disciplinary process.

40 Furthermore, the Tribunal[13] states that the Respondent invoked a number of implied obligations in his contract of employment namely (a) the right to fair treatment including due process, (b) the Secretariat's obligation to exercise powers, and in particular disciplinary powers, for the purpose for which those powers are conferred and not for an improper purpose and (c) the obligation of trust and confidence, which the Tribunal considered referred to the duty to treat the staff members with dignity which can also be expressed as the "the duty on the part of the employer not to conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence between employer and employee without proper or reasonable cause"[14].

41 The Tribunal considered that these implied obligations were well established and were not disputed by the Secretariat in its pleadings. However, the Tribunal explained that what in essence was in dispute were the questions of "what is required by those implied

[12] Para 97, Interim Judgment.
[13] See para 102, Interim Judgment.
[14] Para 102.3, Interim Judgment.

obligations in each of the relevant contexts, and whether those obligations were breached"[15].

Ground 1(a) – The findings of the Tribunal that the Applicant failed to give adequate reason for the suspension

42 The Tribunal referred to Regulation 19 of the Staff Regulations, which forms part of the Respondent's contract of employment and which provides that "if a charge of misconduct is made against a staff member and the Secretary-General is satisfied that a prima facie case has been established, the employee may be suspended from duty, with or without pay, during the investigation. …"[16].

43 The Tribunal then referred[17] to Part 5, Section 5 of the Staff Handbook, which provides in paragraph 11.1 a non-exhaustive list of grounds for suspension[18].

44 It then made reference to the respective positions of the parties as follows[19]:-

> "113. Mr Venuprasad says that the suspension decision formed part of the "campaign" against him, and was motivated by hostility towards him. He says that there is no record of the material that was before Ms Applewhaite at the time of the suspension, and no record of the reasons for the suspension. To the extent it was based on the information gathered by Mr Dunn in the course of preparing the Fact-Finding Report - and there is no direct evidence of this - he says that the investigation process was unfair and unbalanced.
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> 114. In its Answer, the Secretariat says that Mr Venuprasad was suspended "because there were reasonable grounds for believing that the Applicant might interfere with evidence and/or obstruct the investigation." The Secretariat acknowledged, in the course of the hearing before the Tribunal, that there was no record of the reasons for the decision except to the extent that those reasons could be inferred from the Secretariat's letter of 22 June. The Secretariat submitted that the nature of the allegations against Mr Venuprasad, and their context, permitted an inference to be drawn that Ms Applewhaite made the decision on the basis of concerns about potential interference with evidence, and concerns about potential further leaks."

[15] Para 103, Interim Judgment.
[16] See para 111, Interim Judgment.
[17] See para 112 of the Interim Judgment.
[18] All provisions of para 11.1 are outlined in para 56 post.
[19] Paras 113-115, Interim Judgment.

45 The Tribunal examined the issues and concluded as follows[20]:-

> "115. At the hearing the Secretariat also acknowledged that there was no evidence before the Tribunal about the information that was before Ms Applewhaite at the time the suspension decision was made. There is no record of what she was told or shown, or by whom. It seems likely that Mr Dunn provided some information to her - presumably orally, given the absence of any disclosed communications between them - but even that is a matter of inference.
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> 116. The Tribunal understands that Ms Applewhaite continues to be employed by the Secretariat, and could have been asked to provide evidence on these important issues. But no evidence was tendered from her.
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> 117. The Tribunal is not prepared to draw the inferences about the reasons for the suspension contended for by the Secretariat, in the absence of any contemporaneous record of those reasons, and in the absence of evidence from Ms Applewhaite. There may have been good reasons to suspend Mr Venuprasad in June 2016. But in this case the adequacy of those reasons was challenged, the Applicant claims that the suspension was motivated at least in part by an improper purpose, and there is no contemporaneous record of the information relied on in reaching the decision or of the decision-maker's reasons for her decision. In those circumstances it was incumbent on the Secretariat to provide evidence from Ms Applewhaite addressing those matters. Absent such evidence, the Tribunal is not in a position to speculate about the reasons for the decision, and whether suspension for those reasons was open to the Secretariat on the basis of the information available at that time.
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> 118. The Tribunal's reluctance to draw an inference that the suspension decision was made for the reasons put forward by the Secretariat is contributed to by the continuation of the suspension, apparently without review, until the end of Mr Venuprasad's employment on 31 December 2016. The Staff Handbook contemplates regular review of any suspension.[10] But there is no evidence that any such review took place between 22 June and 31 December. By 15 July 2016 (the date of the Fact-Finding report), or at the latest 31 October 2016 (the date on which the Disciplinary Board held its final meeting and reached its decision on the allegations against Mr Venuprasad), there was no risk of interference with evidence. The investigation process had been concluded. And by 31 October the Board had formed the view that it had not been shown that Mr Venuprasad was the source of any leaks (leaks that, as the Board noted, had continued after his suspension). The rationale for the suspension put forward by the Secretariat in its Answer was spent, but the suspension continued. The doubt that this casts on the

[20] Paras 116-120, Interim Judgment.

original rationale for the suspension confirms the need for the Secretariat to call evidence to establish the reasons that motivated the original suspension decision.

119. We add that in the absence of any contemporaneous record of the reasons for a decision affecting an employee, it will often be necessary for the Secretariat to provide evidence from the decision-maker to enable the Tribunal to determine an application on a properly informed basis. The Tribunal expects a high degree of openness and candour from the Secretariat, which extends not only to disclosure of relevant written material but also to provision of evidence on significant matters that are within its sole knowledge. The Tribunal is unlikely to be receptive to submissions that an Applicant has failed to make out his or her case due to lack of evidence about the process followed in making a decision, or the reasons for a decision, in circumstances where there is no contemporaneous record, a genuine concern has been raised by the Applicant, and the Secretariat has not tendered evidence to dispel that concern.

120. The Tribunal has concluded that the decision to suspend Mr Venuprasad on 22 June was not made in a manner consistent with Mr Venuprasad's contract of employment. We add that if we had found that the suspension was justified on 22 June, we would have found that there was an obligation to review the suspension periodically, and that there was no justification for its continuation beyond 31 October. The failure to carry out a review promptly after that date, and the continuing suspension after that date, were further breaches of the Secretariat's obligations to the Applicant."

The contentions of the Applicant on Review

46 The first contention by the Applicant is that the findings of the Tribunal, that the Suspension Decision was in breach of the Respondent's employment contract and that there was insufficient evidence as to the reasons why the Respondent was suspended, were wrong in law and in fact.

47 The Applicant explains why it contends that the Tribunal erred. After citing an extract from *Kaberere v. The Commonwealth Secretariat*,[21] it suggests that the *Kaberere case* sets out three key points that should have been followed by the Tribunal, but were not: "First, the reviewable decision is the letter notifying the staff member of the suspension. Second, the Secretariat is entitled to suspend a staff member where the allegations alone establish a clear *prima facie* case against him. Third, the Tribunal cannot review the merits of a suspension and the Tribunal's power of review is limited in any event."[22].

[21] CSAT/20, paras 55-56.
[22] Paras 32-35 of the Review Application on Liability Judgment of 10 July 2018.

48 The Applicant further contends that:- "Had the Tribunal followed the correct approach in law as applied by the *Kaberere* bench, it could not possibly have arrived at the conclusion that the Suspension Decision was not properly issued. It was an error in both law and fact to err from this precedent and failed to consider the Suspension Decision in the correct light and wrongly omitted parts of it."[23]

49 The Applicant also put forward the following additional arguments to support its contention that the suspension was properly decided:-

(a) That the letter of 22 June 2016 which articulated the Suspension Decision clearly outlined the factual basis, grounds and reasons for the Respondent's suspension and therefore the Tribunal errs in stating in paragraph 33 of its Judgment that there was no written record of Ms Applewhaite's decision or the material before her or the reasons for the decision. The contention goes further to suggest that the Tribunal erroneously omitted to cite in its judgment the evidential foundation for the decision which is contained in the letter.[24]

(b) Although the Secretariat had no further obligation to provide reasons for the suspension, as these were clearly set out in the suspension decision, nevertheless in the letter of 12 August 2016 it attached the fact-finding Report which explained in detail the findings, but which was ignored by the Tribunal. These findings the Applicant contends establish a *prima facie* case[25].

50 The Applicant argues that the above allegations, which were raised in the letter of 22 June 2016, clearly fall within the meaning of misconduct as provided in Section 5.2(g) (misuse of Secretariat's IT systems) and (j) (failure to comply with the Secretariat procedures) of the disciplinary procedure and also clarified that the Secretariat considered the Respondent's alleged actions to be in breach of its IT and confidentiality policies[26].

51 The Applicant agrees[27] that, as to the merits of the suspension, the Tribunal has a limited role in reviewing the suspension, but asserts that the Tribunal erred manifestly in imposing on the Secretariat an obligation to provide adequate reasons for the suspension, without citing the source of such obligation[28].

52 Furthermore, the Tribunal, according to the Applicant, completely overlooked the core facts of this case that confidential information was leaked to the media and that the

[23] Para 35, Review Application on Liability.
[24] Paras 38-41, Review Application on Liability.
[25] Para 45, Review Application on Liability.
[26] Para 42, Review Application on Liability.
[27] Para 47, Review Application on Liability.
[28] Para 117, Interim Judgment.

Respondent had some of these documents, something that he never disputed. The Tribunal, in contrast to the *Kaberere* precedent, failed to take the factual foundation into account, and as a result its conclusion on the suspension can only be described as unreasonable and erroneous in law[29].

53 Finally, the Applicant, without much elaboration, asserts that the Tribunal failed to give adequate reasons for its decision[30].

The Respondent's position

54 The Respondent in his Submissions in Response of 8 May 2019, submits that initially the Applicant's case before the Tribunal was that the Respondent was suspended "because there were reasonable grounds for believing that (the Respondent) might interfere with the evidence and/or obstruct the investigation"[31]. At the Review stage, the Applicant shifts his arguments to the existence of a *prima facie* case of misconduct against the Respondent, which is entirely inconsistent with that advanced before the Tribunal and therefore not open to the Respondent at the Review stage[32].

55 But even if the argument could be raised on review, it is unsustainable as no evidence was presented that the Secretary General formed such a view. Furthermore the Respondent submitted that Regulation 19 anyway must be read alongside Part 5, Section 5 §11.2 of the Staff Handbook (cited by the Tribunal at [112]) which gives examples of situations where the power to suspend might properly be exercised, and which shows that the mere existence of a *prima facie* case of misconduct will not be enough by itself to justify suspension.[33]

56 The Respondent refers to a similar shift of position, when the Applicant advances its arguments on Review against the finding of the Tribunal, that there was no record of Ms Applewhaite's decision. The letter of 22 June did not make any mention of the reason for suspension, namely that the Respondent would interfere with evidence. The Respondent referred to *Ayeni*[34] to advance his submission that an administrative authority must give clear reasons for its decision.

Applicant's Submissions Strictly in Reply

[29] Para 48, Review Application on Liability.
[30] Para 29, Review Application on Liability.
[31] See para 114, Interim Judgment, which is cited in para 39 above.
[32] Paras 20-21, Respondent's Submissions in Response.
[33] Para 22, Respondent's Submissions in Response.
[34] CSAT/12 (No. 2).

57 The Applicant in its submissions, although these are not strictly in reply but extend to other matters, repeats many of the arguments advanced before the Tribunal and in its Review Application. As to the adequacy of reasoning and the lack of evidence, it concentrates its arguments amongst others, on the following:-

(a) There was clear evidence before the Tribunal which justified the decision to suspend. The letter of 22 June 2016 clearly sets out the reasons[35].
(b) It was not reasonably open to the Tribunal to find that the decision to suspend was not made in a manner consistent with his employment contract[36].
(c) There were reasonable grounds for the Secretariat to suspend on June 22, 2016[37].
(d) The legal test in the *Kaberere (No. 2)*[38] was satisfied on the facts presented, and the Tribunal erred in finding that the suspension was in breach of the Respondent's contract[39].
(e) The scope of the oral hearing did not extend to the decision to suspend or to continue the suspension and consequently the finding that it was incumbent on the Applicant to provide evidence in relation to such matters at the oral hearing, was procedurally unfair[40].
(f) The Applicant rejects the Respondent's arguments in paragraphs 23-25 of the Submissions in Response that its arguments are new[41].
(g) As to the criticism that the Applicant unfairly summarises paragraph 119 of the Interim Judgment and ignores an important part of the reasoning of the Tribunal in paragraph 118, the Applicant states this is not right. The Applicant in paragraph 47 of his Liability Review Application referred at footnote 30 to paragraph 117 of the Judgment, and not to paragraph 119 and therefore paragraph 119 of the Judgment was not unfairly summarised, as the Respondent alleged[42].

Our conclusions

58 We do not agree that the Tribunal has erred in any way either in law or in fact in finding that the Suspension decision was a breach of the Respondent's employment contract. Nor do we find that the Tribunal failed to give adequate reasons for its decision. These grounds are without merit. It is apparent from the contents of paragraphs 97 and 110-120 of the Interim Judgment, some of which are cited above [43], that the Tribunal correctly

[35] Paras 33, 51-53, Submissions Strictly in Reply.
[36] Para 34, Submissions strictly in Response.
[37] Paras 35-41, Applicant's Submissions Strictly in Reply.
[38] CSAT APL/20 at [55]-[56],
[39] Paras 42-43 and 44-47, Applicant's Submissions strictly in Response.
[40] Para 34, Applicant's Submissions Strictly in Reply.
[41] Para 51, Applicant's Submissions Strictly in Reply.
[42] Para 55, Applicant's Submissions Strictly in Reply.
[43] See paras 39-40, above.

directed itself as to the express terms of the relevant contract of employment as well as to those other terms that were incorporated into the contract by virtue of the Staff Handbook Regulations and the Staff Rules. Furthermore, it pointed out correctly that there was no dispute amongst the parties that the contract of employment incorporated rights and obligations for fair treatment, including due process, that the powers of the Secretariat, especially the disciplinary powers, must be exercised for a proper purpose and not for an improper one, and that they impose a duty to treat staff members with dignity, so as not to endanger the trust and confidence between employer and employee.

59 We consider that in relation to suspension of a member of staff of the Secretariat, it is necessary to read Regulation 19 of the Staff Regulations alongside Part 5, Section 5 paragraph 11.1 of the Staff Handbook. In other words, it is necessary both to establish a prima facie case of misconduct under Regulation 19 of the Staff Regulations (which, as we have already indicated, forms part of the Respondent's contract of employment) and in addition to establish that there is a specific reason to exclude that person from the organisation, such reason being set out in paragraph 11.1(a)-(d) of Section 5, Part 5 of the Staff Handbook. :-

> "**Suspension**
> 11.1 The Secretariat reserves the right to suspend a staff member with or without pay while an investigation takes place and during the process of any formal disciplinary proceedings.
> Possible grounds for suspension include (but are not limited to):
> (a) where the staff member may or could interfere with key documents/tamper with key evidence;
> (b) where the staff member may or could interfere with witnesses;
> (c) where the staff member may or could obstruct any investigation(s);
> (d) where a member of the Senior Management Committee considers this to be in the interest of the organization.
> 11.2 The decision to suspend a staff member rests with the divisional director, in consultation with the line Deputy Secretary-General and Director HRD. Following the outcome of the investigation and/or disciplinary proceedings, any pay withheld for the period of suspension shall be reinstated if the staff member is exonerated.
> 11.3 The imposition of suspension does not constitute disciplinary action.
> 11.4 Where the decision is taken to suspend a staff member, they will be informed in writing:
> (a) of the reason for the decision to suspend;
> (b) of the anticipated duration of suspension;
> (c) whether the suspension is with or without pay;

(d) that the period of suspension will be reviewed regularly;
(e) that they will be kept informed of the progress of the proceedings;
(f) that they may be required to attend an investigatory interview;
(g) that, depending on the outcome of the investigation, they may be required to attend a formal disciplinary board hearing."

60 The Tribunal in paragraph 117 of its Interim Judgment, recognizes that "there may have been good reasons to suspend the Respondent in June 2016. But in this case the adequacy of those reasons was challenged".

61 In view of the Respondent's allegations and challenges, the main issue before the Tribunal was whether reasons were actually given for suspending him and not whether theoretically there were good reasons. The Tribunal was right in pointing out that in the absence of any evidence, it could not speculate as to what the reasons were for the suspension. It is upon the reasons stipulated by the Applicant at the time of the decision to suspend that the legality of the decision would be examined during the hearing by the Tribunal. In the absence of evidence of specific reasons the Tribunal, like any Tribunal, is placed in a very difficult position to choose amongst the many reasons that may be available. Also, the Respondent was entitled to know the reason he was suspended.

62 The absence of a clear record as to the reason for the suspension, leaves the Applicant free to shift from one reason to another, as has happened in this case. This, as the Tribunal correctly pointed out, is unacceptable especially in a case where the Respondent right from the outset advanced a serious allegation that the suspension decision was part of a campaign against him and that it was taken for improper or oblique purposes.

63 We do not agree with the Applicant's Submissions that the letter of 22 June 2016 or any other contemporaneous record specifies clearly the exact reason for the suspension which was in accordance with the Staff Handbook. We consider that the allegations against him, outlined in the letter of 22 June 2016, provided a good basis for investigating the Respondent's conduct but that they did not necessarily provide a basis for suspending him from his employment and excluding him from the workplace. From the letter of 22 June one could speculate as to the reasons for suspension, but as the Tribunal correctly states, this is not enough. And we should stress that, in international administrative law, besides the implied contractual obligations, it is of the utmost importance to give specific reasoning for any decision, especially of the caliber of the decision which is the subject matter here. The duty is a constituent element of the principles of natural justice[44].

[44] *Ayeni* CSAT/12 (No.2).

64 In the absence of a specific reason, we do not consider that there is any need for us to address the arguments about whether there is a prima facie case of misconduct. In any event, we do not consider that the letter of 22 June 2016 indicated that the Secretary General was satisfied that there was a prima facie case of misconduct, given that the letter states in terms that the "Secretariat had not reached a decision as to the veracity or otherwise of the above allegations".

65 We agree with the Tribunal's reasoning as to the lack of a contemporaneous record of the information relied on by Ms Applewhaite in reaching her decision. In the absence of such evidence, the Tribunal, in our view, was justified in stating that it expected the Secretariat to show "a high degree of openness and candour…which extends not only to disclosure of all relevant written evidence, but also to the provision of evidence on significant matters that are within its sole knowledge."[45].

66 We also do not agree with the Applicant's submission that the evidential foundation for the suspension decision, which was contained in the letter of 22 June 2016, "was omitted in error" by the Tribunal. We are of the view that the Tribunal not only quoted sufficiently from the letter but also made extensive references to it throughout its judgment. As counsel for the Respondent correctly points out, the Tribunal quoted from the letter in paragraphs 31 and 114 of the Interim Judgment and made several other references to the implications of the contents of this particular letter.

67 The Applicant also asserted, in a general manner, that the Tribunal failed to give adequate reasons for its decision[46]. We are unable to agree with the submission. The judgment of any Tribunal must be considered as a whole. In this case, the Tribunal gave proper and extensive reasons, which often exceeded the minimum of what is required. We believe the case of *Fasla*[47], to which counsel for the Respondent referred us, accurately summarises the boundaries of proper reasoning of a judgment:-

> "While a statement of reasons is thus necessary to the validity of a judgment of the Tribunal, the question remains as to what form and degree of reasoning will satisfy this requirement. The Applicant appears to assume that, for a judgment to be adequately reasoned, every particular plea has to be discussed and reasons given for upholding or rejecting each one. But neither practice nor principle warrants so rigorous an interpretation of the rule, which appears generally to be understood as simply requiring that a judgment shall be supported by a stated process of reasoning.

[45] Para 119, Interim Judgment.
[46] Para 29, Review Application on Liability.
[47] Application for Review of Judgment No 158 of the UNAT, ICJ Reports 1973, p. 166 at pp 210-211, at §95.

This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a Party, it is not obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole."

Ground 1(b) – *The finding of the Tribunal that the Suspension Decision was not reviewed by the Applicant*

The finding of the Tribunal

68 The Tribunal in its Judgment[48] concluded that the Staff Handbook contemplates regular review of any suspension.[49] But there was no evidence that any such review took place between 22 June and 31 December 2016, when the Respondent's employment came to an end. It also pointed out that by 15 July 2016 the investigation process had been concluded and there was no risk of interference with evidence. By 31 October 2016, the Disciplinary Board formed the view that it had not been shown that the Respondent was the source of the leaks, which, as the Board noted, had continued after the Respondent's suspension.

69 The Tribunal concluded in paragraph 118 of its Interim Judgment[50] that the "rationale for the suspension put forward by the Secretariat in its Answer was spent, but the suspension continued" without review.

The Applicant's complaints on Review

70 The Applicant contends[51] that the Tribunal committed a "substantial error in fact in finding that the initial Suspension Decision was not reviewed". According to the Applicant the Suspension was reviewed and this is evident by the fact that on 12 August 2016 the Respondent was informed in writing that following investigations, the matter

[48] See Interim Judgment, para 118, which is cited in para 40 above.
[49] Staff Handbook, Part 5, Section 5 at para 11.4.(d).
[50] See extract in para 40, above.
[51] Paras 56-57, Review Application on Liability.

was being referred to a Disciplinary Board and that he would "continue to be suspended, with pay, until the Secretariat concludes the Disciplinary Board, and any subsequent related procedures". The Applicant also submits that "This notification clearly constitutes communication of the decision, namely a review of the Suspension Decision …". This, the Applicant asserts, is entirely consistent with the internal law, as set out in Subsection 11.1, Section 5, Part 5 of the Staff Handbook. Lastly, it says that as the process continued, there was no other change of circumstances to warrant a review of the suspension[52].

The Respondent's position

71 The Respondent in his Response submits [53] that the Tribunal was correct in finding that there was an obligation on the Applicant to review the suspension periodically after 22 June 2016 and that the Applicant was in breach of its obligations under Part 5, Section 5. §11.4(d) of the Staff Handbook.

72 The Respondent further submits that[54]:-

(a) The allegation that the Applicant reviewed the Suspension Decision is new and was never put forward before the Tribunal.
(b) In any event the letter of 12 August did not constitute evidence of a review, still less of a "regular" review.
(c) After 31 October, there was no longer any risk of interference with evidence or the investigation and consequently there was no need for the continuation of the Suspension. Nevertheless, no explanation was furnished by the Applicant for its continuation.
(d) The Respondent was not cross-examined on his allegation in his explanatory statement that the suspension was among other things a "horrible experience".
(e) The suspension should have been reviewed in any event, in view of the Respondent's repeated reminders that he was concerned about its continuation[55]. Instead, the Applicant informed the Respondent that it was "moot" since his employment was about to end.
(f) The delay in lifting the suspension had tangible reputational effects on the Respondent and was likely to damage his reputation and his search for employment.

The Applicant's Submissions Strictly in Reply

[52] Para 56, Review Application on Liability.
[53] See paras 37-40, Respondent's Submissions in Response.
[54] See paras 39-40, Respondent's Submissions in Response.
[55] See paras 65 and 76 of the Interim Judgment.

73 The Applicant denies[56] that the argument that it had reviewed the Suspension Decision is new as suggested by the Respondent. It was, it submits, a response to an inconsistency in the Interim Judgement. The Applicant maintains that in the letter of 22 June 2016, it was made abundantly clear that "the suspension will remain in force until the Secretariat concludes the fact finding and any subsequent related procedures"[57]. This, it says, was reasonably open it to do, given the risk of further leaks. Furthermore, the Applicant refutes the submissions made by the Respondent in paragraph 40 of the Submissions in Response, insisting on the arguments it advanced in previous pleadings that in any event there was a serious breach of IT policy, which justified the continuation of the suspension, and that it was not assessed properly by the Tribunal[58].

Our conclusions

74 We have already cited paragraph 11.4(d), Section 5, Part 5 of the Staff Handbook[59], which provides that the Staff member must, amongst other things, be *"informed"* in writing that *"the period of suspension will be reviewed regularly"*. Since the Staff Handbook implicitly provides for regular review, this creates not only an obligation on behalf of the Secretariat to do just that, but also a respective right on behalf of the Respondent to have his suspension reviewed regularly. We cannot accept the Applicant's argument that a review had taken place and that the letters of 22 June 2016 and 12 August 2016, in view of their contents, constitute communication of the review decision to continue the suspension for the entire disciplinary process and until the Secretariat concludes the fact-finding procedure. In our view, the contents of the two letters do not at all reveal information that a review had taken place, in the manner provided in the Staff Handbook.

75 The main purpose of the letter of 22 June 2016 was to inform the Respondent of the decision to suspend him. The fact that the letter also informed the Respondent that "the suspension will remain in force until the Secretary concludes the fact finding and any subsequent related procedures" cannot amount to a review and did not inform him that there had been any such review.

76 Judging from its contents, the letter of 12 August 2016 was sent for a different purpose. The letter concerned the referral of the allegations against the Respondent to a

[56] Para 56, Submissions Strictly in Reply.
[57] Para 57, Submissions Strictly in Reply.
[58] Paras 61-64, Applicant's Submissions Strictly in Reply.
[59] See para [ ] above.

Disciplinary Board in accordance with Part 5 of the Staff Handbook and makes reference to the rights that the Respondent had under the Regulations.

77 The fact that the letter informed the Respondent that he would "continue to be suspended with pay..." does not provide evidence of a review as provided in paragraph 11.4.(d) of Section 5, Part 5 of the Staff Handbook. It is our view that the Regulation, as it is worded, imposes an obligation on the Secretariat to regularly hold a review or in other words to direct its mind consciously as to whether the suspension ought to continue or not, under the circumstances, and to convey its decision to the member of staff. The review of the duration of the suspension is not limited to those matters mentioned in Regulation 11.1 but could extend to any factor that may necessitate a continuation or a termination of the suspension, depending on the circumstances.

78 In our view, the letter of 12 August 2016, in essence, does not refer at all to a review of the suspension having taken place. But even if we were to assume, for argument's sake, that such a review did take place, we would expect that the Applicant should have provided details in the communication to the Respondent and more importantly, stated clearly the specific reasons for which the continuation of the suspension was deemed necessary. Usually, it is these reasons that the Tribunal, at a later stage, would take into account in order to decide the issue, in the event of a dispute between the parties.

79 In the instant case, stating the reasons for the continuation of the Suspension was even more important, as the Fact-Finding Report was issued on 15 July 2016 and a decision was taken on 12 August 2016 to refer the Respondent to a Disciplinary Board. As the Tribunal correctly states, from then, and until 31 October 2016, when the Board reached its decision on the allegations against the Respondent, there was no apparent risk of interference with evidence. If the Applicant considered that the suspension should continue for some reason, it should have stated it on record, provided of course that it did hold a review, which does not seem to be the case, as the Tribunal correctly finds.

80 In view of the Applicant's arguments, the Respondent's counsel was justified in his Submissions in Response, to refer to the following passage from the Judgment of Elias LJ in the English case of *Crawford v. Suffolk Mental Health Partnership NHS Trust*[60], which highlights the seriousness of a suspension and its demoralizing effects on the employee:-

> *"*I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from

[60] [2012] EWCA Civ 138 at [71].

work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them."[61]

81 Given the importance of the Suspension Decision, as highlighted above, the need becomes immediately apparent for there to have been a regular review as well as for proper reasoning when deciding at each review to extend or not the duration of the suspension. It also goes without saying that a suspension must not remain in force for a period longer than is necessary and justified under the circumstances. There is no basis in fact or law for us to disturb the Tribunal's finding that there was no evidence that the suspension decision was reviewed regularly.

Ground 1(c) – The findings of the Tribunal, that there was no record of the material that was before Ms Applewhaite and that she should have been called as a witness

The relevant findings of the Tribunal

82 The Respondent argued before the Tribunal that there was no record of the material that was before Ms Applewhaite, at the time of the suspension, from which one could ascertain the reasons for the suspension. This, according to the Respondent, made the whole investigation process unfair and unbalanced, especially in view of his initial allegations that "he was subjected to a campaign of intimidation and hostility which was designed to punish him and to damage him reputationally and psychologically."[62]

83 The Applicant denied any breach of its obligation to the Respondent and stated that at all times of the disciplinary process, it acted in good faith. Furthermore, it asserted that the allegations of the Respondent were not well founded by any evidence.

84 The Tribunal, in paragraphs 113-116 of its Interim Judgment,[63] agreed that there was no evidence before it about the information that was before Ms Applewhaite at the time the Suspension Decision was taken. It also found that "[t]here was no record of what she was told or shown, or by whom". The Tribunal noted that although Ms Applewhaite continued to be employed by the Secretariat, she was not called to give evidence, although she could have been.

85 The Tribunal held that in the absence of any contemporaneous record of those reasons, it

[61] See Submissions in Response, page 19, ft.60.
[62] Para 84, Interim Judgment.
[63] See relevant extract in paras 39-40 above.

was not prepared to draw inferences or to speculate about the reasons for the suspension.[64]

The Review challenge

86 As to Ms Applewhaite not testifying at the oral hearing, the Applicant complains[65] that Ms Applewhaite was not contemplated to be a witness, but if she was a necessary witness, the Respondent or the Tribunal on its own motion should have signified that it was necessary to hear from Ms Applewhaite prior to the hearing date, or if the Tribunal considered that she was a necessary witness in the case, it should have adjourned the hearing to allow for the necessary arrangement to be made for her to be called from leave to attend. The Applicant further submits that, under the circumstances, the conclusion of the Tribunal as to Ms Applewhaite not attending as a witness "is not only manifestly unreasonable towards the [Applicant] but it is also manifestly unfair and thus is unreasonable if and in so far as the judgement carries any adverse criticism against her individually"[66].

The Respondent's position

87 The Respondent submits[67] that what the Applicant asserts in its Review Application[68] runs counter to the Applicant's concession of the point as recorded at the oral hearing. In the Interim Judgment, it is stated that at the oral hearing it was acknowledged by the Applicant "that there was no evidence before the Tribunal about the information that was before Ms Applewhaite at the time the suspension decision was made"[69].

88 The Respondent submits that the Applicant cannot claim to have been taken by surprise by the need to have evidence from the decision-maker, Ms Applewhaite. Given the Respondent's case that he had been suspended for an improper purpose, it was always going to be necessary for the Tribunal to examine the decision-maker's thought processes. He asserts that the Applicant is preoccupied with the question of Ms Applewhaite's attendance at the oral hearing, but that it would have been possible for her to give a written witness statement at any time. Alternatively, there is no reason why the Applicant could not have applied for and been granted an adjournment in order to fill in the gaps in its case.

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[64] Para 117, Interim Judgment. See extract in para 40, above.
[65] See Application for Review on Liability, para 52.
[66] See Application for Review on Liability, para 55.
[67] Para 23, Respondent's Submissions in Response.
[68] Para 38, Review Application on Liability.
[69] Paras 114-115, Interim Judgment.

Applicant's Submissions Strictly in Reply

89 The Applicant, repeating arguments from its Review Application, submits that the arguments on suspension were pleaded in depth as an additional point at the oral hearing. The scope of the oral hearing did not extend to the decision to suspend the Respondent on 22 June 2016 or to continue the suspension on 12 August 2016. In so far as the Tribunal found that it was incumbent on the Applicant to provide evidence, including oral evidence, it was procedurally unfair[70].

Our conclusion

90 We have already referred in previous paragraphs to the issue of the lack of any record of the material before Ms Applewhaite before she took the decision to suspend, and there is no need to go into it in more detail. In any event, it was acknowledged by the Applicant that there was no specific record.

91 We cannot accept the arguments advanced by the Applicant that the Tribunal's observations as to the failure of the Secretariat to adduce evidence (at the oral hearing or otherwise) were unfair and unreasonable. We consider that it should have been obvious to the Secretariat that it needed to call evidence to explain the decision-maker's thought-processes, given the Respondent's allegation, made from the outset, that the disciplinary process including the suspension decision, was motivated by an improper purpose. We have already explained our view in other paragraphs of this Judgment that the burden to adduce the right evidence to support its case and to refute the Respondent's case was primarily on the Applicant and the Tribunal as an umpire does not normally undertake that role.

92 Having considered all aspects of the Applicant's arguments in relation to the Tribunal's treatment of the issue concerning the Respondent's suspension, we find no reason to hold that the Tribunal made errors of fact or of law or acted unreasonably in its decision that the Suspension Decision was unlawful.

Ground 2 – The finding of the Tribunal that due process was not followed at the disciplinary proceedings

The surrounding facts

93 Since the findings as to the process that was followed in the disciplinary proceedings are challenged, we consider that we have to refer in some detail to the relevant facts.

[70] Paras 25-28, Applicant's Submissions Strictly in Reply.

94 As mentioned earlier during the outline of the relevant facts in Ground 1, whilst the Respondent was on leave, the decision was taken on 22 June 2016 to suspend him.

95 On 1 July 2016, the Respondent was asked to attend a fact-finding meeting on 8 July 2016. Initially he agreed, but his solicitors requested further information and documents and informed the Applicant that they had advised the Respondent to seek a postponement of the meeting of 8 July, until they had the opportunity to consider the material. The Board then asked the Respondent to attend on 11 July 2016[71].

96 The Respondent did not attend the meeting. He sent the Secretariat a *"sick note"* from his general practitioner that he was placed on sick leave from 8 July to 1 August. On 13 July 2016 the Applicant informed him that it had arranged a referral for him to see its Occupational Health Consultant, Dr Schilling, on 27 July 2016[72].

97 Dr Schilling examined the Respondent and in his report to the Human Resources Department of the Secretariat, dated 29 July 2016, stated that the Respondent was *"seriously unwell"* and at present not fit for work and that he was likely to remain unfit to work for some time[73].

98 By a letter dated 12 August 2016, the Respondent was advised that the allegations against him would be referred to a Disciplinary Board under section 5.12 of the Staff Handbook and that he was required to make himself available to meet the Board. The Respondent was also informed that his suspension would continue with pay until the disciplinary process was to be concluded. The letter also enclosed a copy of the Fact Finding Report of 15 July 2016 which was prepared by Mr Dunn[74].

99 The "fact-finding Report", after rejecting as false explanations provided by the Respondent, concluded with the following recommendations[75]:-

> "72. After considering the evidence from this fact-finding exercise, it is clear that Ram Venuprasad has breached the organisations policies and general standards of professional conduct amounting to gross misconduct.
>
> 73. In accordance with the provisions of the Secretariat disciplinary procedure, I recommend that this case is immediately progressed to the formal stage and that a

[71] Para 34, Interim Judgment.
[72] Para 35, Interim Judgment.
[73] Para 37, Interim Judgment.
[74] Para 38, Interim Judgment.
[75] Para 39, Interim Judgment.

Disciplinary Board is convened as soon as practicable."

100 The Respondent, by a letter dated 24 August 2016, requested a number of additional documents that were referred to in the fact-finding Report.

101 Finally, by a letter dated 5 September 2016, the Respondent was advised that the Disciplinary Board would convene on 12 September and was reminded that he was required to attend.

102 The Respondent's solicitors, by a letter dated 8 September 2016 to the Secretariat, asked that the Disciplinary Board be adjourned to 6 October 2016. The letter raised several concerns, namely, that the requested information had not been provided, that the Respondent was too unwell to attend a hearing and that the hearing was scheduled while the Respondent was *"signed off sick"* until the end of September. Under the circumstances, the solicitors informed the Secretariat that the Respondent would provide by 16 September, an *"Interim Statement"* to rebut some of the allegations made by Mr Dunn in his Fact-Finding Report[76].

103 The Interim Statement was sent by 12 September 2016 and ran to some 19 pages with numerous annexes. The Respondent in his Statement, amongst other things, took issue with various statements made by Mr Dunn. He expressed concern that the Secretariat had not followed due process in investigating the allegations against him, and ended by saying that it was his intention to adduce further evidence and call witnesses on these matters at the Disciplinary Board meeting[77].

104 On 14 September 2016, the Secretariat informed the Respondent's solicitors that the Disciplinary Board meeting would be postponed to early November and that the Board would be guided by Part 5, Section 6 of the Staff Handbook in relation to the procedure to be followed in the event that a staff member was on sick leave during a disciplinary process[78].

105 Some of the documents disclosed by the Secretariat revealed that in October 2016 Mr Dunn, the Deputy Secretary-General, requested from the Chairman of the Disciplinary Board a report on the disciplinary process and that the Report *"should also contain next steps"*[79].

[76] Para 44, Interim Judgment.
[77] Paras 45-46, Interim Judgment.
[78] Para 47, Interim Judgment.
[79] Para 48, Interim Judgment.

106 A draft report was prepared and circulated to the Board Members. One of the Board Members, Ms Paula Harris, Director, Corporate Services Division, expressed concerns about both the request and the draft, and wondered whether it was appropriate that the Deputy Secretary-General should be demanding such a Report from the Board. The Board Members seem to have discussed the concerns by telephone and decided to provide Mr Dunn with a very brief report on the process followed and the *"next steps"*, which included scheduling a hearing at the earliest possible date[80].

107 One other set of facts which the Tribunal considered was that in early July 2016, the Respondent explored the possibility of a termination of his contract on an agreed basis. However, his proposal was not accepted.

108 On 1 October 2016, the Respondent wrote an open letter to the Secretary-General, tendering his resignation a few months in advance of the conclusion of his contract. By a letter, dated 7 October 2016, the Secretariat advised that it did not accept the Respondent's resignation. The content of the Secretariat's letter was cited in full in para 51 of the Interim Judgment. The letter also informed the Respondent that the Disciplinary Panel would meet on 3rd and 4th November 2016 and that his attendance was required.

109 The Respondent's solicitors, on 13 October 2016, replied to the Secretariat's letter, defending the Respondent's right to resign. Nevertheless, they informed the Secretariat that the Respondent was willing to attend the Disciplinary Board hearing "on the strict condition that a) he is well enough and b) that he is provided with all the documentation referred to in Mr Dunn's Fact-Finding Report." Furthermore, they expressed once again their concerns about the fairness of the disciplinary process[81].

110 On 14 October 2016, it was confirmed to the Respondent that the hearing was to take place on 3 November. Also, by e-mail on 20 October 2016, the Respondent was advised that the Secretariat would like him to attend a further Occupational Health appointment with Dr Schilling on 27 October[82].

111 On 24 October 2016, the Respondent's solicitors wrote to the Secretariat advising that the Respondent would not be able to attend the appointment with Dr Schilling, as his health was such that he was to be admitted to hospital for several weeks. They further informed the Secretariat that under the circumstances, the Respondent would not be able to attend the disciplinary hearing, which was scheduled for 3 November 2016.

[80] Para 49, Interim Judgment.
[81] Para 52, Interim Judgment.
[82] Para 55, Interim Judgment.

112 On 27 October 2016, the Respondent was advised by e-mail, that since he expressed the intention not to attend the hearing on 3 November 2016, the Disciplinary Board would convene in his absence, at an earlier date, on 31October 2016[83].

113 The Respondent's solicitors responded to the above email on 28 October 2016. The full contents of the email are cited at paragraph 59 of the Interim Judgment. The letter raised deep concerns at the Secretariat having contacted the Respondent, despite his deteriorating health and admission to hospital. The letter referred to Part 5, Section 6 of the Staff Handbook and the procedure that must be followed in the event of a staff member going sick during a disciplinary process. In particular, relying on Section 6.6.3.(e) of the Handbook, they complained that they had not received all necessary documentation in advance, despite their repeated requests for full disclosure. The Respondent's solicitors also complained that the Respondent was not given all documentation in order to be able to finalise his interim statement. The Respondent's solicitors conclude their letter as follows:-

> " ….. To go ahead with a Disciplinary Hearing, in our client's absence and without affording him the benefit of your own procedural protections is not only grossly unfair, it is illustrative of the settled intention to dismiss him which we have expressed from the outset of this matter. Ram has resigned his position, after 15 years' service. His employment is due to terminate on 31 December 2016. He is currently [in hospital] and will be until mid November 2016. The Commonwealth Secretariat's decision to bring the Disciplinary Hearing forward and hold it in breach of your own procedures is extremely telling…."[84]

114 The Tribunal in its Interim Judgment makes reference to several other facts which it considered relevant:-

(a) That on 28 October 2016 Dr Schilling e-mailed the Secretariat to confirm that he had advised the Respondent that he should give his treatment priority over coming to see him on 27 October and that he should arrange to see him following his discharge from hospital. Furthermore, Dr Schilling recommended that the Disciplinary Board be postponed until the Respondent's treatment was complete[85].
(b) Despite the Respondent's request for an adjournment and the e-mail of Dr Schilling, the Board proceeded on 31 October 2016 to complete the disciplinary

[83] Para 58, Interim Judgment.
[84] The full content of the letter is cited in para 59, Interim Judgment.
[85] Para 60, Interim Judgment.

process and to meet in his absence. The explanation given to the Respondent, by a letter dated 8 November 2016, was that the Board did not consider that it was in the interest of the Respondent "for the proceedings to be unduly prolonged for a further period" and that it was of the view that it had sufficient information to proceed, including the detailed interim statement from the Respondent[86].

(c) The Disciplinary Board received oral evidence from Mr Tran (by telephone) and Mr Dunn (in person). The Board recorded in its decision that they were "key witnesses", whose evidence meant that "some key queries of the Board had been satisfied". Because the Board met in the Respondent's absence, he was not aware of that evidence and had no opportunity to address it.[87]

115 On 25 November 2016, the Applicant informed the Respondent and his solicitors by email of the outcome of the disciplinary process, attaching the Board's recommendation. In a covering letter, the presiding chairman of the Board advised that the Board found that both allegations against the Respondent were substantiated. The Board recommended that he be issued with a final warning[88].

The original challenge to due process before the Tribunal

116 The Respondent, with reference to Section 6 of Part 5 of the Staff Handbook, asserted before the Tribunal, that the Disciplinary Board hearing should have been adjourned until he was well enough to attend and that there were no exceptional circumstances that could justify the hearing process to continue in his absence. By the non-participation in the hearing process, in effect, he was denied the opportunity to respond to the evidence given at the hearing, to put further questions, as well as to make representations to the Board and finally he complained that the Board failed to consider other special measures or options, e.g. permitting him to participate by telephone, through a representative or to file submissions, once all the evidence was tendered.

117 The Secretariat in its Answer, submitted that there were reasonable grounds for proceeding in the absence of the Respondent. Furthermore, it asserted that the Respondent submitted an "Interim Statement" explaining his actions and the issue, whether the Respondent forwarded confidential information to his private email account, was narrow and in any event was admitted. Finally, it submitted that it was in the interest of all concerned that the disciplinary process should be concluded by 31 December 2016, when the Respondent's employment was to end.

The conclusions of the Tribunal

[86] Para 61, Interim Judgment.
[87] Para 137, Interim Judgment.
[88] Para 66, Interim Judgment.

118 The entire reasoning of the Tribunal on the challenge to the disciplinary process appears in paragraphs 122-141 of the Interim Judgment. In paragraph 128, it concludes that the decision of the Board to proceed without hearing the Respondent *"was a breach of his right to a fair procedure in a number of respects"*. In view of the seriousness and importance of the allegations made, we consider it useful to cite the complete reasoning of the Tribunal, which is explained in the paragraphs that follow:-

> "129. The record of the Disciplinary Board's deliberations does not, as noted above, set out the reasons for the Board's decision to proceed in the absence of Mr Venuprasad. This was a very significant procedural decision that the Board needed to consider carefully, and which should only have been made for good reason. The absence of any recorded reasons casts doubt on whether the Board understood the significance of this decision and the high threshold that needed to be reached before such a decision was made. The only contemporaneous record of the Board's reasons for proceeding in the absence of Mr Venuprasad is the Secretariat's letter of 8 November 2016, in which it was said that:
>
> > "the Secretariat did not consider it to be in the interest of Mr Venuprasad for the proceedings to be unduly prolonged for a further period of time. The Board was of the view that it had sufficient information to proceed, including the detailed interim statement from Mr Ram Venuprasad".
>
> 130. Neither of these reasons is convincing. They fall far short of the "exceptional circumstances" threshold.
>
> 131. In circumstances where Mr Venuprasad and his lawyers considered that it was in his interest for the meeting to be postponed to enable Mr Venuprasad to attend, and the Secretariat's own medical consultant had given advice supportive of a postponement, it was not reasonably open to the Secretariat to assert a different view about Mr Venuprasad's interests and proceed on that basis.
>
> 132. The view expressed in the letter that the Board had sufficient information to proceed reveals a fundamental misunderstanding of the purpose of participation in a disciplinary hearing by the relevant staff member. Without hearing from Mr Venuprasad, the Board could not know what other information he might be able to provide, or what submissions he might wish to make on matters of procedure, substance and (if relevant) sanction in light of the discussion at the hearing. In particular, if he was not present he would not be able to hear and respond to the evidence given by the "key witnesses" that the Board intended to question to address some outstanding matters: Mr Tran and Mr Dunn.
>
> 133. As noted above, in its Answer the Secretariat submitted that there were reasonable grounds for the Board to proceed in Mr Venuprasad's absence, and sought to identify those grounds. But the Secretariat was not able to say whether those were in fact the grounds on which the Board reached its decision, in the absence of any

record of its reasons and of any evidence on that point. If the reasons put forward in the Secretariat's Answer had been the Board's reasons, they also would fall far short of the "exceptional circumstances" threshold that would justify the exceptional step of proceeding in Mr Venuprasad's absence, and in particular proceeding to hear oral evidence and (in light of that evidence) reach a decision.

134. That leads into the second respect in which the procedure adopted was unfair. The Board identified the importance to its inquiries of speaking with key witnesses. It spoke with Mr Tran by telephone, asking him a number of questions about the investigations that had been undertaken, and about other investigations that had not been undertaken. The Board also conducted what appears to have been a substantial interview with Mr Dunn in person. Mr Venuprasad was entitled to know what Mr Tran and Mr Dunn had to say, and to respond to it. He should also have had the opportunity to put questions to them.[89] But because he was not present on 31 October, he did not have the opportunity to do so.

135. It is elementary that a fair disciplinary procedure requires that the affected party be aware of, and have an opportunity to respond to, all the material before the Disciplinary Board. As this Tribunal said in *Mohsin,* a case concerning a Review Board decision where the Applicant had been given an opportunity to comment on written material before the Board but did not know of, or have an opportunity to comment on, further oral representations made to that Board by her supervisor at the Board's invitation:[90]

> "The audi alteram partem [hear the other party] rule is an essential characteristic of natural justice. Natural justice requires that the Applicant should have known of the additional oral representations against her interest and that she was given fair opportunity to deal with them."

136. In that case the Tribunal set aside the Review Board recommendation to offer the Applicant a two year contract rather than a three year contract, and set aside (as "tainted") the decision of the Secretary-General based on that recommendation.

137. In the present case, the Board received oral evidence from Mr Tran and Mr Dunn. The Board recorded in its decision that they were "key witnesses", whose evidence meant that "some key queries of the Board had been satisfied." The Board's decision expressly records its reliance on their evidence. Because the Board met in Mr Venuprasad's absence, he was not aware of that evidence and had no opportunity to address it. As the Secretariat acknowledged at the hearing, this of itself meant that the procedure followed by the Board was not fair. That acknowledgement was appropriate: the Tribunal considers that the procedure

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[89] See eg Amerasinghe *The Law of the International Civil Service* (1994) vol 2 ch 6 at 211, referring to a number of decisions including *Lindblad* UNAT Judgment No 183 (1974); *Lebaga* UNAT Judgment No 340 (1984).

[90] *Mohsin* CSAT 3 (No 1) (2001) at [8.3].

adopted was clearly unfair. As *Mohsin* illustrates, it is irrelevant that the Board might have been able to reach the same conclusion on the basis of other material before it. If Mr Venuprasad had been present he might have been able to elicit further evidence, or make further submissions, that shed a different complexion on the relevant events and on their wider context, leading to a different result. It can hardly ever be said with confidence that a particular result is inevitable whether or not a party is heard, and this is not one of those rare cases.

138. There is a third and closely related respect in which the procedure that was adopted was unfair. In circumstances where a Disciplinary Board considers proceeding in the absence of a staff member, despite the staff member expressing a desire to participate in the hearing, the Board is required to consider other procedural options for ensuring a fair hearing. This is recognised by the discussion of "special measures" in paragraph [6.3.1] of the Staff Handbook, set out in the Appendix to this judgment. That list of special measures should not be treated as exhaustive: in each case, consideration needs to be given to appropriate special measures that will ensure effective participation of the staff member in the disciplinary process. In this case, there is no record of the Board considering what special measures could have been adopted to enable effective participation by Mr Venuprasad despite his illness. The Board needed to consider whether he should be given the opportunity to participate by telephone or some other audio-visual means.

139. The Board should also have considered whether Mr Venuprasad would be permitted to attend the hearing through a representative.[91] One of the "special measures" contemplated by the Staff Handbook where a staff member is unable to attend a Disciplinary Board hearing is permitting the staff member to be represented in the process by a colleague or Staff Association representative, who takes an expanded role in the process to assist the staff member in ensuring that their case is fully presented. The Disciplinary Board should have offered Mr Venuprasad the opportunity to be represented at the hearing. We also consider that the Board should have given careful consideration to permitting representation by Mr Venuprasad's solicitors, in the circumstances of this case. Legal representation of a staff member will not normally be necessary at a Disciplinary Board hearing. But Mr Venuprasad's inability to attend, coupled with the background to the allegations and the impact on Mr Venuprasad of an adverse outcome, and the absence of a CSSA nominee as a member of the Board,

[91] The Staff Handbook contemplates that where a Disciplinary Board hearing proceeds in the staff member's absence, a "companion" of that staff member may attend even if the staff member is not present. The "Companion Policy" in the Staff Handbook provides that the companion must be a work colleague or Commonwealth Secretariat Staff Association representative. The usual role of the companion is to provide moral support. See Part 5, Section 3.

were factors that pointed strongly towards a different approach in the present case.

140. As a bare minimum the Board should have provided Mr Venuprasad with an opportunity to make further written representations after being advised of the inquiries that the Board had directed to Mr Tran and Mr Dunn, and their responses to those inquiries. We doubt this alone would have been sufficient to provide a fair procedure overall. But the failure to provide even this limited protection underscores the serious procedural failings in the Disciplinary Board process.

141. The defects in the Board procedure mean that, as in *Mohsin,* the Board's recommendation that a final written warning be issued must be set aside. It follows that the Secretariat's decision to accept that recommendation and issue the warning, which were founded on the Board's recommendation, must also be set aside."

The ground of Review

119 The Applicant asserts that the Tribunal erred in its understanding of what was the applicable due process in internal disciplinary proceedings. Also, that the Tribunal erred in holding that the Disciplinary Board breached the Respondent's contract by deciding to proceed in his absence and by not affording him every opportunity to effectively participate in the disciplinary hearing application by other means. According to the Applicant, the entire history of events demonstrates clearly that the Respondent chose not to engage with, and attempted to manipulate the disciplinary proceedings for ulterior purposes[92].

120 The Applicant further asserts that the Tribunal, in erroneously concluding that the Respondent was not afforded due process during the disciplinary proceedings, failed to give due weight to a whole series of events, such as:-

(a) That the Respondent had admitted sending confidential emails to his personal email account and then deleting them.

(b) That the events clearly indicate that the Respondent appeared all along to be uncooperative, manipulative of the whole disciplinary process and actively used his best efforts to avoid, misuse, disrupt, prevent and frustrate the process.

(c) That it was desirable for all concerned to conclude the disciplinary proceedings before the expiry of the Respondent's contract, in less than two months' time.

(d) That various letters were sent by the Applicant to the Respondent and his solicitors, which offered every opportunity to him to attend and effectively defend himself, in whichever way he considered best, and

[92] Application for Review, paras 64-65.

(e) That he submitted an extensive interim statement admitting the basic allegations against him without putting forward any defence, thus leaving the substance of the case uncontested.

The Respondent's Answer

121 The Respondent in his Response to the Review Application asserts that the particular ground of review is doomed to fail in the light of the express concession that was made by the Applicant before the Tribunal, that the procedure followed by the Disciplinary Board was not fair. This is acknowledged by the Tribunal in paragraph 137 of the Interim Judgment[93].

122 The findings of the Tribunal, according to the Respondent's submission, were fully justified and properly reasoned, given the detailed provisions of the Staff Handbook, Part 5, Sections 5 and 6 and the absence of evidence, that the Applicant had given consideration to whether there were "exceptional circumstances" or whether any of the "special measures" were available[94].

123 The Respondent's counsel in paragraphs 49-72 of the submissions in Response, deals with each of the Applicant's arguments in the Review Application and submits that none are valid, for the reasons he explains in his pleadings. We summarise some of these, for the sake of completeness:-

(a) The argument that the Respondent was not fit to attend anyway, is an *ex post facto* explanation. In fact there was no evidence that this consideration formed part of the Applicant's actual reasoning at the time of taking the decision to proceed in the Respondent's absence. In any case, Dr Schilling did not say that the Applicant would never be fit to attend.
(b) The argument that the Tribunal did not give due weight to the factor that the Applicant wished to finish the disciplinary process before the Respondent's employment ended, is not an error of law but a matter of weight of evidence.
(c) It was open to the Tribunal to reject the submissions that it was in the best interest of the Respondent for the disciplinary process to be heard in his absence and
(d) With reference to *John v Rees*[95] and the rules of natural justice, it contested the submission of the Applicant that the Tribunal had erred in what it said in para 132 of its Interim Judgment, as to the purpose of the participation in a disciplinary hearing[96].

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[93] See also Transcript of Proceedings, 4 April 2018, at pages 23-26.
[94] See Part 5, Section 6, paras 6.2.(d), 6.3 and 6.4.(a).
[95] (1970) Ch 345, 402.
[96] Para 56, Respondent's Submissions in Response.

(e) Moreover, the Applicant's assertions were wrong because the admitted conduct did not necessarily amount to misconduct, or misconduct of any seriousness, in circumstances where this conduct was commonplace in the organization.
(f) There was no evidence of the Applicant considering special measures, and none were put in place. The Respondent was not even given the opportunity to put in written submissions commenting on the evidence of Mr Tran and Mr Dunn.[97]

Our conclusion

124 After careful consideration of the material before us, we conclude that the ground of review cannot succeed. We have not been convinced by any of the arguments advanced by the Applicant that the Tribunal erred in any way as a matter of law or fact or acted unreasonably in finding that due process was not followed. In our view, it was justified in finding that the decision of the Disciplinary Board should be set aside for lack of due process.

125 The Tribunal was correct to consider, as a starting point, two crucial provisions of the Staff Handbook. The first relates to Part 5, Section 5, para 12.3.5, which provides that a staff member "will be given the opportunity to attend and make submissions to the Board".

126 The second relates to Part 5, Section 6 of the Staff Handbook. In view of the importance of this Section, the Tribunal attached its detailed provisions as an Appendix to its Interim Judgment. The Section describes in detail the procedure that the Secretariat must follow, where the ill health of a staff member impairs his ability to participate in the disciplinary process in a normal way.

127 Part 5, Section 6, paragraph 6.2. provides that, where "the staff member is not fit to take part fully in the standard disciplinary procedure, the Secretariat will consider taking any of the special measures set out" in the Section "to enable the staff member to participate effectively". Section 6, paragraph 6.4. provides for the possibility of "holding the hearing in the staff member's absence". However, the Staff Handbook recognises that there may be "exceptional circumstances" when the staff member will not be able to attend a disciplinary hearing regardless of the measures that are taken. In such circumstance, the Disciplinary Board reserves the right to proceed in the staff member's absence, although full consideration will be given as to whether or not this is necessary in the circumstances. It seems to us that only in "exceptional circumstances" and after full consideration of the special measures provided in paragraph 6.3. of Section 6, should the Disciplinary Board determine a matter without providing the staff member the

[97] Paras 63-65, Respondent's Submissions in Response.

opportunity to participate and address the Board, which is an essential element of a fair procedure.

128 In addition, we consider that the Tribunal was correct to find that it was unfair for the Disciplinary Board to hear and rely on evidence given by "key witnesses" at the hearing, without giving the Respondent the opportunity to respond to that evidence and to make further submissions in the light of it.

129 In view of the available evidence in conjunction with the provisions of Part 5, Sections 5 and 6 of the Staff Handbook, the conclusions of the Tribunal that the process was in breach of the Respondent's right to a fair procedure in many respects are both logical and correct and we cannot see any error either in law or in fact.

130 The Tribunal correctly points out that in view of the above serious provisions of the Staff Handbook, the Board was expected to consider fully the various options and record its reasoned decision. The Tribunal correctly notes the absence of recorded reasons which, as it rightly points out, cast doubt on whether the Board "understood the significance of this decision and the high threshold that needed to be reached before such a decision was made".

131 None of the arguments advanced by the Applicant, both before the Tribunal and at the review stage, has convinced us that any of the conclusions of the Tribunal is wrong. We refer especially to those that concern the failure of the Board to give consideration to the availability of "special measures" and to the failure to consider whether there were any "exceptional circumstances" that had to be taken into account.

132 Counsel for the Respondent is correct in submitting that many of the arguments advanced in the Review Application are *ex post facto* explanations, as there was no record that such considerations (such as that the accused would not have been fit to attend the hearing at any point in the foreseeable future), were ever considered. But even if such issue was considered, the Board could not have decided without medical advice. And as we have already stated, even if there was such advice, the procedure would have been flawed anyway, as the Board never considered the adoption of "special measures", which would have made the whole process fairer to the Respondent.

133 Neither have we been convinced that there was an imperative need to complete the disciplinary process before the Respondent's employment ended. The Staff Handbook is clear as to the procedure when a member of staff cannot attend due to his sickness during the disciplinary process. We also consider that the Tribunal was justified in not being

convinced that proceeding in the absence of the Respondent was in his own interest, especially when the Respondent and his legal advisers thought otherwise.

134 Given the violation of the relevant provisions of the Staff Handbook[98] and the rules of nature justice, which the Tribunal correctly identified, we consider that it is futile to discuss the other points raised, that the Respondent had nothing else to say, as they do not reveal any errors on the part of the reasoning of the Tribunal. Therefore, we reject the Applicant's contention that the Tribunal erred in finding that due process was not followed in the disciplinary proceedings.

Ground 3 – Whether the final written warning should have been set aside

The relevant facts

135 In considering Ground 3, we agree with the Tribunal that a logical point to start is to cite the conclusions and recommendations of the Disciplinary Board which are set out in para 73 of the Interim Judgment:-

> "After extensive deliberations, and a careful review of all written documentation, including the further correspondence between Mr Venuprasad, his lawyers, and the Commonwealth Secretariat, and the evidence provided by Mr Tran and Mr Dunn, the panel were satisfied that some key queries of the Board had been satisfied. Specifically, these related to extra searches on email relating to information presented in the media that Mr Venuprasad would not have been able to leak, owing to the fact that he was on suspension and had no Commonwealth Secretariat IT access; the sensitive and confidential nature of the information; and the process of identifying Mr Venuprasad as a likely perpetrator of the leaks to the media.
>
> In respect to the first allegation against Mr Venuprasad: *It is alleged that Mr Venuprasad acted in breach of the Secretariat's confidentiality policy particularly its IT policy in Part 5, section 12 at the Staff Handbook.* Following the investigations, it was agreed by the Board that the IT Policy had been violated, due to the fact that the emails were sent to his external Gmail account. This first allegation is therefore substantiated.
>
> Regarding the second allegation: *It is alleged that Mr Venuprasad inappropriately handled confidential and highly sensitive information that he had access to in his position as Deputy Director of the Office of the secretary General.* Following the investigations, it was agreed that owing to Mr Venuprasad's position within the organisation, he would have a greater burden of responsibility around highly sensitive

[98] Part 5, Section 6, para 12.3.5 and Section 6, para 6.2.(a), 6.3. and 6.4.(a) and (b).

information. The fact that the emails were exceptionally hard-deleted from his sent items folder in his Commonwealth Secretariat email account is likely to signify that he recognised the inappropriateness of his conduct; the intent to hide the fact that the emails had been sent was not normal practice. The Board found this allegation to be substantiated.

However, on the basis of the evidence, the panel reached a conclusion that there only exists proof that the emails were sent out from Mr Venuprasad's email account, and that there is no direct evidence that Mr Venuprasad leaked the emails and information contained within to a third party.

It is for this reason that the panel recommends that Mr Ram Venuprasad be issued with a Final Written Warning relating to this matter."

136 Acting on the above recommendations the Secretariat issued a final written warning to the Respondent. The letter dated 2 December 2016 reads as follows[99]:-

"Dear Mr Venuprasad,

I am writing to follow up on the letter dated 25 November 2016 from the Presiding Manager of the Disciplinary Board, where you were advised of the outcome of the Board's deliberations.

Under the terms of the Staff Handbook, Part 5, Section 5, Paragraph 13.3 this letter serves as a Final Written Warning to you.

This Final Written Warning is being issued following the Disciplinary Board review of the allegations made against you. Those allegations were:

1. It is alleged that you acted in breach of the Secretariat's confidentiality policy, particularly its IT Policy in Part 5, Section 12 of the Staff Handbook.
2. It is alleged that you inappropriately handled confidential and highly sensitive information you had access to in your position as Deputy Director of the Office of the Secretary- General.

The Board found both allegations to be substantiated, particularly in relation to misuse of the Secretariat's IT systems and equipment and failure to comply with the

[99] See Interim Judgment, para 74.

Secretariat's Rules, Regulations or procedures.

It is expected that in future you will adhere to the requirements of the Secretariat's confidentiality policy, in particular the IT Policy, a copy of which is attached to this letter for ease of reference. You are also expected to exercise sound judgment in the handling of confidential information that you may be privy to in the course of undertaking your duties with the Secretariat.

Should there be a further breach of the Secretariat's confidentiality policy, then you may be subject to further disciplinary action, up to and including dismissal.

Under Part 5, Section 5, Paragraph 14, you have the right to appeal the decision of the Disciplinary Board. Should you wish to lodge an appeal this must be addressed to the Deputy Secretary-General, Economic and Social Development (Deodat Maharaj) within 10 days of the date of this letter.

Yours sincerely"

137 The Respondent's solicitors, in their letter of 8 December 2016, advised the Secretariat that their client did not accept the outcome of the recommendations of the Disciplinary Board and amongst other issues, they raised once again their concerns about the fairness of the hearing before the Disciplinary Board. On 12 December 2016, the Respondent himself also sent a letter to the Secretariat, expanding on the concerns expressed by his solicitors[100].

138 On 21 December 2016, the Respondent's solicitors wrote again to the Secretariat seeking its response to earlier correspondence but they had no substantial response.

The conclusions of the Tribunal

139 The Tribunal found that the defects in the Board procedure meant that, as in *Mohsin*, the Board's recommendation that a final written warning be issued must be set aside, and therefore, that the Secretariat's decision to accept that recommendation and issue the warning, must also be set aside.

140 The Tribunal went on to consider the Respondent's main complaint that the sanction imposed by the Disciplinary Board was not imposed for a proper purpose, and was disproportionate. The Tribunal set out its reasoning in paragraphs 144-149 of the Interim Judgment.

[100] Para 75, Interim Judgment.

The Applicant's challenges on Review

141 The Applicant considers that the main finding of the Tribunal, that the issuance of the final warning could not serve any proper purpose connected to the Respondent's employment,[101] is not only erroneous but also unreasonable. The Applicant submits that:-

(a) It followed the correct procedure and had a proper purpose in issuing the final warning;[102]
(b) it had the sole discretion to decide whether the gravity of the conduct warranted the issuance of a final warning;[103]
(c) the obligations of staff members do not cease at the termination of their employment[104] but continue beyond, as was recognized in *Kaberere*;[105] and
(d) the Respondent did not suffer any disadvantage as result of the final warning.[106]

The Respondent's position

142 On the other hand, the Respondent asserts that none of the challenges put forward by the Applicant is valid and they must fail. In particular, he submits that[107]:-

(a) The Tribunal is entitled to scrutinize disciplinary decisions and its review can extend to all the matters raised in *Carew v. IBRD*[108] and are not limited to issues of abuse of discretion.
(b) It was inevitable that the sanction, being the product of an unfair procedure which did not observe due process, would be declared unlawful and be set aside.
(c) There was no error in the conclusion of the Tribunal that it could not detect any proper purpose in the imposition of the final warning.
(d) The Applicant's challenge that the effect of a written warning can go beyond the end of employment, is without merit. In the *Kaberere case*[109], the Tribunal simply noted that some disciplinary sanctions have validity post employment, but most do not. A final written warning, by its very nature, has no post-termination relevance.

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[101] See Interim Judgment para 146, which is cited above in para 139, above.
[102] Review Application on Liability, paras 94-95.
[103] Review Application on Liability, para 97.
[104] Review Application on Liability, para 98.
[105] *Kaberere v. The Commonwealth Secretariat*, CSAT/20, (81)-(84), 90.
[106] Review Application on Liability, para 95.
[107] See Respondent's Submissions in Response, paras 73-88.
[108] WBAT, 11 April 1995 at [32] and beyond.
[109] CSAT/20 at [82]-[91].

(e) The submission that the Respondent suffered no disadvantage by reason of the imposition of the final written warning, is misconceived as it is inherently disadvantageous to the member of staff. Furthermore, the Applicant failed to challenge through cross-examination the Respondent's evidence that the written warning affected his future employment prospects.

Applicant's Submissions Strictly in Reply

143 The Applicant to a large extent repeats arguments made in its previous pleading.

144 It accepts making the concession[110] concerning the possible violations of the relevant procedural rule (which concerned the examination of a witness in the absence of a staff member without giving him a chance to test the evidence), but says that the above failure tainted procedurally the Disciplinary process and the subsequent decision to impose a final written warning. It did not extend to the purpose or proportionality of the sanction.[111]

Our conclusions

145 The main factor that led the Tribunal to set aside the final written warning, was that it had already found that due process was not followed, and therefore that the sanction must inevitably fall away. The Tribunal could have stopped there. The fact that it continued *ex abundanti cautela* to discuss the Respondent's submissions seemingly out of courtesy to his counsel does not in any way weaken the main reason for setting aside the Warning. Given our finding that the Tribunal was entitled to conclude that due process was not followed, the logical outcome was that the sanction imposed inevitably fell away. It is therefore unnecessary to address the Applicant's arguments regarding the Tribunal's findings as to the purpose and proportionality of the sanction.

Ground 4 – Whether the Appeal Decision was rightly set aside by the Tribunal

The relevant background

146 On 2 December 2016, the Applicant accepted the recommendation of the Board and issued a final written warning to the Respondent who responded through his solicitors informing the Applicant that he did not accept the outcome and recommendation of the Disciplinary Board.

[110] Transcript Day 2, April 4, 2018, at pages 25-26.
[111] Paras 66-67 and 69, Applicant's Submissions Strictly in Reply.

147 The Applicant set up an Appeal Board. Initially, Deodat Maharaj, Deputy Secretary-General, Economic and Social Development, was appointed as Chair of the Appeal Board. The Respondent by a letter dated 8 December 2016, contested the appointment, on the basis that there was a potential conflict of interest.

148 The Applicant by a letter dated 9 February 2017 advised the Respondent that it had appointed Sir Simon Gass, Acting Chief Operating Officer, to consider the Appeal. The letter outlined the issues that were going to be discussed. The letter concluded that the issue of the Respondent's suspension *"is moot following the expiration of his contract"*[112].

149 On 1 March 2017, the Respondent was advised that Sir Simon Gass had decided to uphold the recommendation of the Disciplinary Board. The letter attached a Report with the reasoning of Sir Simon Gass. Details of the Report are outlined by the Tribunal in its Interim Judgment.[113]

150 The Respondent challenged the Appeal Decision before the Tribunal.

The Tribunal's conclusion

151 The Tribunal held that the internal appeal process was such that it could not cure the serious procedural defects which were identified by the Tribunal in its judgment. Consequently, the internal Appeal Decision was wrong in concluding that the procedure followed by the Disciplinary Board was adequate. Furthermore, the Tribunal pointed out that the "sanctions upheld on appeal remain open to the same criticisms that were accepted by the Tribunal in the context of the Disciplinary Board decision"[114].

152 The Tribunal concluded that as a consequence of the above:-

> "…. the decision by Sir Simon Gass to uphold the Disciplinary Board decision must also be set aside. In those circumstances, it is not necessary for the Tribunal to consider whether Sir Simon had been properly authorised to conduct the internal appeal."

The Applicant's challenges on Review

153 The Applicant asserts that the Appeal Decision on its merits was consistent with the Applicant's procedures and was reasonably made. Furthermore, the Applicant

[112] Paras 77-78, Interim Judgment.
[113] See para 79, Interim Judgment.
[114] See para 152, Interim Judgment.

emphasises the point that the Appeal Board invited the Respondent to provide "any additional written representations", but the Respondent did not respond, which, according to the Applicant meant that the only documentary evidence that was before the Appeal Board, was the same with that which was before the Disciplinary Board[115]. The Applicant submits that the Respondent had not substantiated any substantive or procedural grounds to appeal the Disciplinary Decision and failed to provide any evidence to address his misconduct allegations. Consequently, it submitted that the Appeal Decision reached the correct conclusion on the facts before the Board and the Tribunal should not have set it aside.

The Respondent's position

154 The Respondent submitted that the conclusion of the Tribunal "was permissible and obviously correct".

Our conclusion

155 We have borne in mind all the material placed before us, and we are of the opinion that the ground of review has no merit. As the Tribunal correctly pointed out,[116] the flaws that were identified in the process before the Disciplinary Board could not be cured by the internal appeal process that followed. It was perfectly open to the Tribunal to reach that conclusion and we have not found any error in law or in fact in the reasoning of the Tribunal. Consequently, the Tribunal was entitled to set aside the decision of Sir Simon Gass.

Ground 5 – Whether the Applicant's statements to the media were inappropriate

The relevant facts

156 As has already been stated, the original leaks to the media took place in May 2016, but the media continued to take an interest in the matter. In October 2016, a Daily Mail article recorded the Secretariat as saying, in relation to the Respondent's Protected Disclosure statement dated 20 July 2016: "These are a whole series of allegations made by a profoundly disaffected individual who is facing serious disciplinary charges". In November 2016, a reporter from The Times asked questions about the Respondent, and the Applicant issued two statements by email. The first was on 11 November 2016 and included the following paragraph:-

> "A spokesman said "We have always maintained that the claims made by Mr Venuprasad ware [sic] based on a whole series of false, misleading and distorted allegations and outright lies made by a profoundly disaffected individual. Mr

[115] i.e. the six grounds set out in the Respondent's solicitors letter of 8 December 2016.
[116] Para 151, Interim Judgment.

Venuprasad was never suspended for giving advice which he claimed Secretary-General Scotland did not take, as is being purported by the media. He was suspended after internal investigators found that he had breached our policy on confidentiality by sending confidential documents outside the Secretariat. His actions brought the Secretariat and his colleagues into disrepute. Mr Venuprasad is currently suspended from work pending the outcome of a disciplinary board. ..."[117]

157 The second statement was made on 15 November 2016. In addition to answering to certain other allegations against the Respondent, the Applicant said:-

"The internal investigation into Mr Venuprasad, on which we have already commented, is being carried out by our human resources department and will involve a number of senior staff who will consider whether he had breached our policy on confidentiality by sending confidential documents outside the Secretariat."[118]

158 Following the issuing of these statements by the Secretariat, The Times published an article on 17 November 2016 which quoted the Secretariat as saying that the Respondent was a "profoundly disaffected individual" who had made "false, misleading and distorted allegations". The Times article also stated that: "The Commonwealth expressed concern last night that at no point during a 15-year career did Mr Venuprasad inform his employer that he had been implicated in a criminal case".

159 The Respondent complained before the Tribunal that the statements to the media in October and November 2016 "breached [the Applicant's] obligation to treat him with dignity, and not to seriously damage mutual trust and confidence without proper cause". He further asserted that the statements were calculated to discredit him and harm his reputation and had caused significant prejudice and loss.[119]

160 The Tribunal concluded that:-

"155 The conduct of the Secretariat in making these public attacks on Mr Venuprasad was wholly inappropriate. He remained an employee of the Secretariat at the time of the public statements, and was entitled to be treated with dignity and in accordance with the procedures set out in the Staff Handbook for dealing with any concerns about his conduct. If the Secretariat considered that he had engaged in misconduct, it could and should have pursued those concerns through the disciplinary procedure. Those concerns would have been dealt with following an appropriate process, in which he

[117] See para 80, Interim Judgment.
[118] See para 81, Interim Judgment.
[119] See para 154, Interim Judgment.

would have a fair opportunity to answer the allegations made against him. That disciplinary process would be conducted in private: even if a censure was ultimately imposed through such a process, it would remain confidential to the Secretariat and the staff member concerned. The Secretariat cannot circumvent the substantive and procedural safeguards of the disciplinary procedure in this manner.

156 The Secretariat conceded at the hearing that making these public statements in relation to an employee with whom there was a continuing employment relationship was inappropriate. That concession was inevitable. The Secretariat breached its obligations to Mr Venuprasad by making these adverse statements about him to the media."[120]

The Applicant's submissions on Review

161 The Applicant in its Review Application submits that there is no evidence that any media statements formed part of the Disciplinary Board process or that they influenced the decisions which were reviewed by the Tribunal, namely, the decisions to suspend the Respondent, subject him to a disciplinary procedure, issue to him a final written warning and dismiss his appeal against the final written warning. Consequently, the Applicant asserts that, "the pleadings and Interim Judgment are ultra vires and extraneous to the issues" that had to be decided.[121]

162 Furthermore, it submits that the Respondent failed to make a proper complaint about the statements to the media under the grievance procedure. Consequently, the Tribunal, according to the Applicant, erred as a matter of jurisdiction that it had received a competent and valid complaint about the statements to the media and the complaints should have been struck out by the Tribunal.

163 Alternatively, the Applicant submits that, because there had not been a proper grievance process, the full facts remain largely unknown and no reasonable conclusions can be drawn from the limited media statements.

164 Also, the Applicant asserts that the reasoning of the Tribunal was too short and largely ignores the fact that it was the Respondent who started the media ball rolling, by taking his complaint to the Daily Mail.

165 Finally, the Applicant complained that during the oral hearing, the Tribunal, without prior indication "after a considerable period questioning of the [Applicant's] in-house legal representative obtained what is said to be an 'inevitable' concession that these public

[120] Paras 155-156, Interim Judgment.
[121] Para 106, Review Application on Liability.

statements were inappropriate"[122]. The Applicant denies that the lawyer representing the Applicant made any such concession readily, but on the contrary, presented a number of factors that pushed against the liability of the Applicant. These factors, the Applicant says, are "notably absent from the Interim Judgment, including matters such as the self-harmful conduct of the [Respondent] and the likelihood that the substance of what was said by the [Applicant] merely confirmed what the [Respondent] had already placed in the public domain by his own disclosures, either directly or indirectly"[123].

The Respondent's position

166 The Respondent submits that the Tribunal was fully entitled to reach its conclusions.

167 The Respondent disagrees with the Applicant's assertions that the media statements were not made an issue before the Tribunal, and submits that according to Art. 11.1 of the Statute, the Tribunal has jurisdiction to consider applications from a staff member alleging non-observance of the terms of their contracts of employment. Furthermore, the Application to the Tribunal specifically identified the media statements which were annexed to the Application.

168 Furthermore, the Respondent, in his Response to the submissions of the Applicant, asserts that[124]:-

(a) He exhausted all internal remedies.
(b) Even if he is found not to have exhausted all internal remedies, his application is still receivable under Art 11.3(c)(i) and Art. 11.3(c)(ii) and (iii) of the Statute.
(c) His case before the Tribunal included an allegation that, as part of the smear campaign against him in the national press, his employer had breached his rights[125].
(d) All his concerns were repeatedly raised directly as being relevant to his challenge to the disciplinary action against him, and the hostile motivation which underpinned it.
(e) He also raised his grievances during the disciplinary appeal process as required by §1.7 of the grievance procedure.
(f) If, for any reason, the Applicant was of the opinion that the wrong process was being followed for raising this particular grievance, it was incumbent on the Applicant to raise this earlier and reasonably advise the Respondent as to the correct procedure to follow.

[122] Para 112, Review Application on Liability.
[123] Para 112, Review Application on Liability.
[124] See paras 101-124, Submissions in Response.
[125] The allegation was also included in the Respondent's Explanatory Statement, para 39.

(g) The exchanges between the President of the Tribunal and the in-house legal representative of the Applicant during the oral hearing, do not substantiate the complaint of the Applicant for the extraction of the concession after "considerable period of questioning"[126].

(h) The submission that it was the Respondent who "started the media ball rolling" is unfounded, as the Respondent, by his solicitor's letter of 13 October 2016, denied that he was the source of the article of the Daily Mail. In any event, the Respondent says that his position, which was expressed in the above letter, went largely unchallenged as the Applicant did not cross-examine him.

The Applicant's Submissions Strictly in Reply

169 As to the circumstances that the "concession" was made, the Applicant now accepts that it made the concession referred to in paragraph 156 of the Interim Judgment. The Tribunal in paragraph 52 of the Compensation Judgment, refers to it as "inevitable" and "properly made". The Applicant submits that the concession made "does not justify the conclusions of the Tribunal on fact or law, that the media response was an attack which was calculated to damage the [Respondent's] reputation and an effort to impose a censure bypassing disciplinary procedures"[127].

170 The Applicant now accepts that it conceded at the hearing "that it was not appropriate to criticise staff who were still in employment….for the purposes of media defence", but maintains that it was not correct in law for the Tribunal to conclude as it did without properly weighing the evidence. The media lines were a response to questions put forward which were factually accurate at the time. There was no objective evidence before the Tribunal to justify its conclusions at all.[128]

171 The use by the Tribunal of the word "attack" suggests that the response was designed to hurt the Respondent, yet there was no evidence of this. On the contrary, it was the Respondent who initiated the press enquiry, by disclosing information to the High Commissioners.[129]

Our conclusion

172 The ground of review in our opinion is without merit. The ground of review, as formulated in the Review Application and repeated in the Submissions Strictly in Reply, purported to challenge the findings of the Tribunal that the media statements were inappropriate. However, in fact the arguments advanced in support seek to challenge the

[126] See para 112, Application for Review.
[127] Para 77, Applicant's Submissions Strictly in Reply.
[128] Para 79, Applicant's Submissions Strictly in Reply.
[129] Para 8, Applicant's Submissions Strictly in Reply.

jurisdiction of the Tribunal to consider the Respondent's complaints concerning the Applicant's statements in the media.

173 Having had regard to all the facts and submissions, we cannot accept that the media statements did not form part of the Respondent's complaints during the disciplinary process and later before the Tribunal. All along, the Respondent alleged that he was the victim of a smear campaign and that the Secretariat broke its obligation to treat him with dignity whilst in employment. We are of the view that the Tribunal rightly considered that the issues regarding the media statements were legitimately raised before it, as these were part and parcel of the Respondent's allegation of hostility against him. We also note that no issue was taken before the Tribunal that it had no jurisdiction to hear the complaint.

174 In any event, if the Applicant was of the view that the Respondent did not exhaust all internal remedies, we agree that it should have warned the Respondent and furthermore first raised the issue before the Tribunal.

175 We cannot accept the assertion that the internal legal advisor of the Applicant made the concession after she was put under pressure by the Tribunal during the oral hearing. We have read the relevant record and we have not identified any undue pressure. The President of the Tribunal was right to insist that an answer be given to the original question posed, and we cannot see anything wrong in the President's conduct in repeatedly reminding the legal representative to answer the question posed by him.

176 In any event, as counsel for the Respondent points out, whilst submissions were made on the matter during the morning session of the first day of the oral hearing, the alleged concession was made after reflection in the afternoon session of the second day hearing.

177 We therefore consider that the "concession", that the statements to the media were "inappropriate", was legitimately made. Furthermore, we are of the opinion that the conclusions of the Tribunal, as to the appropriateness of the statements to the media, were fair and reasonable.

178 We cannot agree with the Applicant that the reasoning of the Tribunal on the issue of the statements to the media was too short and largely ignored the fact that it was the Respondent who started the ball rolling. We have already referred to the boundaries of a properly reasoned judgment.[130] In our opinion, the Tribunal is not obliged to discuss each and every argument raised.

[130] See extract from *Fasla,* in para 64 above.

179 There was no need for the Tribunal to take into account the allegations that the Respondent was responsible for starting the ball rolling, by first taking his complaints to the media. Even if such an allegation was proved (which it was not), it would not have been appropriate for the Applicant to make the particular statements to the media against the Respondent, who was still in employment, whilst it had the option to use the available disciplinary processes to discipline him, if it believed he was the source of the article in the Daily Mail. It must not be forgotten that the Respondent denied that he was responsible for the leak and that he had been exonerated of that conduct by the Disciplinary Board.[131] Therefore, we find no basis for finding that the Tribunal erred in law or in fact or acted unreasonably in arriving at its conclusions that the media statements were inappropriate.

Ground 6 – Ulterior purpose

The relevant background

180 The Respondent's case was right from the beginning, that the suspension decision, the disciplinary process and everything else that followed formed part of a *"campaign"* against him which was motivated by hostility towards him and was aimed at singling him out in order to punish him for the leaks to the UK media, for which the Applicant considered him responsible.

181 It was the Respondent's position, which he pursued all along, that the whole disciplinary process was exercised for an improper purpose.

182 The Applicant, before the Tribunal, denied all the above allegations and said that the disciplinary process was conducted all along in good faith without any ulterior motive.

183 The Tribunal, having concluded that the Suspension Decision breached the Respondent's contract of employment, and that the disciplinary process was seriously flawed, considered that under the circumstances it was not necessary to determine the Respondent's argument "that all steps taken against him were motivated by an improper ulterior purpose."[132]

184 The Tribunal noted further that, despite the serious allegations advanced by the Respondent as to the existence of an ulterior purpose, no evidence was provided by the Applicant to enable the Tribunal to reach a properly informed decision, especially in a situation where the documentary record was inadequate.[133]

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[131] See Respondent's solicitors letter dated 16 October 2016 with which the allegation was denied.
[132] Para 157, Interim Judgment.
[133] Para 161, Interim Judgment.

185 Under the circumstances, the Tribunal stated that it was "reluctant to decide the 'ulterior purpose' allegation on the basis of inferences or on the basis of arguments about the burden of proof". Furthermore, it considered that it was neither necessary nor appropriate to hold a further oral hearing and exercise its powers under Art. VIII(2) of the Statute and require the Secretary General to appear before it in order to give evidence.[134]

The Applicant's challenge on Review

186 The Applicant complains that the Tribunal "omitted or failed to consider the complete absence of evidence (as opposed to theory) on ulterior purpose which would have led it to expressly, clearly and unequivocally dismiss the allegation."[135]

The Respondent's position

187 The Respondent submits that the Applicant contradicts itself. Initially, it held the view that the ulterior motive allegation was decided by the Tribunal, which had held that the allegation was not established. This, the Respondent says, is contrary to the particular ground that the Applicant pursues today, that the Tribunal did not in fact determine the issue.

The Applicant's Submissions Strictly in Reply

188 The Applicant reiterates[136] that, although the Tribunal did not make a finding on the issue of ulterior purpose against the Secretariat,[137] it coloured its Compensation Judgment, by making conclusions on the basis of adverse inferences.[138]

Our conclusion

189 We cannot see anything wrong in the way the Tribunal approached the allegation of the existence of an ulterior motive. The Tribunal explained in detail why it decided that, under the circumstances, it considered that it was not necessary to determine the issue[139]:-

(a) It had already found that there was a breach of the Respondent's contract of employment;
(b) There were serious flaws in the disciplinary process that necessitated the setting aside of the final written warning;
(c) There was inadequate documentary record on the issue; and

[134] Para 164, Interim Judgment.
[135] Para 114, Review Application on Liability.
[136] Para 29, Submissions Strictly in Reply.
[137] Paras 157 and 164, Interim Judgment.
[138] Paras 117-120, Interim Judgment.
[139] Para 157, Interim Judgment.

(d) There was no direct evidence on behalf of the Secretary-General to rebut the allegations advanced by the Respondent regarding her involvement and statements made by her to a number of people outside the Secretariat.[140]

190 Under these circumstances, the Tribunal considered whether it was an appropriate case to order a further oral hearing on the issue and exercise its discretion under Art. VIII(2) of the Statute and require the Secretary-General to appear before it as a witness, in order for the Tribunal to be able to determine the issue.

191 In exercising its discretion, the Tribunal concluded that such a course was not necessary. We fully agree with the way it exercised its discretion. We believe that any other decision would not have been reasonable under the circumstances and would not have contributed to resolving the main issues before the Tribunal. If the Applicant wished the issue to be resolved by the Tribunal, it should, in satisfying the evidential burden of proof, have provided the Tribunal not only with an adequate documentary record, but also with oral evidence in rebuttal of the specific allegations advanced by the Respondent, something which it failed to do.

192 We also cannot see merit in the argument advanced in the Applicant's Submission Strictly in Reply, that the Tribunal coloured its judgment with matters such as the ones mentioned in para 29(a), (b) and (c) of its last pleading. The mere fact that the Tribunal referred to the Respondent's allegations of improper motive does not mean that it was required to give a definitive finding on that matter. The Tribunal had the duty to describe the facts and allegations that were before it (including the ulterior purpose allegation) in a fair and reasonable manner. In the instance, we cannot agree that there was any colouring of the Tribunal's Judgment, as the Applicant seems to suggest.

Ground 7 – Whether the Tribunal failed to make case management directions

The surrounding facts

193 The Tribunal, in its Interim Judgment, notes[141] that a number of documents were disclosed after an application by the Respondent and during the exchange of pleadings.

194 The Respondent also requested an oral hearing. The Applicant opposed the application, and in view of that, the Tribunal issued directions to the parties "seeking more detailed

[140] Paras 162-163, Interim Judgment.
[141] See paras 90-94, Interim Judgment.

memoranda from the parties on the evidence that might be given at any oral hearing, and on the issues that [the Respondent] wished to address in oral argument."[142]

195 In the light of those memoranda, the Tribunal issued directions that there would be an oral hearing in order to give the opportunity to the Respondent to call the two witnesses he wished to call. The Tribunal also gave directions as to oral submissions on two issues namely (a) whether the decision of the Disciplinary Board to proceed in the absence of the Respondent was in breach of the Respondent's right to fair treatment and (b) whether the disciplinary action against the Respondent was initiated or pursued for improper motives and what inferences could be drawn in relation to this issue.[143]

196 The Respondent also sought to give oral evidence himself and to tender himself to questioning by the Secretariat. He also advised the Tribunal that his original written statement would stand as his evidence in chief. The Secretariat opposed his application and said it did not wish to put any questions to him. In those circumstances, the Tribunal considered that it would not be assisted by oral evidence from the Respondent[144]. Consequently, at the oral hearing, the Tribunal heard the evidence of Mr Gimson (the Respondent's witness) and the submissions of counsel on the relevant issues.

The ground of review

197 The Applicant complains that "the Tribunal failed to make the necessary case management directions required for the proper and efficient administration of the case"[145]. However, in the arguments advanced in support of the ground of review, the Applicant adds that the failure of the Tribunal to give the necessary directions prejudiced the presentation of its case.[146]

198 The Applicant in particular submits that the Tribunal made no directions for the filing of any additional written submissions in relation to the oral hearing and no notice was served of any intention to do so by the Respondent.

199 It further complains that, despite the lack of directions on the first day of the oral hearing, the Respondent's counsel handed the Applicant's counsel a document titled *"[Respondent's] Outline Submissions"* and a bundle of authorities, which she had no

[142] Para 92, Interim Judgment.
[143] Para 92.2, Interim Judgment.
[144] See para 93, Interim Judgment.
[145] Para 30(c), Review Application on Liability where the Applicant makes reference to the powers of the Tribunal under Article VIII.2 of the Statute, to Rules 14-15 and Section D(1) of the Procedures.
[146] See para 116, Review Application on Liability.

chance to digest in advance. The complaint is that the Tribunal proceeded nonetheless with the hearing, in the knowledge that this had occurred[147].

The Respondent's Submissions in Response

200 The Respondent submits that the ground of review, being a procedural ground, in order to succeed it must be shown that "there has been a fundamental error in the procedure which has resulted in a failure of justice"[148] and that the Applicant comes nowhere near meeting the above test, which is an exacting one.

201 Furthermore, the Respondent submits that if the Applicant's counsel considered that any further directions were necessary, she should have applied for them.

Our conclusion

202 After considering all relevant material placed before us, we consider that the ground of review is without merit. Counsel for the Respondent is right in pointing out that the ground of appeal in essence relates to an error in procedure. In being so, Art. XI.5 of the Statute provides that there must be a *"fundamental"* error of procedure which results in a *"failure of justice"*.

203 What the above concept entails has been considered by the ICJ in *Fasla v United Nations.*[149] Counsel for the Respondent referred us[150] to the following extract with which we agree:-

> "It may not be easy to state exhaustively what is involved in the concept of "a fundamental error in procedure which has occasioned a failure of justice". But the essence of it, in the cases before the Administrative Tribunal, may be found in the fundamental right of a staff member to present his case, either orally or in writing, and to have it considered by the Tribunal before it determines his rights. An error in procedure is fundamental and constitutes "a failure of justice" when it is of such a kind as to violate the official's right to a fair hearing as above defined and in that sense to deprive him of justice. To put the matter in that way does not provide a complete answer to the problem of determining precisely what errors in procedure are covered by the words of Article 1 1. But certain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent

[147] Para 117, Review Application on Liability.
[148] See Statute, Art. XI.5 and *Re Fasla* Application for Review of Judgment No 158 of the UNAT, ICJ Reports 1973, p. 166 at para 92.
[149] Application for Review of Judgment No. 158 of the UNAT, ICJ Reports 1973, p. 166 at [92].
[150] Para 129, Respondent's Submissions in Response.

and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-a-vis the opponent; and the right to a reasoned decision."

204 We agree with counsel for the Respondent that the Applicant is nowhere near persuading us that there was an error of procedure and indeed a fundamental one, let alone one that has resulted in a failure of justice.

205 The Tribunal had discretion under Article VIII.1 of the Statute to decide whether an oral hearing was warranted and if so minded, to give the necessary directions, including the hearing of witnesses under Art. VIII.2 of the Statute. We do not detect any procedural errors in the way in which the Tribunal handled the oral hearing and in the directions it gave. Neither do we accept that the Tribunal exercised its discretion wrongly or in an unreasonable way. All the directions it issued were within its power and discretion under the Statute.

206 We also fail to see that there was a failure of justice. The Tribunal was under no obligation to give directions for the filing of written submissions, as opposed to oral, as counsel for the Applicant seems to suggest. We consider that this was entirely in the Tribunal's discretion. In our view, the issuance of directions for the filing of written submissions would have delayed the hearing and perhaps necessitated the adjournment of the case.

207 The issues that were the subject matter of the oral hearing were clear, and had counsel for the Applicant preferred that written submissions were a more convenient option, she should have addressed her concerns in time to the Tribunal.

208 We do not consider that the handing to the Applicant's counsel of the written outline of the Respondent's oral submissions amounts to any prejudice or to a failure of justice. In practice, counsel during oral hearings often prepare written outlines of their oral submissions which out of courtesy they hand to the Tribunal and to their opposing colleague, in order to assist them. We cannot see anything wrong in the practice.

209 If counsel for the Applicant for any reason felt that this was prejudicial to the Applicant or was inappropriate, she was under a duty to raise an objection immediately before the Tribunal and not to allow things to proceed and then complain at the review stage.

210 We therefore reject the contention of the Applicant, that the Tribunal failed to make case management directions that were required for the proper and efficient administration of the case.

Conclusion on the Review Application on Liability

211 The Applicant has failed to persuade us that the Tribunal made errors of law or of fact or otherwise acted unreasonably in coming to its decision as set out in its Interim Judgment. Accordingly, there is no basis in law for us to interfere with that decision. The Application for Review of the Interim Judgment is dismissed.

212 Given that the Applicant has not been successful in its Review Application on Liability, we shall next proceed to the second Application for Review which concerns the compensation awarded to the Respondent. This is in line with the directions of the Tribunal that both Applications for Review should be heard together.

PART B – The Review Application on Compensation

The Grounds of Review

213 The Applicant contests all sums awarded by the Tribunal, except the medical costs of £2,000 and the interest awarded, which was set at 3% per annum on the sum of £133,300 from 1 September 2017 to the date of judgment.

214 The way in which the Application for Review of Compensation was drafted has made it difficult for us to readily identify the grounds of review. Although the Applicant stated at paragraph 3 of the Review Application that the core of its complaint was that the Tribunal erred in fact and in law by failing to take account of relevant considerations and taking into account irrelevant considerations, we consider that the Applicant's real grounds of complaint are that the Tribunal failed to identify or apply the correct principles of law on compensation, that it failed to consider all of the evidence before it, and in so doing, failed to reach sustainable conclusions on whether the Applicant was solely responsible for the Respondent's loss, and that it failed to approach issues of quantification in a reasonable and proportionate way.

215 We have attempted to summarise the grounds of review as follows:-

(1) Whether the Tribunal correctly identified the relevant legal principles and case law on compensation;

(2) Whether the Tribunal correctly evaluated the evidence that was before it from both parties in relation to compensation;

(3) Whether the Tribunal erred in fact or in law in finding that the Applicant's conduct was the sole or substantial cause of the Respondent's losses;

(4) Whether the Tribunal failed, when assessing damages, to take into account the constraints of the Secretariat's operations and its limited resources;

(5) Whether the Tribunal erred in fact or in law in calculating the Respondent's losses and whether its overall award was proportionate and equitable;

(6) Whether the Tribunal erroneously awarded legal costs to the Respondent.

216 In considering the grounds of review, we have also taken into account, besides the Review Application,[151] the Respondent's Submissions in Response, the Applicant's Submissions Strictly in Reply, the underlying pleadings and documents referred to by the parties before the Tribunal, and the relevant law.

Ground 1 – Failing to identify the correct legal principles and case law in relation to compensation

217 The Applicant complains that the Tribunal failed to have regard to its own established principles, and the precedents set out in international administrative tribunals.[152] It also complains that the Tribunal failed to consider its submissions on the law relating to compensation.[153]

218 The Respondent states in reply that the Tribunal correctly directed itself in law, noting paragraphs [48]-[49] of the Judgment on Compensation, and that it recorded the key submissions of parties.[154]

Our conclusions

[151] See Part D, Compensation Review, para 82 onwards, Applicant's Submission Strictly in Reply.
[152] Paras 12-14, Review Application on Compensation.
[153] Para 3a, Review Application on Compensation.
[154] Paras 137 & 140-141, Respondent's Submissions in Response.

219 We have considered the Applicant's Submissions on Compensation, which it submitted to the Tribunal on 11 August 2018. In that document, the Applicant draws the Tribunal's attention to Article X.1 of the Tribunal's Statute, which sets out the power of the Tribunal to fix the amount of compensation to be paid to an Applicant for loss, injury or damage sustained, and which provides that such compensation shall not normally exceed the equivalent of three years' net remuneration of the Applicant.[155] The Applicant accepted that the purpose of damages is to put the Respondent in the position he would have been in had the breaches identified in the Interim Judgment not occurred.[156] It also drew the Tribunal's attention to previous CSAT case law in which the Tribunal had been mindful of the limited funds available to the Commonwealth Secretariat.[157]

220 We note that the Tribunal as a starting point, referred[158] to Art X.1 of the Statute which highlights the wide discretion to the Tribunal to fix the amount of compensation to be awarded:-

> *"Article X.I.:-*
> *If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked, or in addition to, or alternatively to any such remedy, appropriate compensation for any loss or damage occasioned. Where an application is made by a staff member, where relevant, the Tribunal shall, at the same time, fix the amount of compensation to be paid to the Applicant for the loss, injury or damage sustained, provided that compensation shall not normally exceed the equivalent of three years' net remuneration of the Applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher amount of compensation. A statement of the specific reason for such an order shall be made."*

221 In paragraphs 28-39 of the Judgment on Compensation, the Tribunal set out in detail the Applicant's submissions on compensation, including as to the relevant legal principles and case law. At paragraph 29, the Tribunal specifically referred to the Applicant's submission regarding its limited resources, and set out the relevant paragraph from *Ayeni* on which the Applicant had relied. At paragraph 35 of the Judgment on Compensation, the Tribunal acknowledged the assistance of the Applicant's submissions summarising previous awards by the Tribunal of compensation for moral injury.

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[155] Para 11, Applicant's Submissions on Compensation.
[156] Para 16, Applicant's Submissions on Compensation.
[157] Para 17, Applicant's Submissions on Compensation, citing *Mohsin* and *Ayeni*.
[158] Para 18 & 115, Compensation Judgment.

222 Having set out the parties' submissions, the Tribunal, in paragraphs 48-49 of its Compensation Judgment, referred to the relevant principles pertaining to the Tribunal's discretion on compensation and to the relevant legal precedent. The Tribunal stated that:-

> *"**The relevant principles***
>
> *48 It is common ground that the purpose of an award of compensation is to put Mr Venuprasad in the position he would have been in had the breaches identified in the Interim Judgment not occurred. The focus must therefore be on a comparison between the position Mr Venuprasad is in now, and the position he would have been in if the Secretariat had not suspended him, conducted an unfair disciplinary process and issued a final written warning, and made inappropriate statements about him to the media in late 2016.*
>
> 49 *As the Tribunal said in* Addo, *"in assessing the appropriate level of compensation [the Tribunal has] a broad discretion to award what is equitable for the injuries sustained."*[159]

223 We consider that the Tribunal correctly identified the legal principles and case law regarding the proper approach to compensation. It is also evident that the Tribunal took account of the Applicant's submissions on compensation.

224 It is not fair to say that the Tribunal did not take into account the parties' submissions on the law. Whether the Tribunal correctly applied these principles is the subject of our examination in relation to later grounds of review. We therefore reject this ground of review.

Ground 2 – Whether the Tribunal correctly evaluated the evidence that was before it from both parties in relation to compensation

225 The Applicant complains that the Tribunal failed to consider all of the relevant evidence, including contradictory evidence, and gave precedence to the Respondent's version of events. The Applicant states that the Tribunal made various errors of fact which it has set out in detail in Annex 2 to the Applicant's Application for Review of Compensation.

226 We have examined the contents of Annex 2. For the most part, we consider that it simply attempts to re-argue many of the points on which Applicant failed in relation to liability, and sets out arguments on evidence which were rejected by the Tribunal. We do not consider it appropriate or necessary to subject these submissions to microscopic examination, as the Applicant has invited us to do. Rather, we have attempted to identify

[159] CSAT/21 at [118].

the Applicant's main arguments in relation to alleged errors of fact and failure to have regard to evidence.

Evidence as to the likely outcome of the disciplinary proceedings

227 The first key point for consideration is whether the Tribunal erred in its conclusion that "there is no evidence that a properly conducted investigation and internal decision-making process would have led to any adverse consequences for [the Respondent]".[160] The Applicant contends that there was such evidence. It contends that, in the absence of the procedural flaws identified by the Tribunal, it would nevertheless have disciplined the Respondent for an admitted failure to adhere to the Applicant's IT policy by sending to his home email account, and then deleting, certain confidential emails. The Applicant contends, in other words, that the outcome would have been the same, by which we assume it means that it would have found the Respondent guilty of misconduct and imposed on him a Final Written Warning.

228 We have carefully considered this argument. We have had regard to Part 5, Section 5 of the Staff Handbook, which addresses the circumstances in which an employee of the Secretariat may be found guilty of misconduct. We note, in particular, that this section sets out a list of non-exhaustive examples of acts that "may" constitute misconduct, noting that each case will be dealt with on its merits. That list includes misuse of the Secretariat's IT systems and equipment and failure to comply with the Secretariat's Rules, Regulations or procedures. We accept that, in principle, the Disciplinary Board could have found that the Respondent's conduct amounted to misconduct under the policy, but this was not inevitable. It is certainly not inevitable that, even if a finding of misconduct had been made, that the Disciplinary Board would have imposed a sanction of a Final Written Warning.

229 We therefore return to the Tribunal's finding at paragraph 55 of the Judgment on Compensation. We note that the Tribunal had no hesitation in rejecting the Secretariat's argument about the likely outcome of the investigation and disciplinary process absent the defects identified in the Interim Judgment. We consider it is not possible or desirable for us to speculate about whether the outcome could or would have been the same. We are therefore not prepared to conclude that the Tribunal erred in finding that there is no evidence that a properly conducted investigation and decision-making process would have led to any adverse consequences for the Respondent.

Evidence as to the parties' conduct in relation to the media

[160] Para 55, Compensation Judgment.

230 The Applicant also alleges that the Tribunal erred in fact or in law in relation to the evidence concerning the parties' conduct in relation to the media. In particular, the Applicant complains that the Tribunal:

(1) failed to take into account evidence which showed that the Respondent was responsible for the initial leaks to the Daily Mail in May 2016;
(2) failed to take account of evidence which showed that the Respondent was responsible for the disclosure in the media of his suspended status during the course of his employment;[161]
(3) failed to consider the extent to which the Applicant's statements to the media were published and/or were objectively true or appropriate, and therefore the extent to which the Applicant's media statements were responsible for the Respondent's losses;[162]
(4) failed to consider the extent to which the published allegations about the Respondent's involvement in the Indian fraud investigation would have impacted on the Respondent's employability;[163]
(5) failed to consider the extent to which published descriptions of the Respondent as a "whistleblower" impacted on his employability;[164]
(6) failed to consider the evidence which showed that the Respondent and his solicitors provided material to the media during the Tribunal proceedings.[165]

231 We consider that there is no basis for a complaint by the Applicant that the Tribunal failed to consider evidence showing that the Respondent was responsible for the initial leaks to the media in mid-2016. The Secretariat's own Disciplinary Board concluded that there was no direct evidence that he had leaked the emails and the information contained in them to a third party. The Respondent himself denied that he was the source of the leaks, and the Applicant declined to cross-examine him in relation to that evidence. The Tribunal found, at paragraph 55 of the Compensation Judgment, that any assertion by the Secretariat that a fully informed Disciplinary Board process could have led to a finding that the Respondent was responsible for the leak was misconceived. We consider that it was open to the Tribunal to reach that conclusion, on the basis of the evidence before it, and we can find no basis to disturb that finding.

232 We consider that there is no basis for a finding that the Tribunal failed to take account of evidence which showed that the Respondent was responsible for the disclosure in the

[161] Paras 27, 36-37, Applicant's Review Application on Compensation.
[162] Para 25, Applicant's Review Application on Compensation.
[163] Para 31, Applicant's Review Application on Compensation.
[164] Paras 27 and 33-35, Applicant's Review Application on Compensation.
[165] Paras 36-39, Applicant's Review Application on Compensation.

media of his suspended status during the course of his employment. We have examined the Applicant's submissions to the Tribunal on compensation, including the media articles referred to therein. The Tribunal summarised those submissions at paragraph 31 of its Compensation Judgment. The Tribunal, at paragraph 43 of the Compensation Judgment, then had regard to the Respondent's witness statement filed as part of the proceedings in which he stated that he did not seek press coverage or provide any confidential Secretariat information to the media in the course of his employment. The Tribunal also noted that the Secretariat declined to cross-examine the Respondent in relation to this evidence. The Tribunal then concluded, at paragraphs 55 and 57 of its Judgment on Compensation, that the Secretariat failed to establish that the Respondent provided any information of substance to the media during his employment. We can find no basis for disturbing that conclusion.

233 There is no basis for a complaint that the Tribunal failed to consider the extent to which the Applicant's statements to the media were published. As the Respondent explained in his submissions in reply, at paragraphs 155-156, the key parts of the media statements provided by the Applicant all found their way into the article published by The Times on 17 November 2016. For example, that article repeated the Secretariat's comments that the Respondent was a "profoundly disaffected individual" who had made "false, misleading and distorted allegations". As to whether the Secretariat's media statements were objectively true or appropriate, we have already found above that the Tribunal was entitled to conclude that those statements were highly inappropriate, and would have had an adverse impact on the Respondent's employability.

234 The Applicant next alleges that the Tribunal failed to consider the extent to which the published allegations about the Respondent's involvement in the Indian fraud investigation would have impacted on the Respondent's employability.[166] The Applicant also asserts that the media reports and an IPSO report established that the Respondent was in fact a suspect in the Indian fraud investigation.[167] The Tribunal considered this issue in some detail in its Compensation Judgment, at paragraphs 58-63. At paragraph 62, the Tribunal held that it had not seen any relevant and admissible evidence to support the Secretariat's contention that the media reports were true. The Tribunal also noted there was unchallenged evidence from the Respondent that the allegations concerning his involvement in the Indian fraud investigation were untrue. At paragraph 63 of the Compensation Judgment, the Tribunal stated that the information in the public domain about the Indian investigation would not have materially harmed the Respondent's employment prospects some 15 years later. Specifically, the Tribunal stated that: "We

[166] Para 31, Applicant's Application for Review on Compensation.
[167] Annex 2 to the Applicant's Application for Review on Compensation.

would not expect a responsible employer to be deterred by references to the investigation without making further inquiries, in the absence of any charges or any other action by the Indian authorities directed against [the Respondent] in the intervening period". While we may not necessarily have come to the same conclusion as the Tribunal in this regard, we do not consider that the Tribunal has erred in fact or in law in reaching its conclusion.

235 The Applicant also alleges that the Tribunal failed to consider the extent to which published descriptions of the Respondent as a "whistleblower" impacted on his employability. The Applicant makes the point that it was not responsible for these articles, which emanated from material disclosed to the media and created by the Respondent. It alleges that the Tribunal failed to take account of this point when assessing damages and the possible alternative causes of any loss of employment opportunities. The Tribunal addressed the Respondent's status as a whistleblower at paragraph 77 of the Compensation Judgment. It accepted that the Respondent's 'whistleblowing' actions in bringing certain matters to the attention of High Commissioners were not caused by the Secretariat's breaches. It found that this was a step he took on his own initiative and "any consequences it may have had are not fairly attributable to the Secretariat". The Tribunal then stated that the Respondent's actions did not involve disclosure to the media or the wider public.

236 But the Tribunal does not appear to have considered the potential impact of the Respondent being known publicly as a whistleblower (a fact which it acknowledges is not attributable to the Secretariat) on the Respondent's employment prospects. We are troubled by the apparent lack of consideration given by the Tribunal to this issue because we consider that the Respondent's public image as a 'whistleblower' may well have impacted on his employability. We consider that this was a relevant consideration to which the Tribunal ought to have had regard when assessing compensation and attempting to determine what losses flowed from the Applicant's actions. We consider the implications of this below, when we address causation. In conclusion, we consider that the Tribunal failed to take account of a relevant consideration, namely the Respondent's public status as a whistleblower, when assessing compensation.

237 Finally, the Applicant alleges that the Tribunal failed to consider the evidence which showed that the Respondent and his solicitors provided material to the media during the Tribunal proceedings, and that the Tribunal failed to factor this into the assessment of damages. The Tribunal addressed the question of what material the Respondent disclosed to the media during the Tribunal proceedings in 2018, at paragraphs 54 and 57 of its Compensation Judgment. The Tribunal did not accept that the Respondent breached any confidentiality obligations by making disclosures to the media in connection with the

(public) Tribunal proceedings. The Tribunal also considered whether the disclosures to the media by the Respondent were the effective cause of his difficulties in finding employment, or were a significant contributing factor to those difficulties. The Tribunal concluded, on the basis of all the material before it, that any disclosures made by the Respondent to the media were not a material factor in his difficulties in finding new employment. We consider that it was open to the Tribunal to reach that view, and that it does not disclose any error of fact or of law, and is not unreasonable.

238 In conclusion, except for the finding above at paragraph [236], we reject this ground of review.

Ground 3 – Whether the Tribunal erred in fact or in law in finding that the Applicant's conduct was the sole or substantial cause of the Respondent's losses

239 The Tribunal made the following findings in relation to causation:

> 64 "On the basis of the evidence before us, we are satisfied that Mr Venuprasad was likely to have found other employment from early 2017 onwards if the Secretariat had not breached its obligations to him, and that the Secretariat's breaches were the principal cause of his failure to obtain new employment at this time. The Secretariat's breaches contributed to his inability to find new employment in a number of ways:
>
> 64.1 they had a direct adverse effect on his reputation and his attractiveness to employers;
>
> 64.2 they had a direct adverse effect on his health, which impaired his ability to seek and take up new employment;
>
> 64.3 they prevented him finding new employment while still employed by the Secretariat, which meant that from January 2017 onwards he was in the much less advantageous position of seeking employment while unemployed.
>
> 65 We do not accept that Mr Venuprasad caused or substantially contributed to his inability to find employment in this period. The evidence before us does not support the Secretariat's argument that Mr Venuprasad courted media attention in this period, and is responsible for bringing the adverse publicity on himself. He did not court media attention. Rather, his unchallenged evidence is that he did not contact any media organisations during this period, and provided no information of substance to the media during this period, apart from confirming that he was the author of a document already in the hands of a newspaper. His lawyer in India also responded by text message to an inquiry by a journalist. We do not consider that Mr Venuprasad did anything to seek out media attention, or bring adverse publicity on himself, in

this period. Rather, it was the Secretariat that made wholly inappropriate and damaging statements about Mr Venuprasad to the media, during the course of his employment and while disciplinary proceedings were still on foot.

66 We consider that Mr Venuprasad should recover compensation in relation to the remuneration he is likely to have earned during the period January 2017 to April 2018 but for the Secretariat's wrongful actions: a period of 16 months."

240 We have tried as best as we can to identify the Applicant's grounds of review in relation to causation. We were not assisted by the way in which the grounds of review were drafted. In essence, the Applicant appears to complain that the Tribunal erred in concluding that the Secretariat's breaches were the principal failure of the Respondent's failure to obtain new employment and that in the absence of those breaches, he would have been likely to find new employment from early 2017 onwards. The Applicant argues that the Tribunal has overlooked or failed to give proper weight to the evidence of the other information in the public domain which would have impeded the Respondent's job search, and the evidence of the Respondent's own contributory conduct which would have impeded his job search.

241 We consider that it was open to the Tribunal to reach its conclusion that the Respondent did not cause or substantially contribute to his inability to find employment. We also consider that it was open to the Tribunal to conclude that the Secretariat's breaches contributed to the Respondent's inability to find new employment in a number of ways, namely, that they had a direct adverse impact on his reputation, they had a direct adverse impact on his health, and prevented him from finding new employment while still employed by the Secretariat. As to the latter point, we have noted the Applicant's submissions that it did not prevent the Respondent from looking for a new job while he was still employed by the Secretariat,[168] but respectfully consider that they miss the point. The Tribunal did not find that the Applicant *prohibited* the Respondent from applying for new jobs; the Tribunal found that the Applicant's breaches made the Respondent ill and resulted in him being hospitalized, such that he was not able to look for alternative employment during the period before the expiry of his contract. This is the sense in which we have interpreted the Tribunal's finding that the Applicant's breaches prevented him from finding new employment while still employed. We are therefore not willing to disturb those findings.

[168] Para 32, Review Application on Compensation.

242 We note that the Tribunal concluded that the Secretariat's breaches were the "principal" cause of this failure to obtain new employment. The Tribunal did not in fact identify any other cause than the Secretariat's breaches, and therefore we interpret what the Tribunal said at paragraph [64] of the Compensation Judgment as finding, in effect, that the Secretariat's breaches were the sole cause of his difficulties. However, we consider that the Tribunal fell into error in reaching that conclusion, and in concluding that in the absence of the Secretariat's breaches, he would have obtained alternative employment as soon as his contract with the Secretariat came to an end. We consider that the Tribunal has overlooked the impact that public statements about the Respondent's 'whistleblower' status would have had on his employment prospects. While a reasonable employer may have ignored media reports of the Respondent as a 'whistleblower' or may have considered that his whistleblowing actions did not detract from his attractiveness as an employee, we consider that many employers may well have thought twice about engaging an employee who was known to be a 'whistleblower'. As the Secretariat was not responsible for either the Respondent's 'protected disclosures' or the fact that those protected disclosures found their way into media reports, we consider that the Tribunal erred in attributing sole responsibility for the Respondent's inability to find new employment to the Applicant.

243 As a result, we consider that the Respondent's status as a 'whistleblower', even in the absence of any breaches by the Secretariat, would have had an impact on his ability to obtain new employment. We would therefore reduce the compensation award in relation to loss of earnings by [10 / 20% or £[ ]] to reflect this factor.

Ground 4 – Whether the Tribunal failed, when assessing damages, to take into account the constraints of the Secretariat's operations and its limited resources

244 The Applicant, in paragraph 17 of its Review Application on Compensation, submitted that the assessment of damages has to be "conducted within the constraints of the Secretariat's operations, as it is an organization with very limited resources". It based its argument on a previous judgment of the Tribunal namely in *Ayeni v. Commonwealth Secretariat.*[169]

245 It further submitted[170] that the Secretariat's budget for the financial years 2018-2019, is "£47,691,000 of which £19,949,168 is from assessed member contributions. The remainder of the budgeted income comes from voluntary member contributions, other income and reserves". The Applicant notes that when the global award and costs are

[169] CSAT/12 No.2 at para 85.
[170] Para 19, Review Application on Compensation.

added, these "equate to approximately 2% of budgeted staff costs and 2% of assessed contributions in the current financial year".

246 The Respondent replied[171] that the Applicant failed to provide any evidence of the Secretariat's limited resources before the Tribunal, and it is not open to it to rely on such evidence now. The Respondent contended that the Tribunal was entitled to reject the Applicant's submissions on limited resources for the reasons it gave in its Compensation Judgment at [29] and [108].

247 The Applicant in its Submissions Strictly in Reply submitted[172] that (a) the Respondent's argument, that no evidence was placed before the Tribunal as to the limited resources of the Applicant, was not correct, and (b) the Tribunal in any event was entitled to take judicial notice of the financial constraints of the Applicant, which were not only common knowledge, but were also considered in *Ayeni.*[173] However, the Applicant did not point us to any evidence that it had provided to the Tribunal as to its limited resources.

248 The Tribunal when assessing damages primarily aimed to put the person suffering the loss in the position he would have been in, had the breaches not occurred. In doing so, it had a duty to make sure that the total award was fair and reasonable under the circumstances.

249 Our view is that the review ground is without merit. The Tribunal was correct in pointing out in paragraph 108 of the Compensation Judgment that there was no evidence presented to the Tribunal about the overall budget or about the implications of an award to the organization. We agree with the Respondent's submission that since the evidence was not presented to the Tribunal, the evidence cannot be allowed to be presented for the first time at the Review stage.

250 We cannot accept the argument that the limited resources of the Tribunal were a matter of common knowledge or a matter of which the Tribunal could take judicial notice. We will resist the temptation to cite case law on judicial notice. We restrict ourselves to observing that judicial notice refers to facts that are so notorious or clearly established, that no formal evidence is necessary to prove their existence. We do not consider that the Secretariat's limited resources or periodical financial problems could come under this category of evidence.

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[171] Para 148, Respondent's submissions in Response.
[172] See para 92.
[173] CSAT APL/20 (No.2) at [85].

251 Independently of our conclusion about the lack of evidence before the Tribunal, we point out that the constraints and limited resources of the Secretariat seem to be adequately reflected in Article X of the Statute, which provides expressly that the Tribunal, when necessary, fixes *"the amount of compensation to be paid to the Applicant for the loss, injury or damage sustained, provided that such compensation shall not normally exceed, the equivalent of three years' net remuneration of the Applicant"*[174]. Article X of the Statute also stipulates that only *"in exceptional cases"* and when the Tribunal considers it justified, may the Tribunal order the payment of a higher amount of compensation.

252 We are of the view that when Article X of the Statute was being drafted, the constraints and limited resources of the Secretariat must have been amongst the factors that were primarily taken into account, in stipulating the maximum compensation to be awarded. In the instant case, we are of the view that the Tribunal when assessing the compensation, had in mind Article X of the Statute and the ceiling it provides. [175]

253 We do not consider that the comments made by the Tribunal in *Ayeni*[176] about the limited resources of the Secretariat were binding on the Tribunal or that they contradict what we have said above in relation to resources and Article X of the Statute.

Ground 5: Whether the Tribunal erred in fact or in law in calculating the Respondent's losses, and whether its overall award was proportionate and equitable

The Tribunal's quantification of compensation

254 Before considering the Applicant's submissions on quantification of compensation, it is important to recall the findings of the Tribunal under the various heads of loss, which were as follows.

255 The Tribunal considered that compensation should be awarded on the basis that the Respondent could have obtained employment that provided him with net remuneration that was not less than he was earning in his last year at the Secretariat. The Tribunal agreed with the Respondent that his annual net remuneration would have included not only basic salary (£69,317) but also all benefits he would have obtained from his employment, including an expatriate allowance of £1,141.78 per month, and a contractual

[174] The emphasis is ours.
[175] See paras 18, 29 and 71 and especially para 115, Compensation Judgment.
[176] CSAT/12 (No. 2), para 85.

gratuity accruing at a rate of £1,223.34 per month, thus bringing his net remuneration to approximately £100,000 per annum.

256 The Tribunal stated in paragraph 118 of its Compensation Judgment that:

> "118. We agree with Mr Venuprasad's submission that net remuneration for the purposes of Article X(1) must include all amounts paid for the work done by the employee, net of internal income tax, not just the salary component of that remuneration. It would make no sense for the level of the threshold to depend on how the relevant employee's total remuneration is structured, with the result that two employees receiving a total remuneration package that has the same value, but structured differently, would be subject to different thresholds. The relevant figure is therefore £293,095.44.»

257 For the sake of completeness, the Tribunal stated[177] that if its calculations proved wrong and the applicable figure for purposes of Art. X.1 of the Statute was the figure the Applicant suggested, namely £207,951, then it would consider that there were exceptional circumstances that would justify an award, in excess of that threshold. It considered that any figure below that level would not provide a fair compensation to the Respondent, whose reputation was seriously harmed.

258 The Tribunal's broad evaluation was that a fair and realistic compensation for loss of employment in the 16-month period from January 2017 to April 2018 was £133,300.

259 The Tribunal then considered that he should be awarded a further £100,000 for loss of earnings in the one-year period following delivery of the Interim Judgment in April 2018.

260 The Tribunal then awarded £30,000 for moral injury including harm to reputation and injury to feelings.

261 The Tribunal then awarded £20,000 for serious harm caused to the Respondent's health.

262 The Tribunal awarded £6,000 for travel costs, which included the costs of travel to London from the Respondent's home in India to work with his legal team on the material to be submitted to the Tribunal, and to attend the April 2018 hearing.

[177] Para 120, Compensation Judgment.

The Applicant's submissions

263 The Applicant challenged all aspects of the Tribunal's findings on compensation set out above. Specifically, it argued that:

(1) The Tribunal erred in law in interpreting the phrase "net remuneration" in Article X.1 of the Statute as including expatriate allowance (which represented 14% of gross salary) and gratuity (which represented a further 15% of gross salary).[178] Furthermore, it submitted that in the *Ayeni*[179] case "the Tribunal doubted that gratuity could be considered as salary, remuneration or pay within the meaning of Art.X". The Applicant considered that the Tribunal should have calculated the Respondent's annual net remuneration as £69,317, based on his net salary alone.

(2) The Tribunal erred in fact and in law in awarding a total amount of £133,300 for loss of earnings in the period January 2017 to April 2018, because it was disproportionate, failed to take into account the Respondent's contributory behaviour, failed to recognize that the Respondent did not suffer any financial loss as a result of the Secretariat's conduct, or alternatively, that the Respondent should not be entitled to recover more than his own pleaded case, which sought compensation for loss of earnings up to 15 November 2017.[180]

(3) The Tribunal erred in concluding that, although the Interim Judgment vindicated the Respondent's criticisms of the Secretariat's procedures and should substantially reduce the adverse effect of the Secretariat's breaches, that nonetheless, the Applicant should be awarded a further £100,000 for loss of earnings in the 12-month period following the Interim Judgment. [181] The Applicant therefore contends that the Tribunal should have ordered compensation for loss of earnings, based on his net salary, for a period of only 11.5 months, which totals £66,428.79.[182]

(4) The Applicant contends that no reasonable Tribunal would have made any award for damages for moral injury and injury to health, which were only awarded for

[178] Para 44, Application for Review of Compensation.
[179] CSAT APL/12 (No. 2) [61].
[180] Paras 45-53, Application for Review of Compensation.
[181] Para 54, Application for Review of Compensation.
[182] Para 55, Application for Review of Compensation.

'procedural defects'; alternatively, that such sums should be reduced on the basis envisaged in paragraph 107 of the Compensation Judgment.[183]

(5) In relation to travel costs, the Applicant contends that there was no requirement, in today's world of connectivity through technology, for the Respondent to travel to London multiple times. It contends that the amount should be restricted to the cost of the Respondent's travel to attend the oral hearing in April 2018.

(1) Net remuneration

264 The Respondent submitted that "remuneration" simply means "money paid for work or service" and the contractual gratuity falls within this definition. He contended that what was said in the *Ayeni (No. 2)*[184] case was obiter, since in the end, the Tribunal awarded 1½ year's pay.

265 The Applicant, in its Submissions Strictly in Reply, submitted that the expatriate allowance should not be considered net remuneration for the purposes of the statutory ceiling for two reasons:- (a) the Respondent returned to India towards the end of his contract and therefore can no longer be considered "expatriated" and (b) eligibility for expatriate allowance, which is dependent on nationality and resident status, could lead to an unintended discriminatory effect.

266 Furthermore, it asserted that the Respondent in his Response did not address and therefore appears to have accepted the argument that expatriate allowance is not properly part of the "net remuneration" for the purpose of the Statute[185]. With regards to this issue, the Respondent, with the permission of the Tribunal, filed a Memorandum to rebut the Submissions of the Applicant that the Respondent abandoned any argument as to the expatriate allowance**.** He submitted that he did not abandon the point, but simply did not deal with the point in greater detail than he did in his Submissions in Response. As to the substance of the matter, the Respondent submitted that:-

(a) The expatriate allowance forms part of the remuneration within Art. X.1 of the Statute.

[183] Para 56, Application for Review of Compensation.
[184] CSAT APL/12 (No. 2) [61].
[185] Para 102, Submissions Strictly in Reply.

(b) The allowance "is not in the nature of a fixed sum payable by way of say, compensation for relocation costs, such that it might be regarded as a payment by way of expenses rather than remuneration".
(c) The allowance forms part of the consideration for the role and for the work done in that role.
(d) The new argument made by the Applicant that the Respondent moved to India during the last few weeks of his contract and was no longer considered to be "expatriated", is misconceived[186].
(e) The second argument made by the Applicant that, to include expatriate allowance in the calculation of net remuneration "could have an unintended discriminatory effect", is equally without merit[187].

267 The Applicant in its own Memorandum in Reply submitted the following:-

(1) The Applicant noted that the Respondent did not refer to any international administrative law cases to support his argument[188].
(2) The relevant CSAT caselaw in *Ayeni (No. 2)*[189] expressly defined "net remuneration" by reference to salary.
(3) In *Hans*[190], the award of three months' net salary was based only on the initial net salary.
(4) As to the Respondent's return to India[191], the Applicant asserted that it is simply a matter of fact that the Respondent returned to India from late November 2016 and continued to live there from January 2017 onwards.
(5) The Applicant is not seeking to reduce the Respondent's contractual entitlement to expatriate benefit incurred during his contractual terms. In any event, contractual benefits are not reduced when an overseas staff is unable to work.
(6) As to the discriminatory effect of including expatriate allowance for the purpose of the statutory cap, the Applicant submitted that there is extensive jurisprudence justifying expatriate benefit as a lawful differential treatment and the Respondent failed to justify that his arguments are in line with international administrative law.

268 We do not consider there is any merit in the technical point raised by the Applicant that, because the Respondent did not address in detail the point relating to the expatriate allowance, he should be deemed to have accepted his opponent's argument that it should

[186] Respondent's Memorandum, para 8(a)-(c).
[187] Respondent's Memorandum, para 9(a)-(c).
[188] Para 4, Applicant's Memorandum in Reply.
[189] Above.
[190] Above.
[191] Paras 8-10, Applicant's Memorandum in Reply.

be deducted from gross pay. We accept the Respondent's submissions that it was never his intention to abandon his initial argument.

269 We have considered whether the Tribunal fell into error in relation to its interpretation of "net remuneration". We note that in *Ayeni*[192], the Tribunal reviewed the cases and considered they suggested that "benefits that are permanent or payable over a lengthy period may be included in the concept of 'total net remuneration' while temporary benefits and allowances such as overtime payments and duty allowances are not."[193] The Tribunal went on to find, on the facts of that case, that it doubted that gratuity could be said to be part of the employee's remuneration given that the employee in that case did not actually remain in post for the three years to earn the gratuity.[194]

270 We consider that the phrase "net remuneration" in Article X.1 of the Statute is intended to refer to the amounts actually paid to the employee for the work done, net of income tax. This means it would include benefits actually received by the employee, as well as salary.

271 We are of the view that both of the benefits (the expatriate allowance and gratuity) in the instant case form part of the Respondent's "remuneration", within the meaning of Article X.1 of the Statute.

272 We do not accept the Applicant's submissions that expatriate allowance should not be considered net remuneration for the purposes of the statutory ceiling. The fact that the Respondent was temporarily in India is no reason to reduce the net remuneration, more so when the Applicant itself has not adopted such an approach for assessing the past earnings of the Respondent. We also see no merit in the suggestion that an unintended discrimination would be created here if the expatriate allowance is not deducted. As counsel for the Respondent pointed out, if there is an argument to be made about an unintended discriminatory effect, it may be in the decision to pay such allowances in the first place and in the way net remuneration is calculated for British and non-British members of staff, with regards to the ceiling of Art. X.1 of the Statute.

273 We note that the Secretariat paid the gratuity to the Respondent at the end of the contractual period.[195] We consider that, for this reason, the amount ought to be included

[192] CSAT APL/12 (No. 2) [58].
[193] *Ayeni, CSAT/12 (No. 2)*, para 58.
[194] Ibid, para 61.
[195] Letter from Secretariat to the Respondent's solicitors dated 9 February 2017 [Volume 2, Annex 48].

in the Respondent's net remuneration. The doubt expressed by the Tribunal in *Ayeni*[196], as to whether gratuity can be said to be part of the net remuneration for purposes of Art. X.1, is in our view related to the specific facts of the case, in which the Applicant in that case "did not actually remain in the post for three years to earn the gratuity, albeit due to no fault of his". In any event, it is clear that the doubt expressed by the Tribunal in *Ayeni* was obiter.

(2) *Loss of earnings up to the date of the Interim Judgment*

274 Subject to what we have said above in relation to causation, we do not consider that the Tribunal fell into error in relation to the way it calculated the loss of earnings over the period January 2017 to April 2018. For the reasons already set out in this Judgment, we do not accept that the Respondent suffered no loss as a result of the Secretariat's breaches. As to the argument that the Tribunal erred in allowing loss of earnings to stretch beyond the 11½ month period which the Respondent claimed in his Explanatory Statement, we agree with the submissions of the Respondent's counsel[197] that, since the argument was not raised before the Tribunal, it cannot be raised for the first time on Review. In addition, we note that the Respondent did claim, in the Pleas Section of the Application, the sum of £386,757 by way of loss of earnings, which represents just under four years' net earnings on his calculation.

275 As set out above, we consider that the Tribunal ought to have taken into account the impact of the Respondent's whistleblower status on his employment prospects. We have reached a conclusion that the sums awarded by the Tribunal for loss of earnings in the period January 2017 to April 2018 (£133,300) should be reduced by 15%, bringing the award down to £113,305.

(3) Loss of earnings in the period after the Interim Judgment

276 The Tribunal awarded a further £100,000 for loss of earnings in the period after the Interim Judgment. The Tribunal held that although the delivery of the Interim Judgment would substantially vindicate the Respondent, nevertheless, it would not wholly undo the reputational harm inflicted on him by the Secretariat's actions. The Tribunal stated at [74] of its Compensation Judgment that those statements made by the Secretariat would continue to be retrieved in online searches and would continue to have an adverse impact on his employment prospects. The Tribunal decided to award one year's loss of earnings on the basis that it would provide fair compensation for the significant but declining

[196] CSAT APL/12 (No. 2), [61].
[197] Para 191, Respondent's Submissions in Response.

impact of the breaches on the Respondent's employment prospects from April 2018 onwards.

277 We consider that this award must be reduced by 15% for the reasons we have set out above, to reflect the impact of his whistleblower status on his employment prospects. This will reduce the compensation payable to £85,000.

(4) Moral injury and injury to health

278 The Tribunal awarded £30,000 for moral injury in respect of damage to his reputation and injury to feelings, and £20,000 for significant harm to the Respondent's health. We consider that the award for moral injury is disproportionately high, given the previous CSAT case law in this area, and also bearing in mind that the Secretariat was not solely responsible for the damage done to the Respondent's reputation in the public arena. We therefore substitute the sum awarded with a sum of £20,000. We consider that this adequately reflects the serious impact that the Secretariat's actions had on the Respondent.

279 However, we see no error in relation to the award for damage to health, and we are not prepared to disturb the Tribunal's finding in that regard.

(5) *Travel costs*

280 The question is not whether we could award a slightly smaller or larger amount, but whether the sum awarded was fair and reasonable, given the evidence before the Tribunal and whether an error of law or fact has been established. The review process is not by way of rehearing, in the sense of reconsidering all the evidence. The review process, as outlined in Article XI.5, allows challenges on a judgment on the grounds that the above Article allows, for instance, errors on a question of fact or law or both, or that the Tribunal acted unreasonably having regard to the material placed before it.

281 Although we consider that the award for travel costs may be somewhat on the high side, we have not been convinced that it is so high as to merit our intervention. On the contrary, we are of the view that it was open to the Tribunal, on the evidence before it, to make the award for £6,000 for travel costs. Consequently, we are of the view that this ground is also without merit.

282 In conclusion, we consider that the Tribunal was correct to interpret "net remuneration" as including benefits such as expatriate allowance and gratuity. We also consider that the

TRibujnal was entitled to make an award for loss of earnings in the two period before and after the Interim Judgment. However, we have reduced both of those awards for the reasons set out above. We have also reduced the award for moral injury to £20,000. We are not prepared to disturb any other finding of the Tribunal in relation to compensation.

Ground 6 – Costs

The relevant facts

283 The parties did not reach an agreement as to whether costs are payable, but they reached an agreement on the amount of costs payable in respect of the proceedings up to and including delivery of the Interim Judgment (16 April 2018), except one item, namely the sum of £1,400 for seeking counsel's advice on 12 October 2016. The particular advice was sought in relation to the Daily Mail Article of 7 October 2016, in which the Secretariat was quoted as describing the Respondent as "a profoundly disaffected individual who is facing disciplinary charges."[198]

284 The Respondent argued before the Tribunal that this particular amount is recoverable as costs or alternatively as damages. The Secretariat disputed that this item can be recovered as costs.

285 Furthermore, the Respondent sought an order for the recovery of the costs that he incurred in these proceedings after 12 April 2018, the date that the above agreement on costs was reached in the initial phase of the proceedings.[199].

286 The Tribunal decided the issue as follows:-

> "102. We do not consider that this amount could be included in an award of costs in respect of the present proceedings. It was not incurred for the purposes of the proceedings, which were filed some 7 months later. If it is recoverable, it can only be on the basis that it is a loss caused by the Secretariat's breaches.
> 103. We consider that the cost of obtaining this advice is recoverable as compensation for the Secretariat's breach of its obligations in making adverse statements about Mr Venuprasad to the media. It was reasonably incurred as a direct consequence of statements made to the media by the Secretariat in breach of the Secretariat's obligations. If the Secretariat had not breached its obligations, it is very unlikely that this cost would have been incurred."

[198] Paras 13, 23 and 100, Compensation Judgment.
[199] Para 24, Compensation Judgment.

287 Furthermore, the Tribunal awarded the Respondent, who succeeded in the claim, his actual and reasonable costs for making his claim.[200]

The Review challenges

288 First and foremost, the Applicant challenges as wrong the award of legal costs to the Respondent. It argues that the Tribunal failed to take into account the submissions the Applicant made before the Tribunal, in paragraphs 87-90. According to counsel for the Applicant, the CSAT precedents it cited are to the effect that the parties bear their own costs of the proceedings. It further submitted that, even in the limited cases that the Tribunal did award costs in the past, it set those costs at a reasonably small lump sum, which has never exceeded £15,000.

289 The Respondent, in disagreeing with the Applicant, suggests that if there was a case where costs should be allowed, it is in this case.

290 As to the sum of £1,400 for seeking counsel's advice, the Applicant complains that the Tribunal "erred in fact and in law in the contradiction in paragraphs 102 and 103 of the Compensation Judgment"[201]. It submits that, on the one hand, the Tribunal states that the cost of £1,400 for obtaining legal advice was *"not incurred for the purposes of the proceedings"* and as a result is not recoverable, and on the other hand, it proceeds to treat the amount as compensation for the media statement made by the Applicant. The Applicant submits that the linking of the cost for obtaining counsel advice to the media statement, was inappropriate and it was an error in fact to have allowed this particular item of cost.

291 The Applicant, in its Submissions Strictly in Reply, with reference to *Hans*[202], submits that not all costs in relation to litigation prior to submitting an Application to the Tribunal, are recoverable.

292 It further refers to the factual circumstances that led the Respondent to incur the particular cost. After misconstruing the letter sent to him on 7 October 2016 by the HR Directors, he sought advice on 12 October 2016 concerning potential proceedings against the Secretariat in the UK. The Applicant considers that it is apparent that the fees

[200] Paras 123 and 124.3, Compensation Judgment.
[201] Para 61, Compensation Judgment.
[202] CSAT APL/1, at page 10.

challenged of £1,400, were not incurred in relation to employment obligations and therefore should not have been allowed by the Tribunal and the order should be set aside.

Our conclusions

293 We will deal first with the challenge that relates to the sum of £1,400. The Tribunal, correctly in our view, decided that the award of £1,400 for seeking counsel's advice, was not part of the award for legal costs, as it was not incurred for the purposes of the current proceedings, which were filed some 7 months later, as the Tribunal correctly points out. This is in line with the view expressed in *Hans*[203], that not all costs incurred prior to litigation are recoverable.

294 We cannot agree that there is any contradiction in the Tribunal awarding the fees for counsel's advice as compensation, rather than as legal costs. The approach of the Tribunal is, in our view, correct and in line with what was said in *Hans*[204].

295 We come now to the challenge that the Tribunal erred in awarding the Respondent his legal costs.

296 The unfettered discretion given to the Tribunal by Article IX.3 of the Statute is of crucial importance[205]. The Article provides that:-

> "3. The Tribunal shall determine who shall bear the costs of the application and in doing so may take into account the means of the parties."

297 We agree with the Tribunal that the practice of the Tribunal is so varied that it is difficult to derive any settled practice. This should not be surprising. The Tribunal, in exercising its discretion provided in Article IX.3, is faced with counter-balancing considerations. Much depends on the result, the merit of the case, the justification to bringing the proceedings, the conduct of each party, how arguable each of the points raised was,[206] the means of the parties and many other factors that would take several pages to record and analyse in detail. This is the reason that it is indeed extremely difficult to derive trends in the practice of the Tribunal. It seems that the costs in each case are decided on the facts and special circumstances pertaining to each particular case.

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[203] Above.
[204] Above.
[205] See *Re Bakker,* ILOAT Judgement No. 931 at [6], which emphasises the unfettered discretion of the court as to costs.
[206] *Ototahor, Erasmus and Aina,* CSAT APPL/36 at [37].

298 Subject to what we have just noted, it seems that in several cases of the CSAT, the Tribunal is hesitant to award costs against the Applicant when his Application is dismissed. This explains why in many cases there seems to be no order as to costs or an order that each party pays his/her own costs.

299 In several cases in recent years, where there were no special circumstances, the successful party was awarded his costs. However, we note that no firm principle of practice can be safely derived from CSAT caselaw.

300 In the instant case, the Tribunal, in awarding the successful Respondent his legal costs, in our view, exercised its discretion in a perfectly reasonable manner. Any other order would have been grossly unfair to the Respondent and we agree with the Tribunal that in effect it would have substantially eroded the Respondent's compensation. The Tribunal pointed out that the Applicant showed "uncompromising and aggressive" conduct during the proceedings[207]. We believe this weakened the Applicant's arguments for a different award as to costs.

301 Furthermore, the case itself was one of the most serious that the Tribunal had to try, as it involved the Secretary-General and a high ranking member of the Secretariat. It was a very difficult and complex case and the Tribunal was correct in holding that it would have been extremely difficult for the Respondent and indeed for any claimant to handle a case of this magnitude without legal assistance. This, in our opinion, is an additional factor that makes the award reasonable.

The finalities

302 Before we give our final order, we would like to thank counsel for the parties for the assistance they gave us with their written submissions.

303 We would also like to thank the Secretary of the Tribunal who was of constant assistance to us throughout these proceedings.

304 The Application of Review of the Interim Judgment been unsuccessful for the reasons set out above.

305 The Application for Review of the Compensation Judgment has been successful in part.

[207] Para 109, Compensation Judgment.

Final Orders

306. Consequently, by a majority the Review Board makes the following orders:-

(a) The Application for Review of the Interim Judgment is dismissed.
(b) The Interim Judgment is affirmed under Article XI.10 of the Statute.
(c) The Application for Review of the Compensation Judgment is allowed.
(d) The Review Board rescinds part of the Compensation Judgment. Under Article XI.11 of the Statute, it finds (by a majority) that the Respondent is entitled to recover the following amounts:
    a. £113,305 for loss of earnings before April 2018;
    b. £85,000 for loss of earnings after April 2018;
    c. £20,000 for moral injury.
(e) Save as aforesaid, the Compensation Judgment is affirmed.
(f) The Applicant is ordered to pay to the Respondent the sum that remains unpaid, in accordance with the terms of the Stay Judgment, as well as the interest provided in paragraph 31 of the Stay Judgment and paragraph 124.2 of the Compensation Judgment.
(g) We consider that, overall, the Respondent is the successful party in this review. Accordingly, we order that the Applicant pay the Respondent's costs of the Review. We hope the parties would agree these costs. If they fail to do so, these will be fixed by the Review Board on the written submissions of the parties. Leave is given to the parties to refer the matter to us in the event that they do not manage to reach an amicable agreement.

Delivered this 26th day of July 2019

Signed

_____

Mr George Erotocritou, Former Judge of the Supreme Court of Cyprus,
Presiding Member

Mr Arthur Faerua,
Member

Ms Justice Aruna D. Narain,
Member

Ms Catherine Callaghan QC,
Member

And

Mr Richard Nzerem,
Tribunal Secretary

per Justice Marva McDonald-Bishop, CD

Introduction

1. Having conducted this review, and having had the privilege of considering the views of my learned colleagues, which now form the judgment of the majority, I agree that the Review Application on Liability should, generally, be dismissed, except for the decision arrived at in relation to the suspension decision of 22 June 2016. I am of the view that the Declaration of the Tribunal in relation to that issue should be adjusted to reflect that it is the administering of the suspension decision of 22 June 2016, which was inconsistent with the Respondent's contract of employment and not the suspension decision, itself. Based on what I regard as the need for this variation in the order, I would allow the application on liability, in part.

2. I also share in the decision of the majority that the application for review of compensation should be allowed. Regrettably, however, I am unable to concur in the decision that the compensation judgment should only be rescinded, in part, and that the compensation proposed by them be awarded, in substitution for that of the Tribunal. The entire award of compensation (except for those aspects not challenged on the application for review) should be set aside. The Review Board should then make its own determination of the compensation to be awarded, taking into account some relevant considerations, which, in my opinion, were erroneously omitted by the Tribunal as factors limiting compensation.

3. My learned colleagues have seen it fit to affirm some critical aspects of the Tribunal's reasoning and conclusions on both liability and compensation, which I believe ought not to be affirmed. In the end, I am not persuaded by some aspects of the reasoning and quantification of the award of compensation of the majority to form the view that the award they have proposed in susbtitution of the Tribunal's award is an equitable one, in keeping with the requirements of the Tribunal's statute.

4. I find that there is merit in some aspects of the Applicant's applications for review of both the liability and compensation judgments, which should lead to a substantially less award than that proposed by my learned colleagues. Consequently, I cannot accept the compensation and costs orders proposed by them.

5. I am mindful of the length of the Judgment on Application for Review (the review judgment) and the detailed background already provided, and so to keep the judgment within manageable limits, I have made an effort to provide a synopsis of only the significant reasons for my dissenting opinion on some issues.

Discussion and findings

6. The salient questions for consideration by this Review Board, in treating with the two applications brought by the Applicant, are as follows:

    (a) whether the Tribunal exceeded or failed to exercise its jurisdiction or competence;

(b) whether the tribunal erred in fact or law or both;

(c) whether there is a fundamental error in procedure which has resulted in a failure of justice; and

(d) whether the Tribunal acted unreasonably having regard to the material before it.

7. The standard of evaluating these questions is accepted to be as stated in paragraphs 19-22 of the review judgment.

8. I accept, as a general principle of law, that an award of compensatory damages is not only informed by the existence of liability but, more importantly, by the extent of the liability. As such, in determining the compensation due to the Respondent, due regard must be had to the extent, nature and seriousness (or gravity) of the breaches found to have been committed by the Applicant as well as the critical question of whether those breaches caused the loss, damage and injury, claimed to have been sustained by the Respondent.

9. In assessing the question whether the award of the Tribunal is equitable in keeping with the law of the Tribunal, I found it necessary to examine whether the Tribunal, in coming to its conclusion on the issue of compensation, was correct, in fact and in law, as to the extent of the Applicant's liability. I have concluded that it was not correct in all respects and so the compensation award is rendered flawed. I say so for the reasons detailed below.

Liability Application

Issue: Whether the suspension decision of 22 June 2016 was in breach of the Respondent's contract of employment.

(a) The absence of contemporary record of the basis for the decision.

(b) Whether Ms Applewhaite should have been called to give evidence.

10. I find it difficult to accept as being correct, in law and in fact, or as being reasonable, having regard to the material that was before the Tribunal, the conclusion it arrived at that the decision taken by the Applicant on 22 June 2016 to suspend the Respondent

breached the Respondent's contract of employment or was inconsistent with it. I am led to the view that the decision of 22 June 2016 to suspend the Respondent did not run afoul of the laws. The Tribunal would have erred, in fact and in law, in finding that there was insufficient evidence on the Respondent's reasons for the suspension decision because of the failure to provide a contemporaneous record of the basis on which the decision was made and the failure of the Applicant to call Ms Applewhaite to give evidence concerning the basis of her decision to suspend the Respondent.

11. It is my view that in analysing this issue, a distinction must first be made between the decision to suspend (which was not a disciplinary measure),[208] on the one hand, and the administering or implementation of that decision, on the other. This distinction is critical in evaluating the issues pertaining to the Applicant's complaint concerning the Tribunal's treatment of the suspension decision of 22 June 2016.

12. There is no dispute that the rules, regulations and policies of the Applicant, as detailed in its Staff Handbook, were incorporated in the Respondent's contract of employment. For there to have been a proper finding that the decision made on 22 July 2016 to suspend the Respondent was in breach of the contract of employment, it would have had to be found to have run afoul of the law that governs the Applicant's rights and power to suspend the Respondent. Failing that, it would have had to be found to be inconsistent with other applicable principles of law that applied to the employment contract, irrational or improperly motivated.

13. The Respondent's contention, according to the Tribunal,[209] was that "the suspension decision formed part of the campaign against him and was motivated by hositility towards him. He says that there is no record of the material that was before Ms Applewhaite at the time of the suspension and no record of the reasons for the suspension".

[208]Regulation 19
[209] Interim Judgment [113]

14. The starting point for examining the legality and or propriety of the suspension decision must be the internal laws of the Applicant, which is the primary source of law. When the Staff Handbook is examined, it reveals that the power or right of the Applicant to suspend an employee is derived from two separate and discrete provisions of the Staff Handbook.

15. The first provision is Regulation 19, which provides:

> **"**If a charge of misconduct is made against a staff member and the Secretary – General is satisfied that a prima facie case has been established, the employee may be suspended from duty, with or without pay, during investigation, the suspension being without prejudice to the rights of the staff member."

This relates to the decision of the Secretary-General to suspend on the ground that there is a charge of misconduct against a staff and she is satisfied that a prima facie case of such misconduct has been established.

16. There was no evidence before the Tribunal that the decision taken to suspend the Applicant was on the basis that the Secretary-General or anyone else, for that matter, was satisfied that there was a prima facie case of misconduct in relation to the Respondent. At the time the decision to suspend was made, no charge of misconduct was made against the Respondent. There was to be an investigation into allegations to determine the way forward. The letter that was sent to the Respondent on 22 June 2016 was explicit that no view was formed as to the veracity or otherwise of the allegations.

17. Regulation 19, therefore, could not have assisted the Applicant in its case before the Tribunal and so the weak effort made by it during the course of the hearing to belatedly rely on this provision was properly rejected by the Tribunal.

18. The power or right of the Applicant to suspend, however, is not confined to Regulation 19 and may be exercised on other grounds other than a prima facie case of misconduct and other than in circumstances where a charge of misconduct is made against a staff member. In this regard, Part 5, section 5 of the Staff Handbook proves rather instructive.

19. I find it necessary to treat extensively with this section of the Handbook. I will begin with Part 5, section 5.7; it provides the procedural overview. According to the law, the disciplinary procedure operates in two stages: an informal stage and a formal stage.[210] It explains[211] that allegations of misconduct will normally be investigated before any form of disciplinary action is taken, with the exception of circumstances where a staff member admits the misconduct or where the facts of the case are already explicitly clear, e.g. conviction of a serious criminal offence. In these circumstances, the case will proceed directly to a formal disciplinary hearing.

20. Part 5, section 5.8 then follows. It sets out what the informal stage entails. It makes provision for, among other things, a meeting to be held with the staff member in question. This meeting is called a 'Guidance Meeting' and does not constitute formal disciplinary proceedings.[212] Part 5 section 5.8.6 provides, in relation to the Guidance Meeting, that a "written record of any discussions [in that meeting] will be made and retained by the manager".

21. Based on this provision, when the meeting was held with the Respondent, prior to his suspension, there would have been an obligation on the Applicant to reduce the discussions arising from the meeting into writing. There is no dispute that this was done and that these notes were before the Tribunal for its perusal. The same notes would have been available to Ms Applewhaite. The Respondent was also at the meeting and so would have been in a position to refute matters arising on the record with which he disagreed.

22. Part 5, section 5.10 then makes provision for an investigation, where a matter arises concerning misconduct. The section provides:

> "**Investigation**
>
> 10.1 - **Where a matter arises concerning misconduct, it may be necessary to conduct an investigation (See Section 8,**

[210] Staff Handbook Part 5 section 5.7.1
[211] ibid, section 5.7.2.
[212] Part 5 section 5.5.8(3)

Investigations and the role of the investigator). The allegation of misconduct would be reviewed by the line manager who will determine, in consultation with the Director, HRD, whether there should be an investigation and the type of investigation. Once an investigation is determined, the line manager also assumes the role of the commissioning manager (the one raising the matter) of the investigation.

10.2 - **An investigating officer may be appointed by the Director HRD to conduct an investigation. The investigating officer will gather information that is relevant to the case and will report on their findings to the commissioning manager, usually the line manager. The investigating officer may be external or internal depending on the particular circumstances.**

10.3 - **Upon receipt of the investigation report, the commissioning manager, in consultation with HRD, will determine whether a Disciplinary Board is required.**" (Emphasis added)

23. In keeping with this provision, the letter of 22 June 2016 had informed the Respondent that under Part 5, section 8 of the Staff Handbook, a decision was taken, following the meeting with him, to conduct a further fact-finding mission to ascertain whether there was a need to hold a formal investigation or if the matter could be resolved otherwise. It should be noted that up to this stage, all that would have been required for the line manager to order an investigation was that "a matter arises concerning misconduct". There is no question that a matter had arisen in the circumstances of this case. The Tribunal also found that an investigation into the allegations was 'inevitable' and 'appropriate'.

24. It follows that once a proper basis existed for the investigation to be commissioned, a consideration of the power of the Applicant to suspend the Respondent, during the course of that investigation, would have been triggered. The provisions of Part 5, section 5.11 makes this clear. It reads, in part:

"11.1 The Secretariat reserves the right to suspend a staff member with or without pay while an investigation takes place and during the process of any formal disciplinary proceedings.

11.2 Possible grounds for suspension include (but are not limited to):

a) Where the staff member may or could interfere with key documents/tamper with key evidence;

b) Where the staff member may or could interfere with witnesses;

c) Where the staff member may or could obstruct any investigation(s);

d) Where a member of the Senior Management Committee considers this to be in the interest of the organisation.

11.3 The decision to suspend a staff member rests with the divisional director, in consultation with the line Deputy Secretary-General and Director HRD. Following the outcome of the investigation and/or disciplinary proceedings, any pay withheld for the period of suspension shall be reinstated if the staff member is exonerated.

11.4 The imposition of suspension does not constitute disciplinary action."

25. As is seen above, Part 5, section 5.11.3 indicates the persons who are involved in the decision-making process, concerning suspension during the course an investigation being conducted within the Part 5, section 5 scheme. It is not the Secretary-General.

26. Part 5, Section 5.11.2 specifies several examples of possible grounds for suspension during the course of an investigation that would be commissioned by virtue of the powers conferred by Part 5, section 5.10.1. The list of examples of possible grounds for suspension is not exhaustive and the possible grounds are separate and distinct from the ground under Regulation 19, which is that a prima facie case of misconduct exists. It means that where the power of suspension is exercised under this section by the person who should make the decision under Part 5, section 5.11.3, that person may do so on any of the possible grounds set out in the section or on other posible grounds not specified. This is because the section does not provide an exhaustive list of possible grounds. There is no requirement for there to be a prima facie case of misconduct, even though there is nothing, on the face of the Staff Handbook, to prevent that from being a possible ground.

27. My interpretation of Part 5, section 5.11 has led to the conclusion that notwithstanding Regulation 19, the Applicant still reserves the right to suspend during the course of an investigation, on other grounds, examples of which have been given in the section. It means that the power of the Secretary-General under Regulation 19 is separate and distinct and is not subject, at all, to section 5.11.3. If anything, the 'Part 5 right' to suspend supplements the Regulation 19 power given to the Secretary-General and does not limit it. The Regulation 19 power can be exercised by the Secretary-General on the basis set out, without any reliance on any of the Part 5, section 5 grounds. To employ any other interpretation would give rise to a fetter on the power of the Secretary-General to suspend on the sole basis of being satisfied that a prima facie case of misconduct has been made out.

28. My interpretation of the provisions relating to the power of the Applicant to suspend an employee, therefore, differs from the views of the majority expressed in paragaph 59 of the judgment that where the power is exercised under Regulation 19, there should still be satisfaction of one of the possible grounds listed under Part 5 section 5.11.2. This cannot be so because the clear power given to the Secretary-General to suspend under the Regulation would be cut down by making it subject to Part 5. This could not have been the intention of the framers. I would be very hesitant to render Regulation 19 subject to Part 5, section 5.11.2. There is no need for this to be done as the provisions are clear and unambiguous.

29. I am fortified in my view that the power of the Secretary-General to suspend under Regulation 19 is a 'stand-alone' power by dicta of the Review Board in ***Kaberere Commonwealth Secretariat ("Kaberere no. 2"):*** [213]

> "55. Finally, the Applicant argues that the grounds for his suspension have not been made out, the Applicant was suspended under Regulation 19. **That power is exercisable if**

[213] CSAT apl/20 (no 2) [55]

> **and only if the Secretary-General is satisfied that a prima facie case of misconduct has been established.**
>
> 56. **Because the threshold for suspension is a prima facie case of misconduct, there is no need for the allegation of misconduct to be "proven" before the power to suspend is exercised. It is sufficient that there was at that time a prima facie case of misconduct**. Indeed, it may be sufficient that it was reasonably open to the Secretary–General to consider that a prima facie case of misconduct had been made out. But this is not an issue that we need to decide in this case, as the Initial Panel proceeded on the basis of the higher threshold, more favourable to the Applicant, asked whether the test of prima facie case of misconduct was satisfied, and found that it was." (Emphasis mine)

30. Part 5, section 5.11.5 then speaks to what should obtain when the decision is taken to suspend the staff member. It reads:

> "11.5 Where the decision is taken to suspend a staff member, they will be informed in writing:
>
> a) of the reason for the decision to suspend;
> b) of the anticipated duration of suspension;
> c) whether the suspension is with or without pay;
> d) that the period of suspension will be reviewed regularly;
> e) that they will be kept informed of the progress of the proceedings;
> f) that they may be required to attend an investigatory interview;
> g) that, depending on the outcome of the investigation, they may be required to attend a formal disciplinary board hearing."

31. The provision clearly shows that there is a legal obligation on the part of the Applicant, when the decision to suspend a staff member is made, to inform the staff member " of the reason for the decision to suspend". This is not a pre-suspension conditionality. It should be taken to mean then that whatever is stated in the notice to the staff member to be the reason for the suspension should be regarded, for all intents and purposes, as the decision maker's actual reason for the suspension. In my view, the Applicant must be taken to be bound by the reason stated in writing to the staff member. This would be in keeping with the rules of natural justice, since if the Applicant is not taken to be bound by that reason, it could go changing reasons to the detriment of the staff member. This is clearly

demonstrated in this case, by the presentation of the case for the Applicant at the hearing, during the course of which reasons were being advanced, which were not indicated in the letter to the Respondent. A reason not stated in the letter could not have been properly accepted by the Tribunal from the Applicant as the reason or basis for the decision.

32. It follows then that if a ground is relied on by the Applicant to suspend a staff member, which is not specified in the Staff Handbook, but is conveyed to the staff member in writing, the reason cannot, without more, be declared to be unlawful, wrong or otherwise improper by the Tribunal, without an objective analysis of that given reason, within the framework of the relevant law and evidence presented to the Tribunal relating to the decision to suspend

    It was to the letter given to the Respondent that the Tribunal was to first look for the reason for the decision to suspend him. The argument of the Applicant that was before the Tribunal and before this Board is that the reason and evidential foundation for the decision were evident on the face of the letter itself. The Applicant contends that the reason for the decision was the nature of the allegations which clearly fall within the meaning of misconduct under the Applicant's Staff Handbook. The Applicant further argued that there was no further obligation on it to provide reasons for the suspension. It maintained that in any event the evidential basis was set out in the letter of 12 August 2016 to which the Fact Finding Report was attached. [214]

33. The terms of the letter of 22 June 2016 must be examined fully in determining its full meaning and effect. For present purposes, it reads in part: [215]

"ALLEGATION OF BREACH OF CONFIDENTIALITY

The letter below is sent on behalf of the Chief of Staff, Office of the Secretary-General, Ms Lolita Applewhaite

[214] [Applicant's] Application for Review of Liability Judgment [40 - 46]
[215] Application and Annexes Vol 1/Annex 44

I refer to your meeting with Mr. Gary Dunn, Deputy Secretary-General, Corporate, on 12th June 2016, regarding the handling of confidential information allegedly in contravention of the Secretariat's IT policy.

During that meeting with Mr. Dunn, you were asked a series of questions. It has been determined that the answers that you have provided were inconclusive. As a result of this, I wish to notify you that a decision has been taken under Part 5, Section 8 of the Staff Handbook to conduct further fact finding with a view to ascertaining if there is a need for formal investigation or if the matter can be addressed and resolved without a formal investigation.

The allegations against you are that you forwarded confidential and sensitive information from your official email to your personal email from the Secretariat's IT systems. You then made a deliberate attempt to conceal the fact that you had forwarded specific confidential emails to your personal email by deleting the electronic record of the email or any trace that it had been forwarded from your official email account.

In taking these actions, it is alleged that:

1. You have acted in breach of the Secretariat's confidentiality policy particularly its IT policy in Section 12 of the Staff Handbook, a copy of the relevant policy is provided as Annex 1.

2. You inappropriately handled confidential and highly sensitive information you had access to in your position as Deputy Director of the Office of the Secretary-General.

Due to the nature of the allegations, a decision has been taken by the Chief of Staff to suspend you, with pay, with effect from Monday 27th June 2016 when you are due to return from annual leave. The suspension will remain in force until the Secretariat concludes the fact finding and any subsequent related procedures.

…

It is important to note that at this stage, the suspension does not constitute disciplinary action and the Secretariat has not reached a decision as to the veracity or otherwise of the above allegations.

You are reminded that you are required to keep all matters concerning the fact finding confidential and they should not be discussed with anyone else in or outside the Secretariat."

34. The core challenge of the Respondent was not that the suspension decision made on 22 June 2016 was wrong for failure to comply with the provisions that govern suspension during the course of investigation. His contention was that it was made for an improper purpose, being part of the campaign against him and hostility towards him. He prayed in

aid, the fact that there is no contemporaneous record showing the basis for the decision taken on 22 June 2016 to suspend him. He had requested to see the "report" on which Ms Applewhaite had based her decision to suspend him on the 22 June 2016. This is seen from his Interim Statement,[216] which he stated was to be taken part of his grievance before the Tribunal.

35. The record reveals that in his Interim Statement, the Respondent raised the issue relating to his need to see the "report", which formed the basis of the decision to suspend him.[217] He then explained the efforts he had made to secure the document and his failure to do so. He then continued:

> "Therefore, this makes me conclude that the decision taken by Ms Applewhaite to suspend me was arbitrary and based on no evidence but other 'factors' which I have covered with evidence in section M of this statement." [218]

Later in the Interim Statement, he reiterated that "in the absence of any evidence of a report that warranted my suspension, it is clear that Ms Applewhaite took the decision to suspend me without a basis." He indicated then that he would be seeking to call Ms Applewhaite (as well as the Secretary-General) at the Disciplinary Board meeting.

36. It is clear from the Respondent's case that he recognised a purported basis for the decision to be matters emanating from the meeting held on 12 June 2016, with Mr Gary Dunn. The letter has indicated that much by its reference to that meeting and what it stated transpired there. The reason given for the suspension was the nature of the allegations involving breach of confidentiality. The Respondent never contended that no reason was disclosed in the letter. What I understand him to be saying is that regardless of what is stated in the letter, the decision made to suspend him was based on no evidence but other 'factors' in respect of which he had evidence.

[216] Vol 2 Annex 9
[217] Vol 2 Annex 9
[218] ibid

37. The issues pertaining to the propriety of the suspension decision was raised by the Respondent as a dispute for consideration by the Tribunal. This had implications for the role and function of the Tribunal during the course of the hearing. In considering this aspect of the decision, I consider it necessary to point out that the Tribunal had undertaken a dual role in the proceedings brought by the Respondent. One component of its functions, based on the application before it, was to act as a review forum in relation to the decision of the Disciplinary Board and the Applicant's internal appeal decision, relating to the hearing into the allegations of misconduct against the Respondent and the sanctions imposed on him. At the same time, the Tribunal also embarked on considering, as a related matter, the grievance of the Respondent regarding his suspension, which was not determined or resolved by the Disciplinary Board or the internal appeal proceedings.[219]

38. The Tribunal, therefore, acted as a first instance forum dealing with disputed facts, including matters relating to the suspension decision. In this regard, therefore, the Tribunal was not conducting only a review of that decision but would also have been acting as a forum, at first instance, hearing a case brought by the Respondent raising issues of, among other things, unfair and discriminatory treatment, in order to make its own determination on the facts.

39. As a review forum, it would have been circumscribed in its ability to draw inferences or to substitute its own views for those of the decision makers at first instance, be it the Disciplinary Board, the appeal forum or the person who made the decision to suspend. However, as the first instance forum, treating with several aspects of the Respondent's grievance, which gave rise to disputed facts, the decision making in relation to those issues would have been for the Tribunal. In that regard, The Tribunal would have been entitled to make findings of facts, including the drawing of inferences from proven facts, given that the drawing of inferences is tantamount to the finding of facts.

[219] This has generated another ground for review pertaining to the jurisdiction of the Tribunal to treat with the grievance of the Respondent on issues not before the Disciplinary Board. Review application on liability [47]

40. It would have been open to the Tribunal, then, to infer the basis or the circumstances that had informed the decision to suspend the Respondent from the letter itself along with any other documentary evidence before it that could shed light on the validity, propriety and sincerity of the decision to suspend. This would have included the notes from the meeting referred to in the letter. This was not a letter in which no clear reason or basis for the reason was not indicated.

41. It was the Respondent, who, having been given the letter stating a reason for the suspension, sought to challenge the suspension decision on the ground that it formed part of the campaign against him and was motivated by hostility towards him. His case was one of unfair and discriminatory treatment being meted out to him by the leadership of the Applicant and that as part of this, the suspension (as well as the disciplinary process) was for an improper purpose. His case was not that no reason was given in the letter, thereby putting the onus on the Applicant to present the reason. His view was that he ought to have seen the "report" on which the decision to suspend him was based in order to know what was in the mind of the decision maker or what had informed the decision.

42. Despite the fact that arbitral proceedings are not to be burdened with formal legalism and rigid strictures of the general law or of the laws and procedures of national courts, it must be accepted that when a party to quasi-judical proceedings, such as this, raises a positive or affirmative case against the other party, which is disputed, then the party raising the issue must be taken to have assumed the risk of non persuasion. That party is required to bring evidentiary material to establish that which he asserts in order to persuade the tribunal of fact to his view. The person against whom the allegation is brought and who would have to prove the negative ought not to be called upon as the party having the ultimate burden of proof, unless it is in relation to a matter within its own peculiar knowledge.

43. I say all this to say that in this case where the Respondent's case was one of discrimination, unfair treatment and victimisation that was borne out of a vendetta against

him, and where he alleged that he had the evidence to prove other 'factors' as the reason for the decision, he bore both the evidential and ultimate burden to prove those assertions. His duty to prove his case was totally independent, separate and distinct from the duty on the Applicant, which would only have been an evidential one, to disprove or rebut the case brought by the Respondent.

44. The Tribunal had cited **Ayeni v Commonwealth Secretariat**[220] in support of the principle that an administrative authority must give reasons for his decision. However, it is useful to have regard to that extract in its entirety it states:

> "37. An Administrative authority must give reasons for its decision and where it fails to give clear reasons for the non-renewal of the contract the **Tribunal will examine the evidence available in order to establish whether or not the decision was improperly motivated**."[221] (Emphasis mine)

I accept this principle as a sound statement of law. In this case, the decision for the suspension was given in writing to the Respondent. In my view, the reason was clearly set out. But as **Ayeni** instructed, even where the reason is not clearly given, "the Tribunal will examine the evidence in order to establish whether or not the decision was improperly motivated".

45. In the face of the challenge to the propriety of the suspension decision in a case like this, in which the Tribunal was called upon to resolve the matter in dispute as a tribunal of fact at first instance, there ought to have been an independent and objective analysis of the decision to suspend, against the background of the law, the incidence of the burden of proof and all the surrounding circumstances revealed on the relevant evidence before it including the leak of information to the media.

46. The Tribunal was to examine whether the reason stated in writing was in conflict with the law or the contract of employment. In fact, the core question would have been

[220] CSAT/12 (No.2).
[221] Ibid. [37]

whether the decision was made for an improper purpose, as alleged by the Respondent. The Tribunal did not take its enquiry that far and so by failing to do so, it erred in law, in my view.

47. When the provisions of the Staff Handbook, which relate to the suspension of staff members, are closely examined, it is clear that there is no requirement for any contemporary record to be taken and kept of the reasons for the suspension for the purpose of disclosure to the staff member, the Tribunal or anyone. The rule expressly requires a record of discussions at the informal meeting to be kept and not one of the basis for the reasons for suspension. Had the framers of the rules required a separate record to be kept by the decision maker of his state of mind and what formed the basis for the reason for the suspension, other than that it be stated in the letter to the staff member, they would have said so expressly as they had done in relation to the record of the meeting at the informal stage.

48. The Staff Handbook must be accepted as having incorporated the minimum standard of fairness and the rules of natural justice in order to ensure fairness in the suspension process. This is clearly evident in the provisions of Part 5, section 5.11.5. The fact that the framers of the rules did not provide that contemporary record of the reasons for the decision must be retained for the purposes of disclosure to the staff member must be taken to mean that such an obligation was not intended. I do not believe that such an obligation should be read in the Statute, especially bearing in mind that the suspension was not a disciplinary action and that provisions are made for the reason to be relayed to the staff member in writing when the decision is made. There was clear compliance with this requirment in this case.

49. In the absence of a requirement in the rules and regulations that a contemporary record of the basis for the decision is to be provided, and given that a reason was expressed in the letter to the Respondent, the Tribunal would have acted contrary to law, in my view, in placing such an obligation on the Applicant. While the making and retention of a contemporary record of the basis for the decision may be prudent or desirable, there is

nothing to say it was obligatory, as a matter of law, so as to vitiate the decision due to failure to provide that record or to bring evidence to explain the basis on which the decision was made.

50. There is nothing in the Staff Handbook or anywhere indicated in the reasoning of the Tribunal that would have rendered the reason given in the letter to be an unlawful one, since it was not expressly or implicitly ousted by the statutory framework of the Applicant or any other law. The fact that the Applicant presented arguments before the Tribunal, raising other reasons, was not determinative of the issue. Those reasons were to be rejected, as the Tribunal rightly did, because the Applicant would have been bound by the reason given to the Respondent in his letter and ought to have been treated as being so bound.

51. If the reason was not precluded by the law of the Applicant or did not breach the Respondent's fundamental rights or any other acceptable and relevant law, then the Tribunal ought to have examined whether it was given for the improper purpose alleged by the Respondent. The Tribunal did not examine the available evidence before it and arrive at such a finding. In fact, it had refrained from making any finding on improper or ulterior motive, which was the core contention of the Respondent in challenging the suspension decision.

52. Given the absence of any finding on the part of the Tribunal that the reason for the suspension that was given in the letter was contrary to law or irrational or that the decision was made for an improper purpose, I find it difficult to appreciate how it could have arrived at a finding that the suspension decision made on 22 June 2016 breached the Respondent's employment contract. In my view, it was not open to the Tribunal on the material that was before it, to so find. There was no legal obligation on the Applicant to provide a contemporary record of the basis for the decision taken to suspend the Respondent, outside of the letter in writing.

53. Consequent on this finding, I have also formed the view that there was no reason in law for Ms Applewaithe to give evidence of the basis on which she had arrived at her decision to suspend the Respondent. The letter was very clear on the face of it as to the purported basis. It was for the Tribunal to determine the validity and propriety in law of the basis, before declaring the decision to be inconsistent with the Respondent's contract of employment, regardless of any other reason advanced by the Applicant at the hearing.

54. It was no doubt the attempt by the Applicant to improperly introduce new reasons that led the Tribunal to the conclusion that the letter did not disclose the reasons it was contending at the time. The Applicant, of course, must be faulted for the manner it presented this aspect of its case. However, that notwithstanding, the Tribunal would have needed a firm legal basis to have moved from the point of there being no contemporary record or evidence from Ms Applewhaite at the hearing to explain the basis for the decision, to declaring the decision as being in breach of the Applicants obligation under the Respondent's contract of employment. I have not been able to discern the legal basis for that conclusion and, particularly so, in the light of the absence of a finding by the Tribunal that the suspension decision was for an improper purpose, as alleged by the Respondent.

55. Having considered all these matters, I form the view that the Tribunal erred in fact and in law or otherwise acted unreasonably having regard to the material before it and on the totality of the circumstances, in arriving at its conclusion that the Applicant ought to have provided contemporaneous record of the decision to suspend the Respondent or should have called Ms Applewhaite to give evidence as to the basis for the suspension. The legal obligation of the Applicant in relation to disclosure of the reason or basis for the decsion to suspend made on 22 June 2016 was discharged upon giving the reason for the suspension in writing to the Respondent.

56. Regrettably, for the foregoing reasons, I cannot agree with my colleagues that the decision to suspend the Respondent on 22 June (as distinct from how the suspension was administered following the decision) was not made in a manner consistent with the

Respondent's contract of employment or was a breach of the Applicant's obligations under the Respondent's contract of employment.

57. I agree that the Applicant would have failed to review the suspension regularly, and that there was no justification for its continuation after the sanction was imposed on the Respondent by the Disciplinary Board. These are breaches of the Respondent's contract of employment for which the Applicant should justifiably be held liable, in relation to the Respondent's suspension. However, the Declaration of the Tribunal that the suspension decision was inconsistent with the Respondent's contract of employment should, in my view, be taken to be only in these two respects, which would not have affected the lawfulness of the decision itself.

58. It is on this basis that I would rescind or vary the Declaration made by the Tribunal and substitute one to reflect the conclusion, which I have arrived at that the suspension decision itself made on 22 June 2016 was not inconsistent with the Respondent's contract of employment.

The Compensation Application

Issue: Whether the Applicant caused the loss, damage and injury suffered by the Respondent

a. *The suspension decision*

59. The finding, on my part, that the suspension decision is lawful has served to inform my view of the compensation that should be awarded to the Respondent as a result of the Applicant's breaches. It is my opinion that the liability of the Applicant ought not to extend to the decision made on 22 June 2016 to suspend him. it follows that all the damage, injury or loss alleged by the Respondent to have flowed from the decision to suspend him, made on 22 June 2016, would not be recoverable from the Applicant because the decision would have been lawful. Unfortunately, he would have to live with the repercussions of that lawful decision, whatever the consequences may be.

60. The Tribunal had taken the suspension into account in determining the award. This is clear from its Compensation Judgment in which at paragraph 48, it stated:

> "48. It is common ground that the purpose of an award of compensation is to put [the Respondent] in the position he would have been in had the breaches identified in the interim judgment not occurred. **The focus must therefore be on a comparison between the position [the Respondent] is in now, and the position he would have been in if the [Applicant] had not suspended him,** conducted an unfair disciplinary process and issued a final written warning, and made inappropriate comments about him to the media in late 2016." (My Emphasis)

61. At paragraph 11 of the Interim Judgment, the Tribunal had noted that the Respondent sought rescission of the decision to suspend him. The Tribunal did not, however, rescind the suspension decision. It declared that there was a breach of the Applicant's obligations under the contract of employment. The Respondent was treated for the purposes of compensation, however, as if the suspension decision was rescinded. In the light of my findings that the suspension was lawful, I cannot accept the Tribunal's basis for awarding compensation to the Respondent, that is to place him in the position he would have been in had the Applicant not suspended him.

62. Given that that my learned colleagues have affirmed the Tribunal's decision on the suspension decision and have taken it into account in the detrmination of their award, as being partly responsible for the Respondent's alleged loss, injury and damage complained of under the various heads of the award, I cannot agree with the proposed compensation to be awarded.

63. I would have taken no issue with an award of compensation that is limited to the consequences that are proved to have resulted from or caused by the breaches committed by the Applicant in administering the suspension decision, along with the other breaches, which I agree with the majority had been committed.

b. causation in relation to the Respondent's failure to find new employment

64. Even if the suspension decision itself was wrongful, I find that I entertain grave concerns relating to the question of causation and the Tribunal's finding relating to the extent of the Applicant's liability to pay compensation to the Respondent. Consequently, I am unable to share the views of the majority on some fundamental aspects of their decision relating to compensation. In my view, the Respondent has failed to establish that critical causal link between the proved breaches of the Applicant and all the loss, injury and damage, allegedly suffered by him and in respect of which he claims compensation.

65. I have concluded that the Applicant's contention in its application for review that the amount awarded is manifestly disproportionate to the breach and not linked to causation,[222] is not at all without merit. I accept it for reasons which now will be outlined.

66. In his Submissions on Remedy for Compensation, the Respondent pointed to, among other things, the various acts of unlawful conduct towards him by the Applicant, which he says "entirely" destroyed his ability to obtain new employment. He maintains that in 2016, with several months to go before his contract drew to an end, he was well placed to search for a new role from a position of great strength. He contends that his suspension contributed not only to his isolation but also to his serious illness, which left him hospitalised, his name was besmirched in the press and across the internet by 'public attacks' by the Applicant, which the Tribunal found to be 'wholly inappropriate' and calculated to discredit him and harm his reputation". [223] The gravamen of his case was that but for the Applicant's unlawful treatment of him and statements in the media, he would have secured well-paid employment upon the expiration of his contract.[224]

67. The Tribunal stated in paragraph 51 of its Compensation Judgment:

> "Those breaches by the Secretariat/Applicant were inherently likely to have damaged [the Respondent's] reputation and prejudiced his search for new employment as the Tribunal observed in the Interim Judgment at [168]."

[222] Application for Review Compensation [6]
[223] [Respondent's] Submissions on Remedy, paragraphs 4-5.
[224] [Respondent's] Submissions In Response to the [Applicant's] Applications for Review [150]

At paragraph 168 of the Interim Judgment, the Tribunal had found the Applicant liable to pay compensation because its breaches were "inherently likely" to have caused the loss, damage and injury of which the Respondent complained. The Tribunal did not make a finding that on, the breaches, in fact, caused the damage, injury or loss, allegedly, sustained, on a balance of probabilities. The Tribunal's finding on this question was, therefore, not entirely in keeping with the Respondent's pleaded case that the Applicant was the cause of his difficulties in finding well paid alternative employment upon the end of his employment on 31 December 2016 or that but for the Applicant he would have obtained such employment.

68. The concern I have with the Tribunal's treatment of the question of causation is even more compounded by its findings of the absence of direct evidence that the Applicant caused the difficulties alleged by the Respondent. After stating some aspects of the Respondent's evidence concerning his search for jobs and what he was told by a recruiter[225], the Tribunal stated:

> "53. There is no direct evidence that the reason that [the Respondent] did not obtain this particular job, or the many jobs that he applied for in the relevant period, was the action taken against him by the [Applicant] or the media statements made by the [Applicant]. And we bear in mind that there was nothing wrongful in the [Applicant] deciding to investigate whether the [Respondent] was responsible for the leak; to the contrary such an investigation was inevitable and appropriate."[226]

69. The Tribunal, without identifying the evidence on which it relied, in the absence of direct evidence, then subsequently stated, after considering several matters raised by the Applicant:

> "64. **On the basis of the evidence before us we are satisfied that the [Respondent] was likely to have found employment from early 2017 onwards if the [Applicant] had not breached the obligations to him, and that the [Applicant's] breaches were the <u>principal cause</u> of his failure to obtain new employment at this time. The [Applicant's]**

[225] Compensation Judgment [52]
[226] Compensation Judgment [53]

breaches <u>contributed</u> to his inability to find new employment in a number of ways:

64.1 they had a direct adverse effect on his reputation and his attractiveness to employers;

64.2 they had a significant adverse effect on his health; which impaired his ability to seek and take up new employment;

64.3 they prevented him finding new employment whilst still employed by the Secretariat, which meant that from January 2017 onwards he was in the much less advantageous position of seeking employment while unemployed." (Emphasis added) [227]

70. Then at paragraph 66, the Tribunal concluded under that section:

> "We consider that the [Respondent] should recover compensation in relation to the remuneration he is likely to have earned during the period January 2017 to April 2019 but for the [Applicant's] wrongful action: a period of 16 months."

71. From the reasoning above, it is clear that the Tribunal is saying that it had found evidence that satisfied it that:

(a) the Respondent was likely to have found employment from early 2017 onwards if the Applicant had not breached its obligations to him;

(b) the Applicant's breaches were the "principal cause" of the Respondent's failure to obtain new employment; and

(c) the Applicant "contributed" to the Respondent's inability to find new employment in a number of ways.

72. The fact that there was no direct evidence that the reason the Respondent did not obtain employment was as a result of the Applicant's breaches, must be taken to mean that in making the findings detailed above, the Tribunal would have had to have indirect evidence of those facts. The Tribunal must, however, demonstrate, by its reasoning, those proved facts or the indirect evidence from which it had drawn a reasonable inference that

[227] Compensation Judgment [paragraph 64]

the actions and media statements of the Applicant were the cause, principal cause or contributed to the Respondent's inability to find new employment as it had found.

73. The Tribunal has not identified the facts on which it relied in coming to those crucial conclusions on the issue of causation. Counsel for the Respondent had indicated those facts which he said existed, from which the Tribunal could have come to those findings[228]. Having examined the evidence pointed out by Counsel, I cannot agree that those facts relied on by the Respondent sufficiently support the conclusions arrived at by the Tribunal on causation.

74. Added to the absence of evidence, it is also observed that the Tribunal found in one respect that the Applicant was 'the principal cause' of the difficulties and, in another respect, that it had 'contributed' to the difficulties in a number of ways. None of these terms used by the Tribunal to describe the blameworthiness of the Applicant conveys a finding of exclusive or sole responsibility on the part of the Applicant. The Tribunal, however, has not indicated in its judgment any other cause or contributor it had identified as being likely to have affected the Respondent's employment prospects at the material time. In other words, other than the applicant, it had not expressly identified anything else that would have been "inherently likely" to cause the damage of which the Respondent complained.

75. Even if it were to be accepted that there was evidence to support the finding that the Applicant was the 'principal cause' or 'contributed' to the Respondent's difficulties and that that is sufficient in law to ground causation, there would have had to be an apportionment of liability based on this finding for the purposes of compensation. The finding was not definitively and consistently that the Applicant was the cause of the problems alleged. As a result of this failure in apportioning liability, there is also a resultant failure on the part of the Tribunal to reflect the apportionment of liability in the process of the quantification of the award. Therefore, there is no allowance made, by way

[228] [Respondent's] Submissions in Response to the [Applicant's] Applications for Review [154]

of reduction in the compensation, for other likely or potential causes and co-contributors, even if minor.

76. There is also no identification in the quantification process of any mitigating fact or circumstance that would have arisen on the evidence, and which would have served to limit the liability of the Applicant in paying compensation to the Respondent.

77. In the light of these omissions on the part of the Tribunal, I am unable to confidently say that it had not erred, in fact or in law, in assessing the extent of the liability of the Applicant for the purpose of compensation. It evidently did not have regard to other factors that would have affected the question of causation and the extent of the liability of the Applicant to compensate the Respondent.

78. The Applicant has argued that the Tribunal had overlooked or failed to give proper weight to the evidence of other information that was in the public domain and which would or could have affected the Respondent's reputation and employment prospects. It also complained that the Tribunal overlooked or failed to give proper weight to the evidence of the Respondent's overall conduct, which could have impeded his job search.[229] In my view, these submissions are not without merit.

79. There were, in my view, other material factors which ought properly to have been taken into account by the Tribunal and be applied as limiting the compensation to be awarded. Those factors were rejected by the Tribunal or omitted to be considered as having any effect on the extent of the Applicant's liability and or the quantum of the compensation. I will focus on three significant ones for present purposes. They relate to:
    (a) the parties' conduct in the media;
    (b) the Respondent's whistleblower status in the media; and
    (c) the media reports of the Respondent's alleged involvement in the Indian Fraud Investigation.

[229] Paragraphs 21-33 of the Applicant's review of the application on compensation

Relevant considerations

a. The parties' conduct in the media

80. One aspect of the Applicant's contention is that the Tribunal failed to take account of evidence which showed that the Respondent was responsible for disclosing to the media information of his suspended status during the course of his employment.[230]

81. At paragraph 231 of the judgment of the majority, my learned colleagues concluded that "there is no basis for a finding that the Tribunal failed to take account of evidence, which showed that the Respondent was responsible for the disclosure in the media of his suspended status during the course of his employment." They accepted the Tribunal's conclusion that the Respondent did not provide any information of substance to the media during his employment. Unfortunately, I have a difficulty with this conclusion in the light of my examination of the media reports and other evidence, which were before the Tribunal.

82. In treating with the Applicant's arguments about the contribution of the Respondent to the media publicity, concerning his suspension and other matters, the Tribunal found that the Applicant had not established that the Respondent had breached any confidentiality obligations by making disclosures to the media in the course of his employment. It also rejected the Applicant's argument on the basis that disclosures by the Respondent to the media, would have been relevant to the assessment of compensation only if they were the effective cause of his difficulties in finding employment or were a significant contributing factor to those difficulties. It concluded that, "on the basis of all the material before us, we do not consider that any disclosures [the Respondent] have made to the media have been a material factor in his difficulties in finding new employment."[231]

83. Then, at paragraphs 65, the Tribunal continues:

[230] Paragraphs 27, 36-37 of the Applicant's review of the application on compensation
[231] Paragraph 57 Judgment No.2(Compensation)

> "We do not accept that [the Respondent] caused or substantially contributed to his inability to find employment in this period. The evidence before us does not support the [Applicant's] argument that [the Respondent] courted media attention in this period, and is responsible for bringing the adverse publicity to himself. He did not court media attention. Rather, his unchallenged evidence is that he did not contact any media organisations during this period, and provided no information of substance to the media during this period, apart from confirming that he was the author of a document already in the hands of the newspaper…"[232]

84. The Tribunal had arrived at its conclusion on what it considered to be the unchallenged evidence of the Respondent that the only thing he did was to confirm authorship of his resignation letter that was already in the hands of the media. The fact that the Respondent was not challenged on this assertion does not mean it ought to have been accepted, without more. The Tribunal's duty was to determine whether the assertions of the Respondent were acceptable on a totality of the evidence before it, including the exhibited media reports and other undisputed documentary evidence.

85. Some aspects of the chronology of events after the suspension, which relates to the parties' interaction with the media, would have been before the Tribunal for consideration. The chronology of events is critical to a proper evaluation of the ground of review, concerning the parties' interaction with the media. The available chronology of events reveals, among other things, the following salient facts. On 22 June 2016, the suspension letter was sent to the Applicant. It was marked as a confidential document. On 20 July 2016, the Respondent prepared his Protected Disclosure Statement, setting out instances where he said he identified concerns regarding the Applicant. This was attached to his Interim Statement, which he sent to the Disciplinary Board. The complete Protected Disclosure statement was eventually sent by the Respondent not only to the Applicant but to High Commissioners. In his resignation letter of 1 October 2016, the Respondent indicated that he would be keeping the Chair of Broad of Governors and Troika comprising past, current and further Chair-in-Office apprised of this matter because of organizational procedures.[233] In the letter it was indicated that these persons

[232] Paragraph 65 Judgment No.2(Compensation)
[233] Vol 2 Annex 13

were copied on it. The contents of these documents ended up being published in the media.

86. There is no evidence that the Respondent was directly responsible for the dissemination of the information contained in those documents in the media but there is evidence that was before the Tribunal showing that he had shared the documents with others other than the Applicant.

87. In the documents that were before the Tribunal were media reports naming the Respondent as the source of information about the Secretary- General and the Applicant, prior to the Applicant issuing its statements, which the Tribunal found to be inappropriate and disparaging of the Respondent. One media report of 7 October, 2016 described the resignation letter as "excoriating". [234] In that article, the photograph of the Respondent appeared alongside the Secretary-General and he was identified as having made certain allegations against the Secretary-General. At times, it is difficult to determine whether the media was repeating things said to them directly by the Respondent or whether they were quoting from his documents in their possession. One thing that is undisputed is that they named the Respondent as the source of the information pertaining to the Applicant and its leadership.

88. It means, therefore, that when media reports referred, as they often times did, to things reportedly said by the Respondent and attributed some statements to him directly, it cannot be said with any degree of certainty, without hearing from the reporters involved, that those statements they had attributed to the Respondent were not directly made by him to them. The Tribunal accepted the Respondent that he made no direct contact with the media. I cannot disturb that finding. What I will say, however, is that even though the Respondent may not have directly engage the media, the question was whether, through him or his instrumentality, information about his grievance with the Applicant had reached outside the disciplinary mechanism of the Applicant. It cannot be denied that the

[234] Vol 4 Applicant's Documents Tab 1

Respondent had caused that to happen. He sent the documents to the High Commissioners who were not a part of the disciplinary machinery.

89. Therefore, even if the Respondent did not make the statements directly to the media but they were contained in the information he shared with third parties, outside of the Applicant's disciplinary mechanism, he would still be indirectly responsible for the dissemination of the information. He would have assumed the risk of it passing from the hands of the third parties, with whom he had shared the information. By taking his grievance outside of the disciplinary mechanism established by the Applicant and bringing it to the attention of third parties, unconnected to the mechanism, he must be held to be, at least, partially responsible, for the information regarding his suspension and the disciplinary proceedings reaching the public's attention.

90. In fact, at paragraph 77 of the Compensation Judgment, the Tribunal observed within this context:

> "77 [The Respondent] says he will continue to be seen as a whistle-blower following delivery of the Interim Judgment, and that this is also potentially damaging to his employment prospects. **However we do not consider that his "whistleblowing" actions in bringing certain matters to the attention of the High Commissioners at the time he sought to resign from the [Applicant] were caused by the [Applicant's] breaches: this was a step [the Respondent] took on his own initiative and any consequences it may have are not fairly attributable to the** [Applicant]. (Emphasis added)

91. Having established that fact of the Respondent's action in conveying information to the High Commissioners, the Tribunal then proceeded to state:

> "Nor, however, do we consider this action- which was confined to communicating with Commonwealth High Commissioners, and did not involve disclosure of his concerns about the management of the [Applicant] to the media or the wider public- can be seen as courting publicly in a manner that reduces the Applicant responsibility for the harm its actions caused to [the Respondent's] reputation."

92. It is seen that although the Tribunal recognised that the Respondent had brought certain matters to the attention of the High Commissioners on his own initiative, the consequences of which could not "fairly be attributed" to the Applicant, it failed to state that it is the Respondent who would have had to bear the consequences of his action.

93. The role of the Respondent in contributing to the dissemination of information was a relevant consideration on the issue of causation and compensation, which was disregarded by the Tribunal. The issue was not whether the Respondent was the cause, "effective or substantial cause" but whether he contributed in any way, even if small, to the damaged, allegedly, caused to his reputation as a result of the extensive media publicity surrounding his suspension and the disciplinary proceedings instituted against him. The Tribunal would have had to find his contribution to be *de minimis* to properly disregard it and it did not so find.

94. In any event, even if the Tribunal was correct in not seeing it necessary to discount the compensation on account of the Respondent's contributory conduct, it, nevertheless, failed to give the Applicant the benefit of the finding that it was not to be blamed for the consequences of, what it called, the Respondent's "whistleblowing" actions in bringing certain matters to the attention of the High Commissioners. The Tribunal ought to have taken into account too, in the assessment of the extent of the Applicant's liability for the purposes of compensation, that at no time did the Respondent allege or prove that the Applicant had issued any information, pertaining to his suspension and disciplinary proceedings, to the media or the public, in general, before the news of his resignation and Protected Disclosure Statement was circulated in the media.

95. The Tribunal ought to have, at least, given the Applicant the benefit of not being the one to have started the 'media ball rolling'. This is because if the Respondent and the Applicant were both not responsible and the 'media storm' was raging as it was, then the only rational explanation would have been that it was due to the 'act of a stranger'. Even on the basis of that alternative analysis, the Applicant could not have been held to be the cause of the media publicity surrounding the Respondent's suspension and the

disciplinary proceedings. There is also no evidence that the Applicant had engaged with the media after November 2016, thereby contributing or causing further media spotlight on the Respondent up to the date of the final judgment. The Tribunal made no allowance for this in its evaluation of causation and the quantification of compensation. It seems to me that fairness would have demanded such a consideration, since the aim of the Tribunal was to arrive at an equitable compensation.

96. By not allowing any discount in the compensation on account of the media publicity not caused or contributed to by the Applicant, the Tribunal would have, in effect, attributed to the Applicant all the responsibility for the revelation of information about the Applicant in the media and his resultant inability to secure employment as he alleged. This would have been so although it had said that the Applicant was the principal cause and had contributed to the difficulties he allegedly experienced. The Tribunal would have ignored its own conclusion made at paragraph 77 of the Compensation Judgment that the Respondent had brought certain matters to the attention of High Commissioners on his own initiative and so any consequences it may have are not attributable to the Applicant.

97. I find that the Tribunal erred in fact and in law, or acted unreasonably having regard to the material that was before it in treating with the parties' interaction with the media in determining causation and the award of compensation.

b. The Respondent's alleged 'whistleblower' status

98. The nature of the Respondent's interaction with the media is closely connected to the media ascribing to him the description and status of a whistleblower. The Respondent in his Protected Disclosure Statement sought to rely on the protection afforded by the Applicant's Whistleblower Policy. He explained his reason for doing so in his Explanatory Statement.[235] The media referred to him as a whistleblower and detailed contents of the information obtained from his statement and letter of resignation. Yet, he

[235] Application and Annexes Vol 1 Para [8] of Statement

complained before the Tribunal that this designated whistleblower status affected his employment prospects for which the Applicant should be held liable.

99. The potentially adverse effect of the designation of whistleblower status on the reputation and employment prospects of the Respondent cannot be laid at the feet of the Applicant. The Tribunal, however, has failed to take it into account in assessing the crucial question whether but for the Applicant's statements to the media, the Respondent would have secured well-paid employment upon the expiration of his contract with the Applicant. Indeed, the Respondent, himself, viewed his whistleblower status as a factor that would have potentially damaged his reputation and employability.[236] In treating with the question of causation and the quantification of compensation, the Tribunal accorded no weight to this significant fact that the potentially damaging effect of the Respondent's whistleblowing designation was not the fault of the Applicant.

100. I share the views expressed by my learned colleagues that the Tribunal would have erred in not taking this relevant fact into account in determining the quantum of compensation. In my view, the Tribunal also failed to take it into account in determining causation or the extent of the Applicant's liability. This was an error of fact and of law in the light of the material before the Tribunal. This error, in my view, serves to undermine the reasonableness of the award of compensation in a profound way.

101. Where I part company with my learned colleagues in relation to the potential impact of the whistleblowing on the reputation and employability of the Respondent is the apportionment by them of 15% for the whistleblowing. The legal and factual basis for this apportionment is not comprehensible in the light of all the evidence and the questions surrounding the crucial question of causation. The majority has disclosed no evidential or legal basis for this apportionment and so I find it difficult to accept it. I cannot agree, in the absence of clear and cogent evidence, as to what, in fact, caused the Respondent's reported difficulties on the job market, having regard to all the circumstances of the case.

[236] Compensation Judgment [77]; see para. 92 above

102. Fundamentally, the apportionment does not adequately reflect the recognition of the problems attendant on establishing the causal link between the Applicant's wrongful conduct and the damage to the Respondent's reputation and employability. Accordingly, the corresponding adjustment of 15% made by the majority to the awards for loss of earnings do not, in my view, satisfy the requirement of the law that the compensation be equitable. To hold the Applicant liable for the alleged loss of earnings for the period claimed and to attribute 15% to the whistleblowing is based on speculation and not evidence.

c. The Indian Fraud Investigation

103. My departure from the majority on the issue of quantum and, what, in effect, turns out to be the 85% apportionment of blameworthiness to the Applicant, in relation to the Applicant's alleged loss of earnings, is also influenced by their refusal to treat the Indian Fraud Investigation as a likely factor that could have affected the Respondent's reputation and his employment prospects.

104. The Tribunal's approach, in dealing with the Indian Fraud Investigation, and dismissing it as a potential factor affecting the employability of the Respondent, was based on what it accepted as the unchallenged evidence of the Respondent that the allegation that he was a suspect in the investigation was not true and that it had had not seen any relevant and admissible evidence to support the Applicant's contention that the media reports were true[237]. It also concluded that the information in the public domain about the investigation "would not have materially harmed the Respondent's employment prospects some 15 years later"[238].

105. The Tribunal further proceeded to opine:

> "We would not expect a responsible employer to be deterred by references to the investigation without making further inquiries, in the absence of any charges or

[237] Compensation Judgment [62]
[238] ibid, [63]

> any other action by the Indian authorities directed against [the Respondent] in the intervening period".[239]

My learned colleagues have concluded that, "[w]hile we may not necessarily have come to the same conclusion as the Tribunal in this regard, we do not consider that the Tribunal has erred in fact or in law in reaching its conclusion"[240]. Respectfully, I find myself unable to agree with this position. In my view, the Tribunal would have erred and acted unreasonably in the light of the material before it in treating with this matter.

106. The resolution of the issue as to what effect the media reports of the Respondent's involvement as a suspect in a fraud investigation in India would have had, or likely to have had, on his reputation did not depend on whether the Respondent said it was false or the Applicant said it was true at the time of the hearing before the Tribunal. The issue of admissibility of the media reports in evidence would have had no bearing on the matter. The material question to be have been considered should have been in relation to what was out there in the public space at the material time for prospective employers to see and consider in relation to the Respondent as a prospective employee. The prospective employer was not at the hearing to hear the Respondent's denial and so his denial that he was not a suspect was immaterial to the question.

107. In my view, once it was established that such reports were in the media being circulated at the same time with other news concerning the dispute between the Respondent and the Applicant, the question should have been what likely impact, if any, would such allegations have had on the ordinary, reasonable and right thinking employer who would be considering an application for employment from the Respondent.

108. The evidence was that although the investigation had commenced 15 years ago, the investigations were not closed until 2014. In any event, in November 2016, during the course of the dispute with the Applicant, and in the midst of the whistleblowing

[239] ibid, [63]
[240] Review Judgment [233]

allegations, one newspaper reported: *Indian Commonwealth whistle-blower was a suspect in fraud case"*.[241] That article went on to state, among other things, that the Respondent had faced a 13 year probe over his alleged role in the fraud case. In the same article, reference was made to his suspension from the Applicant. So, this one article combined several different pieces of information, which were 'inherently likely' to affect or could have affected the Respondent's suitability for employment.

109. For the Tribunal to say definitively, in the face of all this, that, the Indian Fraud Investigation "would not materially damage the Respondent's reputation" is difficult to accept, in the light of the threshold test it had applied in finding the Applicant liable. It had found that the Applicant's breaches were "inherently likely" to affect the Respondent's reputation and employability. The same must be true of the reports circulating in the media at the time about the Respondent's alleged involvement in the fraud investigation.

110. All things circulating in the public space at the material time, of which the Tribunal had evidence, was to have been considered not only singly or in isolation from one another, but collectively, in determining what would have been damaging, or likely to be damaging, to the Respondent's reputation and employment prospects. There is also no guarantee that the prospective employer would not have had a global look at all the issues concerning the Applicant, rather than basing his decision only on the Indian Fraud Investigation.

111. Once a media report of the investigation was a factor that was inherently likely to impact on the reputation and employability of the Respondent, or could have contributed to it, which it was, and did then it ought to have been considered and weighed in the equation in determining the issue of causation as well as the quantum of compensation. The same standard of evaluation that was engaged in assessing the conduct of the Applicant should

[241] the Asian Voice Newsweekly: [Respondent's] Documents Vol 4, Tabs 10 and 11

have been engaged in assessing other potentially damaging factors, to include the Indian Fraud Investigation.

112. Therefore, the cumulative effect of all the matters which were in the public space about the Respondent at the material time, and the likely effect they may have had on his suitability for employment, should have been considered. Those would have been relevant considerations in determining whether, on a preponderance of the probabilities, the Applicant's breaches were the cause (or, indeed, the principal cause) of the damage to the Respondent's reputation and of his alleged difficulties in securing well-paid employment.

113. Given the failure of the Tribunal to adopt that approach, I conclude that it failed to take into account relevant considerations and took into account irrelevant considerations, which led it into errors of law and fact.

Conclusion

114. It is against the background of all these failings or omissions on the part of the Tribunal that I am unable to accept the computation of the majority, who have used as their reference point, in arriving at their award, the same awards that were made by the Tribunal, which I have found to be erroneous in law for the reasons given above.

115. In my view, the Applicant ought not to be held liable for any losses that allegedly flow from the Suspension Decision made on 22 June 2016. The Respondent was lawfully suspended, it not having been found that the suspension was for an improper purpose, was unlawful or irrational.

116. The Applicant is liable for failure to review the Suspension Decision and to have it extended after the recommendation of the Disciplinary Board that the Final Warning be imposed as a sanction. It is also liable for failure to follow due process in the disciplinary proceedings before the Disciplinary Board and for making the 'inappropriate' statements in the media. To the extent that these breaches resulted in loss of earnings, injury to health and moral injury, the Respondent ought to be fairly compensated.

117. On a rough overview of these heads of damages, bearing in mind that the Respondent was paid during the course of his suspension, and that he was substantially vindicated by the Interim Judgment as the Tribunal found, I see nothing that could justify the award proposed by the majority. Out of deference to the decision, which now forms the final decision of the Review Board, I do not consider it necessary to state my view of what the award ought properly to be. I will only state that there is nothing in the circumstances to justify an award that exceeds the statutory limit.

118. As it relates to costs, I am mindful that the Tribunal had a wide discretion in deciding an award of costs. I would not say that it ought to have ordered that each party bears its own costs. I am of the view, however, in the light of my conclusions, that an apportionment of costs between the parties would have been more equitable, especially in relation to the compensation hearing. The Applicant should not be ordered to pay all the Respondent's costs, given the fact that the Respondent did not succeed on all issues presented by him.

119. The same observations are made in relation to the Review Board's order for costs of the review applications. Even on the finding alone that the Compensation Application succeeds, it seems to me that the Applicant should get the benefit of that result and not pay all the costs of the review but a portion of it.

120. Having taken all these matters into consideration, in reviewing the outcome of the applications before the Tribunal and this Board, I believe that the Review Board ought to have given consideration to the question whether the costs agreed in the sum of £37,000.00 to be paid to the Respondent would be sufficient and fair in all the circumstances, having regard to the means of the parties and the outcome of the applications for review.

121. It is for all the foregoing reasons that I am not in a position where I can comfortably support the compensation and costs orders made by my learned colleagues.

Dated this 26th day of July 2019

Signed

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Justice Marva McDonald-Bishop CD

And

_____

Mr Richard Nzerem,
Tribunal Secretary