CSAT.APL/37(No.2)

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

IRMA MATUS

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Christopher Jeans QC, President; Mr David Goddard QC,member and Professor Epiphany Azinge SAN, member

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JUDGMENT

JUDGMENT ON THE SUBSTANCE OF THE CLAIMS

Introduction and overview

1. The idea of “probation” is familiar and simple.

2. The new appointee’s performance is under review for an initial “probationary” period.

3. If he or she performs the job satisfactorily during the probationary period then the employment will be continued. If he or she does not perform satisfactorily in that period, it will be terminated. The termination will occur within the probationary period or immediately afterwards.

4. Employees appointed on probation understand that they are, in this sense, “on trial” for the period of probation. Where employees “pass” their probation, their employment is often said to be “confirmed”. The use of such language reflects the provisional nature of their appointment.

5. The Respondent operates a system of probation. The system we describe below is the one in force at the time of the Applicant’s probation. It involves a detailed scheme of practices and procedures designed to provide a degree of protection to the probationer at this vulnerable stage of their employment.

6. All employees at certain grades within the Respondent are appointed on probation. The period of probation is six months. It can be extended by a further period of up to six months.

7. Where the line manager does not favour retaining the employee at the end of probation, the matter can be referred to a Review Board. The Review Board then makes a recommendation to the Secretary-General. The employee can write to the Secretary General to challenge that recommendation. The employee can also request that the recommendation be independently investigated.

8. The Applicant, Ms Matus, was subject to probation. There were issues with her performance which we describe below. Her line manager favoured termination at the end of the six month period. She took the matter to a Review Board. Her probation was extended as a result. After the extension period line management again recommended termination. Again the matter went to a Review Board. This time the Review Board

agreed with the line manager and recommended termination. Ms Matus challenged that recommendation in representations to the Secretary-General and asked for an independent investigation. The Secretary-General accepted the recommendation, however, and her employment was terminated just over a year after it started.

9. Pending the Secretary-General's decision Ms Matus was placed on "administrative leave". Her departure from the Respondent's premises was closely supervised by a Human Resources Officer who escorted her out. Instructions were given to security staff at the gate that she was not to be re-admitted without authorisation and her picture was given to them to enable them to identify her if she tried to re-enter.

10. The decision challenged in the claim to this Tribunal is that of the Secretary-General at the end of the process. That challenge also incorporates, inevitably, what Ms Matus would characterise as his failure to uphold her complaints about the procedures adopted and judgments made in relation to her probation. It also incorporates the Secretary–General's decision not to uphold complaints she made to him about being placed on "administrative leave", and about the manner in which she was escorted from and excluded from the premises.

Some Initial Procedural Points

11. Before we set out the facts as we have found them and examine the issues in turn we deal with some procedural aspects.

12. In advance of the hearing the Tribunal made a number of procedural directions. These were contained in an Interlocutory Order dated 20th October 2016. (References to "the Order" in this section of the judgment are to that Interlocutory Order). A judgment was issued explaining the reasoning behind particular paragraphs in the Order on 24th October 2016.

Oral evidence

13. Having decided to hold an oral procedure to assist in resolving the issues concerning the Applicant's treatment on her departure from the premises, the Tribunal directed that witness statements be served and lodged by 11th November 2016: see Section A para 2 of the Order.

14. Ms Matus duly served and lodged the statements of her witnesses on time. The Respondent also duly served and lodged one witness statement.

15. The Respondent then served and lodged a further witness statement on 17th November, six days late. This was the statement of Mr Damian Dunne, who identified himself as having provided the photo of Ms Matus to security staff accompanied by instructions regarding her continued exclusion from the premises.

16. Ms Matus submitted that the Tribunal should exclude Mr Dunne's evidence because of the late service of his witness statement. She suggested that there could have been witnesses whom she could have called in rebuttal if the statement had been served promptly. These would have concerned other employees who were or were not subject to similar treatment to that of Ms Matus in relation to exclusion from the premises.

17. The majority view of the Tribunal (the President and Mr Goddard QC) was that provided that he was available to be questioned upon his statement (which proved to be the case) Mr Dunne's evidence should be admitted.

18. The view of the minority (Prof Azinge) was that this evidence should be excluded. He noted that there was no satisfactory excuse for its lateness. It could not be justified as "reply" evidence when the directions did not provide for reply evidence. The issue to which Mr Dunne's evidence related was in any event clearly apparent from the pleadings and the order. It was not necessary for the Respondent to await the statements submitted on behalf of the Applicant before the relevance of Mr Dunne's evidence could be appreciated. Prof Azinge concluded that the Tribunal should apply the sanction of excluding the evidence.

19. The majority agreed with Prof Azinge that there was no justification for the lateness of the statement. The majority took the view however that Mr Dunne's evidence ought to be admitted pursuant to the Tribunal's discretion in the interests of justice. Fundamentally, the majority did not consider that there was any real prejudice to the Applicant in the late service of Mr Dunne's statement. It was short and simple and Ms Matus had sufficient time to prepare to question him. (We interpolate that in the event she did indeed question him with great composure, clarity and organisation). The majority bore in mind that, without any provision in the Order for reply evidence, the Applicant was not entitled to await the service of evidence from the Respondent before deciding on the witness evidence she would call. Furthermore the question of the

Respondent's practice in relation to exclusion from the premises could have been seen from the pleadings as an issue on which she could call relevant evidence – it was not a matter which became relevant only by virtue of Mr Dunne's evidence. The majority considered that Mr Dunne's apparent role in relation to instructing gatehouse staff was such that the interests of justice would be potentially hampered by not being able to consider and test his account.

20. The view of the majority prevailed and the Tribunal agreed to admit Mr Dunne's evidence on condition that he was available to be questioned on his statement. This necessitated a re-ordering of witnesses in order to accommodate a medical appointment which Mr Dunne had on the afternoon we had reserved for the hearing of evidence. We were grateful to Mr Dunne for making himself available in advance of his medical appointment.

21. The witnesses heard by the Tribunal were as follows: on behalf of the Applicant, Ms Matus herself, Ms Helene Massaka and Mr Kelvin Edwards; on behalf of the Respondent, Mr Damian Dunne and Ms Catherine Stow. We deal with our findings on their evidence in a later section of this judgment.

Transcription of First Review Board interviews

22. In section B of the Order, the Respondent was directed to transcribe tape recordings of the interviews conducted by the first Review Board and to disclose those transcripts to the Applicant and lodge them with the Tribunal.

23. In its Response to the Order dated 17th November 2016 the Respondent reports that the recordings could not be found. It is stated that the Director of Human Resources (Ms Zarinah Davies) had confirmed to leading counsel for the Respondent that "an audio recording was made of the first review board" and that the Board had been "aware that CSAT may request" any recording made. When Ms Davies was later asked to locate the audio tape for transcription she stated that it was saved in a specified electronic folder in the Human Resources Division. When the folder was searched the recording could not be found, despite technological assistance having been obtained. Ms Davies has left the Respondent's employment, though it is not clear from the Response to the Order at what stage in the inquiries she ceased to be employed.

24. The Tribunal notes the Respondent's apologies for the loss of the recordings. The Tribunal stresses the importance of retaining, in a systematic and conscientious way, each and every piece of material which may be required as evidence in proceedings. In some instances the potential relevance of material to future proceedings is not apparent when the material was created. Here, however, it was clearly apparent to the Respondent that the tape recordings in question fell into the category of material which needed to be preserved. It is wholly unacceptable that such material should have disappeared. To the extent that tracing such material may currently depend on word of mouth (here, apparently, from a single member of staff who has left the organisation) the system in place is completely unsatisfactory. It needs to be urgently and thoroughly overhauled, with proper procedures put in place for identifying, retaining and safeguarding all material held by the Respondent that is potentially relevant to proceedings before the Tribunal.

Explanation of Annex XIII to Answer

25. In Section C of the Order the Tribunal also directed the Respondent to identify the author of a "Schedule of Meetings" (which appeared to contain notes on performance discussions with the Applicant) which appears at Annex XIII to the answer. The Order further required the Respondent to explain when and for what purpose it was compiled, whether the document was compiled on the suggestion or instruction of someone else and, if so, to identify that person.

26. In its Response the Respondent states that Annex III was compiled as a "running Note by the Applicant's boss Ms De Silva with the encouragement of the Director Mr Gimson". An explanatory memorandum from Ms De Silva compiled for the purposes of the proceedings was attached to the Response. We deal with this further below.

Anonymity

27. At the interlocutory stage, Ms Matus sought an order or orders which would have the effect of "anonymising" the proceedings at the stage of promulgating the Tribunal's judgment. The Tribunal deferred consideration of this application until the stage of giving judgment, when it would have a clearer picture of whether anything recorded in the judgment might justify this course.

28. Behind the application lies the Applicant's natural concern about allegations, evidence or findings being exposed to public view (particularly via the Tribunal's website) in a

way which would identify her in relation to what she sees as an upsetting and unrepresentative chapter of her working life. She requests that her privacy, in that general sense, be respected.

29. We sympathise with the Applicant's position. However, as the Tribunal has previously ruled in **Kaberere v Commonwealth Secretariat CSAT APL/20** (especially at paras 18 and 19), the Tribunal's starting point is that justice should be open. It was decided in that case that judgments would not (subsequent to that case) be anonymised or redacted to preserve anonymity except where there was a special justification such as public security, inter-governmental or commercial confidentiality or respect for private life. In referring to "respect for private life" the Tribunal was alluding to the internationally recognised human right to privacy. This right is not engaged by ordinary dealings at the workplace, or by an employee's preference that his or her work history should not be made public.

30. We do not consider that there is any justification for anonymising the judgment in this case. In particular, having considered the matters we are about to record in this judgment, we do not consider that there is any aspect which bears on the Applicant's human rights or which brings into play any other considerations which could justify anonymisation of parties.

The provisions "in force" in this case

31. There is one other preliminary matter we should clarify before we deal with the facts and the issues.

32. Appointments to the Respondent's employment are expressly made subject to the Staff Rules and Staff Regulations "as laid down and amended from time to time". The Applicant's employment was no exception. Her letter of appointment specifies this.

33. The Respondent also issues a handbook for the use of staff and management. Until recently this was the "Sutherland Human Resource Handbook" or "Yellow Book", a loose-leaf "bible" of relevant materials which was updated from time to time. From 15th July 2015 this was replaced by a new "Staff Handbook", which we will call the "New Handbook".

34. The Yellow Book contained the Staff Rules and Staff Regulations. It also contained, in a separate section (headed "Part One") an outline of "HR Management Procedures

and Policies" drawn up in consultation with the Staff Association and approved by the Secretary -General. The Foreword to the Yellow Book explained that Part One was "guidance" which was said to be "consistent" with the Staff Rules and Regulations Rules but "*does not form part of staff members' contracts of employment*".

35. Whilst Part One of the Yellow book was not, in itself, incorporated into the contract of employment of a staff member, the statements of policy and practice it contained nonetheless created practical expectations which could, to put it loosely, sometimes affect rights and obligations. It would not be appropriate to attempt any exegesis here but in deciding whether the Respondent's management had acted lawfully, (for example, in exercising a discretion) it would sometimes be relevant to consider management's stated practice, as set out in Part One. Where a new practice or change was introduced, it was useful and important therefore to know the date from which it was effective.

36. The New Handbook, which replaces the Yellow Book, is stated on the cover to be a guide to the Respondent's "Regulations Rules and Policies". The New Handbook is strikingly different from the Yellow Book, not only in layout and organisation but also, at least partly, in content. The Tribunal has not needed to analyse the differences for the purposes of this case because it was ultimately common ground that it is the Yellow Book provisions to which the Tribunal should have regard so far as the Applicant's probation, and the Secretary -General's decision to terminate it, were concerned.

37. Moreover most of the relevant events occurred before 15th July 2015 when the New Handbook became effective and there could be no suggestion that it had retrospective effect in relation to the Applicant's probation. When the Secretary-General made the impugned decision to accept the recommendation to terminate the Claimant's employment he did so after 15th July 2016, but on the basis of a history and procedures which, it is agreed on all sides, were governed by the Yellow Book.

38. The final day of the Applicant's attendance and her "escort from the building" occurred after 15th July however, and it will be necessary to notice a difference between the Yellow Book and New Handbook when we deal with that issue.

The Background facts

39. We now set out the background facts. When resolving issues in the case at a later stage of the judgment we make additional findings on particular matters.

40. Much of the background is undisputed. In some instances there is a dispute as to the interpretation or significance of material. In some instances (particularly in relation to the Applicant's being escorted from and excluded from the premises) there were disputes of primary fact.

41. We make our findings on the balance of probabilities, having regard to all the material before us. It is not of course necessary to refer to all of it.

42. Ms Matus was employed by the Respondent from Monday 28th July 2014. Her appointment was for a fixed term of three years but this was expressly subject to a term set out in the Statement of Terms enclosed with the letter of appointment[1]. Those Conditions specified against the heading "*Probation*":

    "All appointments are subject to a six month probationary period. This may be extended at the Secretary-General's discretion for up to another six months"

43. The job was specified as "Executive Assistant to the Secretary-General, Office of Secretary-General". The Job Profile attached to the appointment letter explained that the role was to provide secretarial services for the Secretary-General and the Director of the Secretary-General's Office, working under the supervision of the Office Manager". The profile went on to exemplify particular secretarial duties entailed in the post and stated:

    "The post-holder assists with sensitive and confidential matters. The post-holder liaises at all levels including to communicate on the Secretary-General's behalf"

44. In mentioning the job title and functions it is important not to pass over two features. First, whilst the role was to provide "secretarial" assistance, it was assistance at the very top of an international organisation with all the pressures and quality standards which this entails. Secondly, and at the risk of stating the obvious, the role was to

[1] Answer Annex I

provide assistance by making the running of the Office smoother and facilitating the work of the Secretary-General.

45. The Office Manager to whom Ms Matus reported was Ms Anuja De Silva. Mr Simon Gimson was in overall charge as Director of the Office of the Secretary-General.

46. Ms De Silva and Mr Gimson soon found that Ms Matus was struggling with her job. There are some early hints of this in, for example, an email exchange[2] between Ms Matus and Mr Gimson on 7th August 2014 and it is borne out by later exchanges of which we have seen a sample[3] and by the "grid" to which we refer below.

47. Both Ms Matus and her line management set some store by the completion of a "Work Plan"[4]. This a matrix setting out performance expectations with indications as to how performance of particular tasks might be assessed, the skills involved and the time within which achievement would be reviewed. The completion of this document was the subject of email correspondence in September 2014 and it was in fact completed on 8th October 2016.

48. With the encouragement[5] of Mr Gimson, Ms De Silva began to compile notes of discussions she had with Miss Matus about the latter's work and performance. These notes form Annex XIII to the Answer discussed above. The entries, which are in the form of a "grid" beginning with a meeting date, run to December 2014. We will call the document "the grid" for ease of reference.

49. The entries on the grid begin against dates in the very first week of the employment where Ms De Silva records having discussed "basic expectations of the job" and the "*importance of accuracy quality and speed*".

50. Although the Respondent's Response to the Tribunal's Order describes the grid as a "running note", we infer that if the entries were indeed made sequentially (as the expression "running note" implies), Ms De Silva did not begin to compile it for some time afterwards. In particular there are entries which begin as follows:

    August 2014 (*cannot remember exact date)*

[2] Answer Annex XI
[3] See Answer Annex IX, referring to some specific issues in October 2014
[4] The one produced is at application Annex XI
[5] See Ms De Silva's Memorandum at Annex I to the Response to the Tribunal's Order

"*Mid September (cannot recall exact date either the week of 8/9 or 15/9)..*"

"*End October (probably Wed 29 or Thus 30) …*

The fact that Ms De Silva is having to "recall" the week in which a mid-September meeting occurred and can only give a "probable and approximate" date for end of October events indicates to us that she did not start to produce the document until some time after those events. The First Review Board was later to record that Ms D Silva had maintained her record from "October 2014 onwards". We infer from the doubt recorded on the grid evident about the late October date (above) that it is likely to have been at some time in mid- November (at the earliest) that she started compiling it - at least in anything like the form we have it.

51. However we do not think that anything turns on the date when Ms De Silva began to compile the grid. In her Reply at paras 31-32 Ms Matus does comment that she had never been shown the grid. She denies that she was "unequivocally" informed that she was at risk of not being confirmed as one of the grid entries suggested (namely the entry for 2nd December 2014). However she does not allege that the grid is a fabrication. She does not take issue with the Respondent's case that there were a number of meetings with her at which particular performance issues were discussed with her, as indicated by the grid. Rather she makes, in substance, the opposite complaint that she was all too regularly and readily "pulled up" over issues of accuracy, speed and quality of work. As regards the 2nd December 2014 meeting, the First Review Board records her acknowledgement that the possibility was raised at that meeting that her employment would not be confirmed at the end of her probation.

52. The grid records a number of discussions between Ms De Silva and Ms Matus about the Applicant's performance, in particular her accuracy, quality and speed in dealing with correspondence and other matters. On some occasions specific instances are mentioned.

53. A number of the entries refer to the Applicant's difficulties in producing timely work and reference is made to occasions on which work had to be redistributed from the Applicant to other staff members, in order to meet deadlines. We bear in mind the high level at which much correspondence within the Secretary –General's office will inevitably be directed: for example reference is made in the grid to a letter to a Foreign

Minister which was apparently awaiting attention for a month[6]. It is of course impossible for the Tribunal to form a view about the significance of timeliness in specific instances or the Applicant's responsibility for particular delays, but there can be no doubt that the Secretary-General's Office will attract time pressures to which the Executive Assistant would have to adapt.

54. The quality issues that were perceived by Ms De Silva were also reflected in some entries on the grid. There were concerns about the Applicant's IT skills, and training was offered . A number of specific points are mentioned. The grid records a meeting at the end of October at which Ms De Silva had indicated that she would be "cutting the apron strings" and could no longer be a "filter/quality check" for the Applicant's work

55. There was no suggestion that Miss Matus was not co-operating or trying hard. Quite the contrary. She was regarded as a willing colleague who was prepared to work late without complaint. But she continued to struggle with the demands of the job.

56. An entry on the grid against the date 2nd December referred to the "up-coming" probation review in January. We quote the relevant part of the entry in full:

> "Irma asked me what her options are. She insisted that I be honest with her. My response was that [she] was making the same errors over and over again; speed has not improved; and I could not see a significant improvement in any areas even with the very much reduced work load; the quality of work; accuracy and speed was still not to the expected standard. I explained that unless I see a very high level to [sic] improvement within the next few weeks, it would be difficult for me to recommend continuation".

57. Meanwhile Ms Matus did undertake some IT courses which she completed on 14th January 2015[7].

58. On 16th January 2015 Ms De Silva met with Ms Matus to review her performance over the probation period. As the letter from Ms De Silva to the Applicant issued following that meeting[8] confirms, Ms De Silva told her that she was recommending that the Applicant's employment should be terminated. The meeting itself became emotional, which hampered discussion as the First Review Board was to find (below).

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[6] Grid entry Friday 14th November
[7] Application para 27
[8] Application Annex XIV

59. As the letter expresses it, Ms De Silva considered that shortcomings in performance could not be remedied "during the probation period or within a reasonable period of extension of the probationary period". The letter referred to "feedback" and "support" which Ms De Silva said that she and other colleagues had provided. It indicated that the Applicant could make a request to the Review Board under Chapter 7 para 8 of the Yellow Book.

60. This provision, which forms part of the statements of policy and practice in Part One of the Yellow Book (see above), does not in terms state that the Review Board process is triggered by a staff member's request, but nothing turns on this. A Review Board was in fact convened, as we record below.

61. Meanwhile there were continuing issues about the completion of the end-of-probation staff appraisal, and the version originally produced had to be revised. There were further meetings around this time mentioned by the First Review Board about appraisal of which the Tribunal does not have (or need) a full record

62. What we take to be the final version[9] of the appraisal bears the date 21st January 2015. In section 5 Ms De Silva states:

    "Irma is a very pleasant and collegial work colleague and is always willing to take on tasks as requested. It is unfortunate that Irma has not been able to meet/demonstrate the required competencies for the role."

    This was echoed by Mr Gimson in his manuscript entry on the appraisal where he described the Applicant's willingness and efforts. He "reluctantly and sadly concurred" with Ms De Silva's conclusion that "*the quality and quantity standards were not achieved*" and that termination of employment was the appropriate course.

63. The Applicant wrote[10] to the HR Director Ms Davies on 28th January 2015 setting out her complaints about her probation and the appraisal. She sought the establishment of a Review Board, to which Ms Davies assented. We refer to the Review Board set up at this stage as the "First Review Board" where necessary to distinguish it from the Second Review Board which was to be set up in the summer of 2015.

[9] Application Annex II
[10] Application Annex III

64. The First Review Board met over three days (16th-18th February). It comprised Miss Davies, Mr Julian Roberts Ocean Governance Adviser GNRAD, Ms Marie Pierre Olivier Legal Adviser LOL, and as non-voting observer Mr Travis Mitchell from the Staff Association.

65. The First Review Board received information from the Applicant, Ms De Silva and Mr Gimson and interviewed each of them.

66. The First Review Board reported on 19th March 2015. It noted concerns about the Applicant's performance and did not consider that her employment could at this point be confirmed following probation. Its main recommendations were that the probation should be extended for a further period of two months; that the October work plan be revised and that clear objectives and performance targets be set for this period; and that there be regular review meetings to be attended by an independent third party such as an HR representative. These reviews would seek to ensure recognition of good performance, and that deficiencies were tackled in a timely way, and that the line manager would receive coaching on providing feedback, as necessary.

67. In deciding that probation be extended, the First Review Board was critical of several aspects of the management of the Applicant's probation:

    (1) inadequacy of the job description in relation to the task of diary management of the Secretary –General;

    (2) the absence of an agreed work plan until October 2014, when it should have been completed within the first two weeks of employment;

    (3) a failure sufficiently to bring home to Ms Matus that her performance was inadequate;

    (4) the Board appeared to accept that Ms Matus had been told of the risk of termination at the 2nd December meeting, but felt that there had been a "communication breakdown";

    (5) formal IT training should have been organised sooner, so that there was time to put it into effect significantly before the end of probation;

(6) issuing the letter conveying the outcome of probation should have been deferred when the 16th January meeting became emotional.

68. The recommendation of the First Review Board for the extension of probation was duly accepted by the Secretary-General. The two month extension was granted with effect from 19th March[11]. The First Review Board's other recommendations mentioned above were also put into effect[12].

69. Over the two month period there was a series of review meetings (usually at two week intervals) at which an independent HR representative, Nike Ajibowo, attended with Ms De Silva or Mr Gimson, and Miss Matus. Records of these meetings took the form of "follow-up" emails[13] from Ms Ajibowo, which set out formally what had been discussed.

70. We have read these records. There are some positive references to improvement made, and the Applicant spoke in one meeting about her returning confidence. She had also worked late to get a job done. However concerns are regularly expressed by managers about inaccuracy, inattention to detail, speed and quality of work.

71. Some of the discussions at the review meetings illustrate the high level of correspondence which she was handling and the sensitivity of mistakes: for example where an error had been made about a name of one of the High Commissioners. On some occasions we noted that the Applicant offers explanations which would have created, rather than allayed, concern. For example, at a meeting on 8th May, towards the end of the extension period, the Applicant's attention is drawn to errors on what were said to be eight "COG" letters. It was recorded that the Applicant had to be "shepherded" through corrections and redrafting. The Applicant's reply was recorded as follows:

> "Irma explained that she had only made errors on 4 out of 8 letters but these were not formatting errors. The wrong content was used as she was interrupted during the preparation of letters and the texts looked similar except two words which she had not noticed…"

[11] See letter at Application Annex IV
[12] See eg Email from Ms Ajibowo dated 2nd April 2015 at Rejoinder Annex VI
[13] Rejoinder Annex VI

72. At the final review meeting on 14th May 2016[14] Ms De Silva informed the Applicant of the recommendation which would be made: that Miss Matus should *not* be confirmed in post. She signed an assessment in support of that conclusion on 21st May 2016.

73. On 15th June 2015 Ms Matus wrote to Ms Davies seeking the intervention of the Review Board.

74. The Second Review Board was promptly convened and met on 18th June 2016. Its membership was the same as that of the First Review Board except that Ms Katalaina Sapolu, Director ROL replaced Ms Olivier.

75. The Second Review Board proceeded on the basis of documentary records. The Board did not invite the Applicant, Ms De Silva or Mr Gimson to attend. It did however hear orally from two individuals from HR (Ms Ajibowo and Mr Dunne) for what it described as "clarification" only. We return to this description later.

76. The "clarification" provided by Ms Ajibowo, as was to be recorded in the Board's later report, was to the effect that during the extended period:

    (i) she did not see any instances where her advice on managing performance had been rejected by Ms De Silva;

    (ii) feedback had been regularly given to Ms Matus, although Ms Matus had not shared the view expressed to her that she was not performing to the required standard; and

    (iii) (agreeing with Mr Dunne) that Ms Matus had resisted the notion that it was appropriate to have a "zero errors" target in the work plan.

77. The "clarification" by Mr Dunne was to the effect that

    (i) he was present at the probation appraisal meeting and was able to assist the focus on the two month extension period with reference to specific examples given on level of performance;

[14] Recorded in an email at Application Annex XVI

(ii) Ms Matus had not shared the view that she was not performing to the required standard and had "resisted" the notion that it was appropriate to have a "zero errors" target in the work plan.

78. The Board Reported on 28th July 2015. It concluded that whilst there had been some comments which indicated improvement, the Applicant's performance on the core competencies of her role was both insufficient and insufficiently sustained. There were still, it concluded, clear examples of inattention to detail and repeated errors which created a reputational risk for the organisation, particularly as regards the Secretary-General's external correspondence. It recommended termination of the Applicant's employment.

79. Under the "Mechanism for Lodging an appeal against a Review Board Decision" which forms Part of the Staff rules, a member of staff may "appeal" to the Secretary General against a Review Board recommendation that probation should not be confirmed. (It is slightly curious that this process should be described as an "appeal" to the Secretary-General against the recommendation rather than simply an invitation to him to reject the recommendation, but nothing turns on this.)

80. On the day of the Second Review Board report (28th July) the HR department sought the approval of the Secretary -General to the process of placing Ms Matus on what is now termed "administrative leave" pending the final decision of the Secretary-General whether to give effect to the Second Review Board's recommendation. This would mean she would continue to be employed and paid, but would be required to stay off the Respondent's premises.

81. The HR Department managed to obtain the Secretary-General's approval to this course only after normal working hours on 28th July. Consequently it was decided to convey to the Applicant at the start of her day on 29th July the news that the Second Review Board had recommended the termination of her employment and that she must leave the premises on administrative leave.

82. A letter dated 29th July was prepared conveying the news of the recommendation, notifying her of the right to appeal to the Secretary-General, informing her that she was on administrative leave and should not attend the premises. When she arrived the morning of 29th July, Ms Matus was asked to meet with Ms Stow of HR in the Wren Room at Marlborough House. Ms Stow there delivered the news and the letter.

83. Precisely what followed is the subject of dispute which we resolve when we deal with the issues in the case.

84. Summarising matters neutrally at this stage, Ms Stow remained in the vicinity of Ms Matus whilst the latter downloaded personal items from her computer, gathered her belongings and prepared to leave. Ms Stow escorted Ms Matus to the gate (and beyond - Ms Stow worked in Quadrant House on the other side of the road) with Ms Matus carrying her personal belongings. Ms Stow took the Applicant's security pass but there is a dispute as to when this happened.

85. Gatehouse staff were subsequently issued with a picture of Ms Matus with the words above it in the handwriting of Damian Dunne from HR:

"IN STRICT CONFIDENCE.
DEAR GATEHOUSE,
IRMA MATUS IS ONLY PERMITTED ON THE PREMISES IF APPROVED BY ZARINAH DAVIES OR DAMIAN
ANY QUESTIONS PLEASE CALL
ZARINAH DAVIES [EXTENSION NUMBER]
DAMIAN DUNNE [EXTENSION NUMBER]

As the Tribunal was to learn from the evidence of Mr Kelvin Edwards of the gatehouse staff, the picture with the message was placed by him on the inside of some small cupboard doors in the gatehouse. In this way it could not be visible to staff or visitors passing through or past the gatehouse, but it could be consulted by the security team in the gatehouse.

86. In August 2015[15] Ms Matus wrote to DSG Gary Dunn about various aspects of her treatment, and sent an appeal to the Secretary General.

87. The appeal letter to the Secretary General contained a number of complaints about her treatment during probation and the decision to terminate employment and the procedures adopted. We will not set these out at length as many form the basis of complaints to this Tribunal. The appeal letter also contained specific complaints about

[15] Letters are undated. Although the Secretary General refers to having received the Appeal letter himself on 17th August it is not clear whether it was lodged earlier. No point is taken by the Respondent as to any appeal to the Secretary-General being out of time

being placed on administrative leave and the manner of being escorted from the premises.

88. The appeal letter also specifically requested

> "under part 3, Annex 4(2) of the Staff Handbook … that the circumstances of the Review Board and the appraisal be independently investigated in accordance with established procedure"

This was a reference to the mechanism in Annex 4 to the Staff Rules whereby a Staff member who is subject to a Review Board recommendation that probation should not be confirmed may, in addition to appealing

> "request that the recommendation be independently investigated in accordance with the established procedures."

The Applicant was explicitly requesting such an investigation.

89. Mr Gary Dunn wrote[16] to the Applicant on 13th August 2015 explaining the decision to place her on administrative leave. The letter stated that this was a management decision "considered to be in the best interests of all involved". It was a busy time preparing for the Commonwealth Foreign Ministers' meeting and it would be difficult, Mr Dunn stated, for line management to offer the necessary supervision and support. Moreover, he noted, Miss Matus would have the time to prepare her appeal to the secretary –General without "the distractions of the workplace".

90. The Secretary- General wrote to the Applicant on 21st August informing her that he accepted the Review Board recommendation and did not uphold the appeal. The letter deals very shortly with the applicant's complaints about her probation and the processes adopted. On the question of administrative leave it refers Ms Matus to DSG Dunn's letter. As regards the request for an independent investigation, the letter states as follows:

> "(d) Regarding your request for an independent investigation, although there is reference in Annex 4 of the handbook that a staff member may request an investigation of the recommendation of the review board, there are no separate "established provisions" in the Handbook for an investigation of the recommendation of the Review Board. Annex 2 of the

[16] Application Annex 29

Handbook on the mechanism to deal with contract and administrative grievances states that the procedures do not apply to grievances relating to a decision that probation should not be confirmed. Therefore the proper mechanism for the administrative review of a performance or probation appraisal report is the Review Board process provided for in the Sutherland Human Resources Handbook.

91. The letter goes on to make the general observation

"the purpose of the probation is to give the Secretariat the opportunity to evaluate a probationer's suitability for a post. I am satisfied that the procedure fully complied with the provisions stated in the Sutherland Human Resources Handbook, which is applicable in your case, and also complied with the requirement of due process".

The Claims to This Tribunal

92. In her application received by the Tribunal on 18th November 2015 the Applicant raises wide-ranging issues about her treatment and the processes followed.

93. The decision she seeks to impugn is that of the Secretary-General made on 21st August 2015 in which he dismisses her appeal, accepts the Second Review Board's recommendation and declines to direct a further investigation. Although the Secretary -General did not deal separately and specifically with every point raised by the Applicant in her appeal letter, his decision of 21st August 2015 necessarily entailed also the rejection of her complaints about related events and processes leading up to, and culminating in, the termination of her employment. Accordingly it may be necessary for the Tribunal to consider elements of those complaints which are implicitly rejected in the Secretary-General's decision in so far as she repeats those elements in her claim to the Tribunal.

94. However, we note that there was no appeal against the First Review Board recommendation and that the Applicant does not challenge (and could not now challenge) the decision to implement it. She is not therefore entitled to raise in these proceedings any challenge to that recommendation, or its implementation. Nor is she entitled to challenge in these proceedings decisions which led to that recommendation or its implementation.

95. Elements of the claims which relate to the First Review Board Recommendation, the implementation of that recommendation or the events leading to it are therefore not admissible.

96. We will deal in turn with each of the elements in the Application. We do so by reference to the allegations Ms Matus makes, which we summarise as follows:

    (1) Initial delay in providing a work plan (Application paras 24-25)
    (2) Unfairness in January 2015 performance appraisal and First Review Board recommendation (Application paras 26-30 and 34-39)
    (3) Failure to warn the Applicant three months into the probation (Application para 33)
    (4) Unfairness in conducting the extended period of probation (Application paras 42-58)
    (5) Failure to investigate negative treatment by management/Second Review Board (application paras 59-61)
    (6) Failure of Second Review Board to give the Applicant a chance to respond to oral accounts heard (application paras 64-68)
    (7) Failure of Second Review Board to take account of staff re-structure and workload (Application paras 69-74)
    (8) Unlawful to place applicant on Administrative leave (Application paras 76-82)
    (9) Escort from the building infringed rights (Application paras 78-82)
    (10) Denial of independent investigation by Secretary-General (Application paras 83-87)
    (11) Failure to clarify applicable rules (Application paras 88-96)
    (12) Conflict of interest in Secretary-General's role (Application para 97 et seq)
    (13) Lack of good faith, inequality of treatment, abuse of authority.

General findings and determinations

97. Before addressing these elements in turn we think it appropriate to make some general findings and determinations about the fairness of the probationary process and the conclusion reached that Miss Matus did not attain the standard required.

98. It is important in a case of this kind, where diffuse complaints are made about many matters of detail, to retain perspective over the central questions. Was the judgment that Ms Matus had failed to reach the necessary standard one which the Respondent

was entitled to make on the information available? Were there flaws in the process which meant that she did not have a fair chance to prove herself? This approach will also enable us to deal concisely with some (but not all) of the individual complaints she makes.

99. We remind ourselves that the power of an International Administrative Tribunal is limited to reviewing the decision made by the organisation and that it may interfere only on restricted grounds: namely that the organisation has acted outside its powers or contrary to law or has abused its authority or has proceeded on factual assumptions or inferences which cannot be justified or has committed a material procedural error.

100. As the ILOAT stated in **Re Felkai** (Judgment 1696):

"The Tribunal will apply those criteria with even greater caution in reviewing the case of a probationer, else probation fails to serve as a period of trial. An organisation must be allowed the widest discretion in the matter and its decision will stand unless the defect is especially serious or glaring. What is more, where the reason for non-confirmation is poor performance the Tribunal will not replace the employer's assessment of the complainant with its own"

These comments about special caution in relation to probation echo those of ILOAT in **Re James** (Judgment 1052) and other jurisprudence in the International Administrative Law sphere discussed in *Amerasinghe The Law of the International Civil service* Vol II pp151-153.

101. On the broad questions we pose above we have no doubt that:

(i) the assessment made at the end of the extended probation that Ms Matus had failed to attain the necessary standard was one which the Respondent was entitled to make on the information available to the organisation;

(ii) Ms Matus had a fair opportunity to prove herself by the end of the extended probation.

102. In so far as there were any criticisms to be made of the management of her initial six month period of probation, they were addressed by the First Review Board and rectified by the extension of the probation period and the careful and conscientious implementation of the First Review Board's recommendations. By the end of the extended probation period there had been a very thorough and structured process of

performance review, with direct oversight by the Human Resources officers. There was ample evidence at the end of that period that the Applicant, though a willing and congenial colleague, lacked the necessary aptitude for the role in the Secretary-General's office where consistent accuracy and timely delivery were of particular importance.

103. These general determinations are not an answer to all the complaints raised by the Applicant, however, and we now address them individually. But we address the individual complaints against the background of these general determinations.

The Individual Complaints.

104. We now turn to the individual complaints

(1) Initial delay in providing a work plan

105. This complaint does not relate to the Secretary-General's decision of 21st August 2015. Rather, it concerns events leading to the First Review Board's Recommendation and its implementation. It is accordingly inadmissible.

106. We note in any event that the failure to provide a Work Plan promptly at the beginning of probation (it was not provided until 8th October 2014) was one of the features criticised by the First Review Board. The matter was remedied by the extension of promotion (with an improved Work Plan) pursuant to the First Review Board's recommendations.

(2) Unfairness in January 2015 appraisal and recommendation

107. This complaint similarly relates to events and decisions other than those which were the subject of the Secretary-General's decision of 21st August 2015. It is likewise inadmissible.

108. We note that the First Review Board did accept certain points made by Ms Matus about the January 2015 appraisal and recommendation, including points she

now makes about the Work Plan and the late stage at which she was placed on IT courses.

109. Although the complaint is inadmissible the Tribunal finds in any event that to the extent that there were defects in the management and appraisal of the Applicant in the initial probationary period, the position was rectified by the careful implementation of the recommendations of the First Review Board and the extension of the period of probation.

(3) <u>Warning after 3 months</u>

110. The Applicant complains that she was not given a warning by the Director after three months' probation. She refers to para 3.3 of Chapter 6 of the Yellow Book This section (headed "Performance and Development") is in Part One of the Handbook and therefore a statement of management policy and practice, not of contractual rights.

111. Para 3 deals with probation. Para 3.3 advises that "potential problems" should be discussed (by implication, with the Probationer) three months into probation rather than at the end of the six month period. The applicant contends that this was not done.

112. In common with the complaints previously considered, this complaint is inadmissible because it does not relate to the impugned decision of the Secretary-General made on 21st August 2015 which is the subject of the claim. Rather it relates to the First Review Board's recommendation (and the events leading to it) which are not the subject of the claim.

113. In any event there a number of answers to this element of the claim, irrespective of inadmissibility. The provision is not contractual and does not purport to confer any right to a warning; it is cast as a piece of advice on sensible practice. In the legal context, the need for explicit warnings about the consequences of poor performance is attenuated in any event in the case of probationers as they know from the outset that they need to demonstrate the necessary standards if the employment is to continue after probation: See *E. O. G. v Pan American Health Organization* ILOAT Judgment No. 3440 (2015)**.** Moreover shortcomings in performance were, we find, being brought to the Applicant's attention by Ms De Silva from the start, so the fundamental mischief against which para 3.3 is directed (that the probationer might be entirely oblivious about the existence of a performance issue at the six month stage) does not arise. Most fundamentally however, the extension of probation on the basis

of the First Review Board's recommendation served as the clearest warning to Ms Matus that standards needed to be improved within a given timescale. Any possible defect in bringing home to Ms Matus in the first probationary period the need to improve performance was cured by the grant of the extended period, during which Ms Matus can have been in no doubt that her employment was at risk.

(4) Unfairness in conducting the extended period of probation

114. The Applicant complains that the extended period of probation was conducted unfairly. She complains of a lack of timely warnings and a want of measurable targets. She says that the ultimate conclusion reached was not evidentially justified.

115. We do not accept these complaints.

116. We consider that, at least from the point where the extended probation was granted, the Applicant could be in no doubt that her performance needed to improve to avoid dismissal at the end of that period.

117. With the revised workplan and regular reviews of performance in the second probationary period the Respondent provided Ms Matus with as clear an indication as the nature of the work permitted of the standards which had to be attained. It would have been arbitrary and time-consuming (and potentially oppressive for Ms Matus) for management to have devised and operated quantitative thresholds for output or errors. Reference to "zero" errors was clearly intended as aspiration only.

118. It follows from our general determinations that we consider that it is clear that there was sufficient evidence for the Respondent legitimately to conclude that the necessary standards had not been achieved.

(5) Failure to investigate "negative and unfair treatment" by line management

119. The Applicant alleges that she was subjected to "negative and unfair" treatment by Ms De Silva which she says should have been investigated "informally".

120. This complaint relates at least in part to the first period of probation and is to that extent clearly inadmissible. In so far as it covers the extended period of probation it does not feature as a distinct complaint in the Applicant's letter of appeal to the

Secretary General, and cannot therefore easily be correlated with the Secretary General's decision of 21st August 2015.

121. If and in so far as we have jurisdiction to consider this complaint, we do not find any substance in it. As Ms Matus accepts, she did not raise any grievance against Ms De Silva. Moreover, the second period of probation was meticulously conducted with the close involvement of the HR department. The criticisms we have seen recorded by Ms De Silva and Mr Gimson are expressed with professionalism, restraint and respect.

(6) <u>Second Review Board failed to give the Applicant the opportunity to attend and respond to information received</u>

122. Ms Matus complains that she should have been invited to attend the Second Review Board and given the opportunity to reply to the "clarification" provided to it by Ms Ajibowo and Mr Dunne.

123. It is necessary to distinguish here between:

(i) the general complaint that she ought to have had the opportunity to meet the board and give an oral account to it;

(ii) the specific point that having received oral clarification from Ms Ajibowo and Mr Dunne the Second Review Board should have invited Ms Matus to comment.

124. It is important to recognise that the relevant provisions in the Yellow Book (Paragraph 8.6 in Chapter 7) are in Part One and therefore constitute Management guidance and policy and do not confer contractual rights on staff.

125. Paragraph 8.6 states that, in addition to appraisals, the Review Board is to seek such further written material from the supervisor and the officer as will enable it to consider the case and that it "*may*" interview the supervisor and the officer. The paragraph continues:

"Where the Board seeks written comments or where it interviews the supervisor or the officer [ie the probationer] it shall give the other officer an equivalent opportunity to be heard. Where the board seeks advice from a third person it shall advise the officer whose case is being reviewed and provide an opportunity for a response to be given".

126. There is nothing in this provision which gives rise to any expectation that a probationer will be permitted to attend a Review Board unless the supervisor has been, or is to be, interviewed. The mere fact that the protagonists had given information orally to the First Review Board did not compel the Second Review Board to follow the same procedure, and invite them to speak to the Second Review Board.

127. So, quite apart from the non-contractual status of the guidance there is nothing objectionable in principle in not interviewing the Applicant when the supervisor is not interviewed.

128. What, however, of the specific argument that having interviewed Ms Ajibowo and Mr Dunne the Second Review Board ought to have interviewed the Applicant? The Board explained the course it had taken on the basis that (whilst implicitly accepting, we think correctly, that these individuals were "third persons") it was not seeking "advice" from them within the meaning of paragraph 8.6 but merely "clarification". Therefore it did not think it necessary to invite a response from Ms Matus.

129. It seems to us to be correct to say that the Board was not seeking "advice" from the two HR Officers. What they were seeking was factual information. The guidance in para does not specifically cover the situation where factual information is sought from "third persons".

130. It seems to us that whilst it does not explicitly cover this specific situation, the guidance is seeking to convey the need to ensure that each side has a fair and equal opportunity to comment on material provided. Seen in that light, it is, we would suggest, generally advisable to ensure that where information is provided to a Review Board by someone other than the relevant employee or the line manager, both of them should have a specific and equal opportunity to comment. This is so even where that third person has no interest in the outcome. Whether or not the information can be described as a mere "clarification" it is still information on which there may be a need for comment by one or both parties.

131. The question we have to decide here is whether any right of the Applicant (including her general right to fair treatment in International Administrative law) was infringed.

132. We conclude that the answer is “No”. We bear in mind that the process of investigating competence is more inquisitorial than the process of investigating a disciplinary complaint. There is no absolute and overriding requirement for the employee in a competence investigation to see every piece of information which is examined. The answers provided by Ms Ajibowo and Mr Dunne which we have set out in our findings covered “old ground”. They did not raise any significant new material or new viewpoint which the Applicant would need to address. There might be cases where a failure to give an probationer a chance to respond to material received by a Review Board would render its conclusions unfair. This was not such a case.

(7) <u>Second Review Board failed to take account of staff restructure and workload</u>

133. The Applicant complains that the Second Review Board failed to have regard to a restructuring of staff that had taken place in 2014 around the time of her appointment which, she says, had the effect of increasing the workload of the remaining staff in the Secretary-General’s office. In February 2015 it was recognised that the office required additional resources, and a further person was employed in the office. She says that the increased workload following this restructuring put pressure on all staff in the office and that any deficiencies in output were not unique to her. She criticises the Second Review Board for not focussing on this in their Report.

134. We do not think that this was a matter to which the Second Review Board was obliged to attach significance. The Second Review Board had to consider whether the Applicant had had a sufficient opportunity to demonstrate her abilities in the second probation period. It plainly took the view, on ample evidence, that she did have such an opportunity. Whatever the position may have been in terms of resources before February 2015, throughout the second probation period which began in March 2015 the office had its full complement of staff and any abnormal pressures had been addressed.

(8) <u>Administrative leave unlawful</u>

135. The Applicant complains that she was placed on administrative leave on 29th July 2015 pending the Secretary-General’s decision whether to accept the recommendation of termination.

136. The Yellow Book did not provide for “Administrative Leave”.

137. The relevant sections of the New Handbook, which had come into force two weeks before 29th July, does set out (at page 45) what appears to be a general discretion to place an employee on “Administrative leave”, whereby the Employee is not permitted to enter the Respondent’s premises without permission from defined persons. This is not part of the Staff Rules or set out in the contract, however, and it is not entirely clear to us what the status of this provision is.

138. However, we conclude that whichever handbook is applied (and whatever the status of the Administrative Leave provision in the New Handbook) there was no breach of contract in deciding that the Applicant should cease to attend work pending the decision of the Secretary-General on whether to accept the termination recommendation, or uphold the Applicant’s appeal.

139. We will not attempt to set out comprehensively the circumstances in which an employee may have a right not only to receive the remuneration due under the contract, but also to attend work. Suffice it to say that an employee does not enjoy an unconditional right to attend work or undertake work on every day of the employment, and that it is normally legitimate to place an employee on leave for a short period at the end of employment if their attendance is not required by the needs of the organisation. This is frequently done, for example, in cases of redundancy.

140. The question for us is whether the decision to place Ms Matus on leave for the very limited period pending the Secretary-General’s decision was one which the Respondent could rationally take in the exercise of its discretion. We conclude that it was. Mr Dunn’s letter explains that the Applicant’s services were not needed for the forthcoming days and that it would not be practical to supervise her work closely over what was to be an intensive period. We think it is only realistic to recognise also that once the Second Review Board’s recommendation was known, the Applicant would be in a very uncomfortable position in the Office and this would be a source of awkwardness for her and her colleagues. It would not help the working environment at a pressurised time.

141. It is also relevant to note that whilst the final decision was pending, the second period of probation had long expired.

142. The decision was rationally open to the Respondent.

143. The fact that special permission would be needed if she were to attend the premises was a natural concomitant of placing her on leave in these circumstances.

(9) Manner of Escort from the premises and subsequent exclusion

Manner of escort from the premises

144. On this issue the Tribunal is divided. Our divisions stem essentially from differences in the findings of fact made by members of the Tribunal and different perceptions as to what amounts to acceptable management practice when an employee is to leave the premises.

145. The Tribunal members formed differing views about the credibility of the evidence of Ms Stow. The majority found her to be a credible witness who was describing to the best of her recollection a routine HR task which she had performed responsibly in escorting Ms Matus out of the building. The majority formed the impression that Ms Stow is a highly professional officer who was likely to be courteous and respectful in her dealings. The majority considered that the Applicant was also conveying her honest recollections, but thought it likely that Ms Matus was in distress over the fact that she was suddenly being asked to leave in front of her colleagues and that the distress and the sense of humiliation she must have felt over these matters may have affected her perceptions and her recollections of Ms Stow's behaviour. We also accept that Ms Massaka genuinely considered that Ms Stow remained closer to Ms Matus than she (Ms Massaka) thought necessary, but we do not think this takes the matter very far.

146. The majority found the essential facts to be as follows. Ms Stow met with Ms Matus in the Wren room at the beginning of the working day. She handed over to Ms Matus, and briefly discussed with her, the contents of the letter of 29th July. Ms Stow offered to fetch the Applicant's possessions. (We note that Ms Matus describes it as an offer in her witness statement.) However Ms Matus wished to go back to her office and collect possessions and download personal documents from the computer to a USB drive, which she was permitted to do. Ms Stow stayed in the vicinity whilst she did so because she needed to ensure (and presumably to be able to report) that no confidential documents were downloaded. The majority considered this a reasonable course and consistent with general HR practice in organisations generally. Even

though Ms Matus had never been regarded as a security risk, an HR officer would be breaching her duty if she allowed an employee unsupervised access to a computer in these circumstances, not least given the highly sensitive materials which would be available to those working in the Secretary-General's office. The majority does not find that Ms Stow remained unnecessarily close to Ms Matus during the process, and the President specifically accepts her very specific recollection of waiting in the corridor for part of the time whilst Ms Matus collected possessions. Ms Stow accompanied Ms Matus through the gate and proceeded to cross the road to her own office in Quadrant House. She did not detect that Ms Matus found the process of being escorted objectionable, though Ms Matus was in some shock at the news in the 29th July letter.

147. The majority did not find it necessary to make precise findings about how close Ms Stow had stood to Ms Matus or to resolve what was, on the majority's general findings, an immaterial dispute as to whether the Applicant's pass had been taken at the desk or at the gate.

148. On the majority's findings there was no breach of the implied obligation to treat staff with dignity and respect. This was not a case where the employee had been "frogmarched" by a security officer. The escort was professionally conducted by an HR officer in a manner consistent with normal and proper HR Practice.

149. Prof Azinge found that Ms Stow had deliberately humiliated Ms Matus by following her in unnecessarily close proximity whilst she cleared her possessions and downloaded documents. Ms Massaka had the clear impression that Ms Stow stayed unnecessarily close and Prof Azinge so finds. Prof Azinge accepts the Applicant's evidence that Ms Stow took her pass at the desk and that Ms Stow had wanted to collect the Applicant's possessions herself. He concludes that Ms Stow was asserting authority unnecessarily throughout towards someone who was distressed and presented no security threat. He further considers that Ms Stow should not have taken Ms Matus to the gate but should have allowed her to leave alone. Ms Stow's conduct was on Prof Azinge's findings in breach of the implied term that employees be treated with respect.

150. The view of the majority prevails. So there is no finding of breach here.

Subsequent exclusion: the photograph

151. A subsidiary feature of the Applicant's concerns about her exclusion (though it did not surface until the later stages of the pleadings) was the posting of her photograph in the security booth on a notice identifying her as someone who was not to be allowed on to the premises without the permission of specified officers.

152. In the light of the evidence we heard it is possible to deal with this aspect shortly and without exploring jurisdictional questions.

153. The notice (which we describe fully in our findings of fact) was delivered to the gatehouse by Damian Dunne as a confidential document for the use of security staff only.

154. The Tribunal heard oral evidence from Mr Kelvin Edwards, the security guard who put the notice up. His witness statement had described the notice as "affixed to the wall like a wanted poster", giving the impression that anyone calling into the booth (as visitors to Marlborough House must routinely do) or looking through the glass (as anyone entering or leaving Marlborough House may do) would see it and identify Ms Matus as a troublemaker or wrongdoer.

155. It emerged in cross-examination however that, consistently with the intention of Mr Dunne, the notice had been kept confidential to Security Staff because Mr Edwards had stuck it to the inside of some small cupboard doors so that it could only be seen by Security Staff who might need to consult it.

156. In these circumstances the Tribunal unanimously concluded that there was no breach of the duty to treat employees with respect and dignity. A different view might have been taken if the Respondent had permitted the notice to go on public view. We do not think that confidential disclosure to gate security (and confidential use by gate security) of this notice, amounts to a breach.

157. There was considerable conflict between the witnesses as to how the notice came to be placed in the gatehouse. We need not resolve that (save to say that the initiative must, we think, have come from HR).

158. The more troubling aspect of the matter was the Respondent's presentation of the issue through its pleaded case. The Rejoinder served in June 2016 referred to the "assertion" that the photo had gone up in the booth as "unsubstantiated hearsay evidence" which was "disputed" (Para 75). This reflected Ms Stow's understanding at

the time that the notice with the photo had not in fact been delivered to the booth. The unqualified language of the denial is however, even at that stage, surprisingly trenchant in the light of the evidence we heard. Both Mr Dunne and Ms Stow gave evidence that it had been intended to deliver just such a notice but that it seemed to have been overlooked. Mr Dunne told us that he regarded this course as normal, and good practice. Even believing that the practice had not been followed on this occasion the Respondent might have been expected to acknowledge that it had intended to put up such a notice, and that to do so would have been normal practice.

159. In July or August 2016 Ms Stow discovered that the notice had in fact been delivered to the gatehouse and she says she made known within the Secretariat the fact that her precious information (which formed the basis of the material in the Reply) was wrong. No correction was however made to the Reply. Moreover the Respondent's Response to the Additional statement signed on 25th August 2016 (para 9) specifically invited the Tribunal to reject the allegations that the Applicant's photo was placed in the booth. We consider that it is completely unacceptable conduct on the part of the Secretariat that no correction was made until witness statements were produced in November 2016, the month of the hearing. We would be still more concerned if, as may well have been the case, the correct position was known to the Secretariat's responsible officers at the time that the Additional Statement of 25 August 2016 was finalised. The Secretariat has a responsibility to be candid with the Tribunal. This requires that any factual errors in the Secretariat's pleadings or evidence that come to its attention must be drawn to the attention of the Tribunal promptly, and the correct position disclosed. It is concerning that this was not done in the present case.

(10) <u>Denial of independent Investigation in response to Appeal to Secretary - General</u>

160. The complaint here is that the Secretary-General denied the Applicant's request for an independent investigation under Paragraph 2 of the Mechanism for Lodging an appeal against a Review Board Decision in Annex 4 to the Staff rules.

161. That provision is part of the Staff rules and is accordingly incorporated into the Applicant's Contract. It provides that a staff member who appeals a Review Board decision

"may also request that the recommendation be independently investigated in accordance with the established procedures."

162. There is no doubt that this applies to probationers who are subject to a Review Board recommendation not to confirm their employment. They are expressly identified as the very first category of employees who are entitled to the benefit of the Annex 4 rights.

163. The Secretary-General refused this request in his letter of 21st August 2015. He did so on the basis that there were no "established" procedures (he in fact refers to "established provisions"). He concludes that in the absence of such established provisions the proper mechanism is the Review Board process which had already taken place.

164. With respect, that cannot be right. The entitlement is to request an independent investigation following the Review Board process. The Review Board process cannot be regarded as a discharging that further and separate right.

165. Nor can the failure to establish procedures itself be a sufficient answer. There must, we think, be a duty to establish appropriate procedures if they do not already exist or at least to establish an ad hoc procedure if an investigation is deemed appropriate. The right would be nugatory if the respondent could rely on its own failure to establish procedures as a complete answer to a request.

166. So we conclude that the Secretary-General has misdirected himself as to his powers and obligations in refusing the request. The refusal is therefore unlawful.

167. However the Applicant had no right to an investigation as such but merely a right to have the request lawfully considered.

168. What follows by way of remedy?

169. The majority (Prof Azinge and Mr Goddard QC) take the view that the remedy should be restricted to a declaration only. The majority bear in mind the Tribunal's unanimous findings as to the fairness of the probation process and the ample grounds which led the Respondent to decide that the employment should finally be ended. The majority consider that if he had lawfully exercised his discretion the Secretary-General would inevitably have decided that the need be no further investigation in this case.

There was nothing which could sensibly be investigated. It can be confidently stated, in the view of the majority that there is no realistic prospect that the Secretary-General would have ordered an investigation. Nor, if he had done so, is there any realistic prospect that such an investigation would have led to a different substantive outcome.

170. The President takes a slightly different view. He agrees that if there had been an investigation it would not have resulted in the applicant being retained in employment. But the President does not share the confidence of the majority that if he had correctly directed himself the Secretary-General would not have ordered an investigation. The Respondent has a strong tradition of responsibility, caution and procedural thoroughness in dealing with staffing issues. Had there been the requisite established procedures (or if the Secretary-General had accepted that there was a duty to establish them) it is at least possible that he would have directed an investigation. The investigation might not have been a lengthy one. In common with the majority the President sees no realistic possibility it would have led to a different result. But the President considers that there is a distinct possibility that a lawful exercise of discretion would have led to a brief extension of the employment (whilst the investigation was ongoing) and that this should be reflected in an award of compensation. The President would have awarded one month's salary to reflect this possibility.

(11) <u>Failure to deal with inquiries about the applicable procedures</u>

171. The Applicant complains about failure to answer her inquiries about applicable procedures.

172. This is a very subsidiary matter and we deal with it shortly. There was a lack of clarity but we do not think that it entails a breach of contract or has caused the Applicant any loss.

(12) <u>Secretary-General had a conflict of interest as final arbiter</u>

173. The Applicant suggests (by reference to a suggestion from the Staff Association Representative)) that the Secretary General had a perceived conflict of

interest in deciding whether to accept the Board Recommendation as she worked in his office.

174. We consider that there is no substance in this point.

175. The Secretary-General has a legitimate concern that all staff should be fully competent. The degree to which he or she has contact with the staff member does not change the nature of that concern or create anything in the nature of a conflict of interest.

176. It is inevitable in every workplace that some staff will work closely with the person at the apex of the organisation. This cannot disqualify that person from performing his or her role as final arbiter on staffing matters.

(13) Lack of good faith, abuse of authority, inequality of treatment

177. At various stages of her pleadings Ms Matus uses these epithets to characterise the Respondent's alleged wrongdoing.

178. We have sought to deal with her specific complaints. For the avoidance of doubt, we do not consider that the Respondent has been guilty of wrongdoing under these headings.

Orders

179. Our orders reflect the Tribunal's conclusions that the limited defect in the decision of the Secretary-General of 21st August 2015 did not (in the majority's view) have any practical consequence. We have therefore granted a declaration in relation to that defect, but we have not awarded any other relief. Our formal orders are as follows:

(1) We declare that the Secretary-General misdirected himself as to his powers in declining to consider whether to order that the recommendation of the Second Review Board be independently investigated under Annex 4 Para 2 of the Staff Rules. We do not grant any other relief in relation to the Secretary-General's decision of 21st August 2015.

(2) The Applicant's claims are otherwise dismissed.

(3) Each party should bear its own costs

Given this 1st day of December, 2016.

Christopher Jeans QC, President

Mr David Goddard QC, member.
member

Professor Epiphany Azinge SAN,
member