

THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL
IN THE MATTER OF:

HH, HL & DW

Applicants

-and-

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

**Mr Chelva Rajah SC, President; Justice Marva McDonald-Bishop CD, member;
Catherine Callaghan QC, member**

JUDGMENT

INTRODUCTION

1. This is a joint application brought by three employees of the Commonwealth Secretariat (“the Respondent”), who will be referred to in this judgment as HH, HL and DW (jointly, “the Applicants”).
2. The Applicants seek to appeal against a decision made by the Respondent’s Senior

Management Committee (“SMC”) on 21 June 2018, communicated to HL and DW on 13 July 2018, not to review or amend its current arrangements or policy regarding expatriate allowances for non-British staff of professional grade, as set out in the current Staff Handbook.

3. In essence, the Applicants’ case is that the Respondent’s employment policy and the contractual terms of employment offered to its staff members should ensure that staff members receive equal pay and other benefits for equal work. However, the Respondent’s policy is to offer certain benefits to staff known as “Overseas Recruited Staff Members” (“ORSMs”), whose stay in the UK is contingent upon their employment with the Respondent. These benefits include an expatriate allowance of 14% of gross annual salary, and an education allowance by way of reimbursement of school fees of up to £18,706 per child per scholastic year. These benefits are not offered to British nationals or to UK residents (as their stay in the UK is not contingent on employment with the Respondent). As the Applicants were British nationals, they were not entitled to these ORSM benefits, and were not offered these benefits as part of their contracts of employment. They allege that this policy is discriminatory on the grounds of nationality, and cannot be justified.
4. The Applicants assert that their application falls within the Tribunal’s jurisdiction under Article II.1 of the Statute of the Commonwealth Secretariat Arbitral Tribunal (“the Statute”). Specifically, they contend that their application relates to the non-observance of their contracts of employment. More precisely, they contend that Sections 4 and 9 of Part 5 of the Staff Handbook form part of their contracts of employment, and that these sections impose a contractual obligation on the Respondent not to discriminate against its staff members. The Applicants allege that the Respondent’s discriminatory policy of offering certain benefits only to ORSMs, and not to British nationals, constitutes a breach of the Applicants’ contracts of employment.
5. The Applicants seek the following remedies:
 - a. Rescission of the decision not to review the current situation whereby the Applicants receive less favourable terms of remuneration and employment benefits than non-British staff members; or rescission of the decision not to re-classify the applicants as “ORSMs” for the purposes of their employment contracts, with all attendant benefits.

- b. Specific performance of the Secretary-General's written commitment to all staff to "address inconsistencies in our employment practices and ensure that we fully comply with the Equality Act 2010 and our duty as a fair employer", and specifically to bring the remuneration and benefits paid to British staff in line with those paid to non-British staff.
 - c. Compensation for the loss in total net remuneration suffered by each applicant due to exclusion from benefits that have been withheld on the basis of their British nationality. DW, in particular, seeks to include a claim for consequential loss as a result of what he describes as his son's "exclusion from private school".
 - d. An order to the Commonwealth Secretariat to improve practices with regards (i) the consistency of application of employment policies, (ii) the procedure for handling claims of discrimination, and (iii) support for childcare costs for employees with pre-school children, in line with host country practice.
 - e. Compensation to HH, HL and DW for the stress and inconvenience caused by the inadequate or dilatory way in which their complaints were handled by Respondent.
6. The Respondent accepts that, in respect of benefits payable to professional staff at Pay Point F, it differentiates between staff members whose stay in the UK is contingent upon employment with the Respondent and those staff members whose stay in the UK is not contingent upon employment with the Respondent. Although nationality is not the distinguishing factor, the Respondent accepts that in practice the majority of ineligible staff are British nationals, and therefore that its policy is indirectly discriminatory. However, the Respondent maintains that this differentiation is justified in light of its policy (embedded in Regulation 11 of the Staff Regulations and endorsed by the Commonwealth Governments) which aims to secure the highest standards of efficiency, competence and integrity when recruiting staff and to do so on as wide a gender and geographical basis within the Commonwealth as possible.
7. The Respondent disputes that Sections 4 and 9 of Part 5 of the Staff Handbook have contractual effect and are incorporated into the Applicants' contracts of employment. The Respondent accepts that some portions of the Staff Handbook are incorporated into staff members' contracts of employment, but argues that these portions do not include Sections 4 and 9 of Part 5, which relate to discrimination.
8. There are therefore two main issues which the Tribunal must resolve:

- (1) First, whether Sections 4 and 9 of Part 5 of the Staff Handbook are incorporated into and form part of the Applicants' contracts of employment, such that this application falls within the scope of the Tribunal's jurisdiction;
- (2) Second, in any event, whether the difference in treatment between ORSMs and British nationals in respect of payment of benefits (which is accepted is discriminatory) is justified under international administrative law.

PRELIMINARY MATTERS

9. Before considering and determining the Applicants' claims, the Tribunal will briefly address certain preliminary matters raised by the parties.

Joint application and exhaustion of internal remedies

10. The Applicants have submitted a joint application on the basis that they each share the same grievance that is the subject of the application. They have invited the Tribunal to direct that the application is admissible in its current format, as the Rules and Procedures of the Tribunal are silent as to the admissibility of joint applications. They have noted that the Tribunal has previously heard joint applications.
11. The Respondent does not object to the joint application in respect of the SMC's decision of 21 June 2018 to maintain its current policy in relation to payment of benefits to ORSMs.
12. The Respondent accepts that DW and HL have exhausted all internal remedies in respect of their grievance regarding the Respondent's discriminatory ORSM benefits policy. Although the Respondent considers that HH did not pursue all internal processes in relation to his complaint, it accepts that he followed the Respondent's advice to await the outcome of its internal review, and the outcome would have been the same. It therefore does not object to the Tribunal considering HH's complaint as part of the joint application.
13. The Tribunal is willing to determine the application of all three Applicants in relation to the SMC's decision made on 21 June 2018 on a joint basis, especially in light of the concessions made by the Respondent.
14. The Tribunal will address HL's separate complaints regarding childcare and transhipment costs, at the end of this judgment.

Request for confidentiality

15. The Applicants have requested that their names not be made public by the Tribunal, pursuant to Rule 23 of the Rules of the Commonwealth Secretariat Arbitral Tribunal (“Tribunal Rules”). The Applicants rely on a number of grounds for anonymity, including avoiding victimisation in the workplace, preventing unwanted press coverage, and avoiding damage to their future employment prospects. The Respondent does not oppose that request. The Tribunal grants the Applicants’ request for anonymity: their names shall not appear in any documents published, including the Tribunal’s judgment. As stated above, the Applicants shall be referred to throughout this judgment as DW, HH and HL.

Production of documents

16. In paragraph 10 of their Application, the Applicants requested an order that the Respondent disclose certain information or documents. The Respondent provided most of the information sought, in Annex 8 to its Answer. The Applicants in their Reply did not take issue with the Respondent’s disclosure. The Tribunal therefore considers that it is unnecessary to make any order for disclosure in that respect.

17. However, in their Reply, the Applicants raised a different issue in relation to disclosure. The Applicants noted that the Respondent had referred to 21 documents in its Answer, which it had failed to annex to its Answer. The Applicants contended that the failure to annex these documents was a breach of Rule 6.3 of the Tribunal Rules, which placed the Applicants at a “significant and unfair disadvantage”. The Applicants have requested that the Tribunal redact all paragraphs from the Answer (15 in total) that refer to documents not made available to them.

18. The Respondent has opposed this request. It contends that it has complied with the Tribunal Rules, and observes that the omitted documents are either legal authorities, which are readily available on the internet, or are documents which are not relied on by the Respondent except by way of background.

19. The Tribunal does not accede to the Applicants’ request to redact paragraphs of the Respondent’s Answer. Most of the omitted documents are cases, which are available electronically. The other documents are documents which the Respondent does not seek to rely on. Accordingly, there is no breach of Rule 6.3 of the Tribunal Rules. In any event, the

Tribunal considers that it would be disproportionate to remedy such a breach by redacting paragraphs of the Respondent's Answer. The Tribunal also considers that the Applicants were not disadvantaged by the omissions, as they were able to provide a sufficiently detailed Reply in respect of the main issues in the case.

Oral hearing

20. Neither the Applicants nor the Respondent have requested an oral hearing. Having considered the parties' pleadings and documentary material in support, the Tribunal is satisfied that an oral hearing is not necessary in this case, and that it can properly consider the matter on the papers.

FACTUAL BACKGROUND

21. All three Applicants were born in England and are British nationals. All three were living and working outside the United Kingdom ("UK") when they were recruited by the Respondent: HH was living and working in the Caribbean; HL was living and working in the Pacific; and DW was living and working in East Asia.
22. HH commenced employment with the Respondent on 1 December 2015 as a Quantitative Analyst, initially at Pay Point H and then on Pay Point F with effect from 31 January 2018. He was employed on a three-year fixed term contract, which terminated at the end of November 2018. HH has three children, born in 1992, 1995 and 2000.
23. HL commenced employment with the Respondent on 19 January 2015 as a Legal Adviser, at Pay Point F. She was appointed on a three-year fixed term contract. Her contract was renewed for a further three-year term in January 2018, but she ceased employment with the Respondent in March 2019 to take up alternative employment in London. She has one child, born in 2016.
24. DW commenced employment with the Respondent on 6 July 2015 as an Economic Adviser, at Pay Point F. He was appointed on a three-year fixed term contract which was renewed for a further three-year term, beginning on 6 July 2018. He remains employed by the Respondent. DW has two children: a son born in 2013 and a daughter born in 2018.

25. The Tribunal has been provided with emails pre-dating the commencement of DW's employment and with DW's letter of appointment dated 15 May 2015. (It has not been provided with similar material for the other Applicants.)

26. In an email dated 26 March 2015, following a successful interview, DW was offered the position of Economic Adviser – Natural Resources, within the Respondent's Governance and Natural Resources Division, subject to receipt of three satisfactory job references and medical clearance. In an email dated 30 March 2015, DW accepted the conditional job offer, and asked to be classified as "an overseas recruited staff member" on the basis that he had not lived in the UK for many years and was working at that time in East Asia.

On 18 April 2015, the Respondent's human resources department informed DW that he would not be considered an "overseas recruited staff member" under the provisions of its Handbook, but that the Respondent would consider providing him with certain "onboarding benefits" such as a one-way flight to London, shipment of personal effects to London, a one-off installation grant (7% of net salary) and subsistence allowance.

27. DW replied on 23 April 2015, asking to receive the employment contract and stating that he was "keen to complete this process now and start arrangements for my move to London". He made no reference to the Respondent's refusal to classify him as an "overseas recruited staff member".

28. DW's letter of appointment dated 15 May 2015 stated as follows:

"Dear Mr [W],

With reference to the interview held in London on 18 March 2015, I am writing to inform you that the Deputy Secretary-General (Economic and Social Development) is pleased to confirm your appointment as Economic Adviser – Natural Resources, Oceans and Natural Resources Division. The Job Profile is enclosed (Annex 1). Please note that this contract is for a period of three years, which may be renewed subject to satisfactory performance and the organisation's requirements at that time. It is expected that you will commence duty on Monday 6 July 2015.

This contract incorporates the Commonwealth Secretariat Staff Regulations and Staff Rules as laid down and amended from time to time by member Governments and/or by the Commonwealth Secretary-General.

The summary of terms and conditions of your appointment (Annex II) is attached.

The pay point for this position is Pay Point F and as a UK recruit your salary will be £71,730 (Pounds Sterling Seventy One Thousand Seven Hundred and Thirty) per annum gross subject to deductions of National Insurance contributions and Commonwealth Secretariat internal income tax (paid at UK income tax rates). Your salary will be paid monthly in arrears.

As confirmed to you by email on 18 April 2015, although you are classified as a UK recruit due to the fact that you hold UK nationality, given your specific circumstances, the Secretariat will be prepared to make the following payments to you to assist with your relocation back to the UK, as detailed below:

- Installation grant of 7% of net salary.
- Travel on commencement of service only as per the following [...]
- Transportation of personal effects on commencement only as per the following [...]
- Subsistence allowance [...]

I should be grateful if you would let me know as soon as possible whether you accept this offer on the terms and conditions of this appointment, and you can confirm that you will be able to assume office on the date indicated above. If you accept this appointment, please sign and return the enclosed two copies of this letter as soon as possible.”

29. DW apparently accepted the offer on the terms and conditions set out in the letter.
30. Annex II to the letter of appointment was a document headed “Summary of Terms and Conditions for Pay Point F”. The preamble to this document states: “This is a summary of the principal terms and condition for Pay Point F at the Commonwealth Secretariat. These terms and conditions are non-negotiable. The full terms and conditions are set out in the Commonwealth Secretariat Staff Rules and Regulations which form part of the contract of all staff members.”
31. The Summary document comprises three sections: Section A “General” terms; Section B “Appointment of British Citizens and UK Residents”; and Section C “Appointment of Overseas Recruited Staff”.
32. In relation to British citizens and UK residents, Section B simply referred to a “fully inclusive” salary of £71,730 per annum gross, subject to deductions of National Insurance contributions and Commonwealth Secretariat internal income tax paid at UK income tax rates. There were no other benefits payable for British citizens or UK residents.

33. In dealing separately with the appointment of ORSMs, Section C defines an “Overseas Recruited Staff Member” as:

“an officer of the Secretariat whose stay in the UK is contingent upon their employment with the Secretariat. Should such a staff member acquire or have, while employed in the Secretariat, been entitled to British nationality or residential status in the UK the staff member will cease, from the date of acquisition or entitlement, to be an overseas recruited staff member.”

34. Section C set out the list of benefits available to an ORSM, which included an “expatriation allowance” (payable on a monthly basis at a rate of 1/12th of 14% of gross annual salary) and an “education allowance” payable in respect of dependent children in continuing fulltime education at the time of the staff member’s appointment, of up to 75% of admissible costs of £24,941 per child per scholastic year, which amounts to £18,706. Further details of the benefits available to ORSMs are set out in Part 4, Section 13 of the Respondent’s Staff Handbook.

35. Although the Tribunal has not been provided with pre-contractual or contractual documentation for HH or HL, it does not appear to be in dispute that both HH and HL accepted employment with the Respondent on the same terms and conditions as DW, namely, that they were to be classified as UK recruits (rather than ORSMs). The Tribunal understands that HH also received the same discretionary benefits as DW (namely, an installation grant, travel and transportation costs, and a subsistence allowance on commencement of his employment), but that HL did not receive any of these benefits because she received compensation from her previous employer in respect of these matters.

36. HL first raised a complaint about discriminatory treatment on grounds of nationality in an email to Deputy Secretary-General Dunn on 19 March 2015. She stated: “I do identical work to two colleagues here, and yet am paid less because of my nationality. This can only be described as discrimination.” By this time, HL had also raised the issue of relocation costs, and noted that she had received no compensation for relocation costs from the Respondent when other British colleagues had received such compensation (in an email dated 16 February 2015). On 6 May 2015, Mr Dunn informed her by email that:

“This issue is part of a larger analysis on remuneration for all staff. This larger issue is very complex and is being progressed through HR at present and will come to me for consideration. This may take some time. Senior Management Committee will then take a decision.”

37. HL raised the matter again in July 2017, this time with the Respondent’s HR Director. In September and October 2017, she raised the matter with the Respondent’s Chief Operating Officer, Nigel Morland, and in November 2017 with the Respondent’s Legal Counsel, Alice Lacourt. HL met with Mr Morland and Ms Lacourt in January 2018 to discuss her concerns.
38. DW first raised a complaint about discriminatory treatment on grounds of nationality in an email to the Respondent’s human resources division on 19 July 2017. He subsequently had meetings with a human resources manager in July and August 2017 to raise his concerns. In October 2017, DW raised the matter with Nigel Morland and in December 2017, DW chased for a response to his concerns. DW met with Alice Lacourt to discuss his concerns in March 2018, and held a further meeting with Alice Lacourt and HL, and a further meeting with Paulo Kautoke, Director, Trade, Oceans & Natural Resources Directorate in May 2018.
39. HH first raised concerns with the Respondent’s human resources department about potential discriminatory treatment in November 2017, which he summarised in an email to the HR Director on 17 January 2018. He was informed that the matter was under “legal review”. He heard nothing further.
40. On 21 June 2018, at a meeting of the Respondent’s SMC, the SMC decided that the Respondent’s current arrangements regarding expatriate allowances for non-UK staff of professional grade should stand, as set out in the current Staff Handbook. At that meeting, it was agreed by the SMC that the Secretary-General would meet with the two staff members who had raised a complaint (DW and HL). The SMC’s decision was notified to DW and HL (but not HH) by email on 13 July 2018.
41. At the end of July 2018, the Secretary-General met with HL and DW (with Ms Lacourt present) to discuss the outcome of the SMC meeting.

42. In August 2018, DW received written confirmation from the Respondent that he had exhausted all internal remedies on the issue.

43. The Applicants submitted their joint application to the Tribunal in October 2018.

CONSIDERATION AND DETERMINATION OF THE APPLICANTS' CLAIMS

The scope of the Tribunal's powers

44. The Tribunal draws its competence or jurisdiction from the Statute and the Statute alone.

45. Article II.1 of the Statute provides as follows:

“The Tribunal shall hear and determine any application brought by:

- (a) a member of staff of the Commonwealth Secretariat;
- (b) The Commonwealth Secretariat;
- (c) any other person who enters into a contract with the Commonwealth Secretariat;

which alleges the non-observance of a contract in writing with the Commonwealth Secretariat and includes, in relation to a contract of service the non-observance of the contract of employment or terms of appointment of such member of staff, and in relation to a contract for services the non-observance of the terms of the contract.”

46. Article II.5 provides:

“For the purposes of this Statute:

- (a) “contract of employment” and “terms of appointment” include all relevant Regulations and Rules in force at the time of the alleged non-observance and include the provisions relating to staff gratuity, retirement and end of contract benefits;”

47. Article III provides:

“In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the Tribunal”.

48. Article XII of the Statute provides, relevantly:

“1. In dealing with a case relating to a contract of service, and subject to paragraph 2 of Article VI, the Tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries.

2. In all other cases, the Tribunal shall apply the law specified in the contract. Failing that, it shall apply the law most closely connected with the contract in question.” Paragraph 2 of Article VI relates to principles governing the Tribunal’s procedure for dealing with applications to it.

49. As evident from above, Article II.1 of the Statute gives the Tribunal the jurisdiction to hear and determine disputes relating to the non-observance (i.e. breaches) of a contract in writing between the Respondent and its employees. The Tribunal does not have the jurisdiction to hear and determine any claims between the Applicants and the Respondent other than those alleging a breach of a contract in writing, and more specifically in this case, a contract of employment or terms of appointment.

50. In the present case, the Applicants’ claims are framed as being for breaches by the Respondent of their contracts of employment. The breaches alleged are of Sections 4 and 9 of Part 5 of the Staff Handbook, which the Applicants allege are incorporated into and form part of their contracts of employment. They claim that these provisions impose a contractual obligation on the Respondents not to discriminate against the Applicants. They allege that in failing to offer them, as British nationals, the same benefits that were offered to ORSMs, the Respondent discriminated against them in breach of contract.

51. The Respondent disputes that Sections 4 and 9 of Part 5 of the Staff Handbook are incorporated into the Applicants’ contracts of employment.

52. The first question the Tribunal has to determine, therefore, is whether Sections 4 and 9 of Part 5 of the Staff Handbook are incorporated into and form part of the contract of employment.

53. In determining this issue, the starting point is to consider the contract of employment (or terms of appointment) itself. In our view, each Applicant’s contract of employment comprises the following:

- (1) The letter of appointment;
- (2) The Job Description (referred to in, and annexed to, the letter of appointment);
- (3) The Summary of Terms and Conditions for Pay Point F (or other relevant Pay Point) (referred to in, and annexed to, the letter of appointment);

(4) The Commonwealth Secretariat Staff Regulations and Staff Rules, as laid down and amended from time to time (referred to in the letter of appointment and in Article II.5(a) of the Statute).

54. The Applicants contend, in paragraph 9 of their Application, that the Staff Handbook “comprises” the Commonwealth Secretariat Staff Regulations and Rules and so forms part of the contract of employment of all staff members. In the Tribunal’s view, this is based on a misreading or misunderstanding of the scope and purpose of the Staff Handbook.

55. The Respondent’s Staff Handbook is in 5 Parts. Each Part has in turn several Sections.

56. Part 1, Section 1, paragraph 4.1 (which is headed “Purpose of the Staff Handbook”) provides:

“4.1 The purpose of this Staff Handbook is to provide staff with a guide to the Secretariat’s Regulations, policies and rules. For employees of the Secretariat, the main Terms and Conditions of Employment are set out in the employee’s Contract of Employment. The mandatory Regulations and Rules in force as set out in Part 2 are contractual.” (emphasis added)

57. Part 2, Section 1 of the Handbook sets out the “Staff Regulations” (27 Regulations in total). Paragraph 2.1 of that section sets out the scope and purpose of the Regulations:

“2.1 The Staff Regulations are made by Commonwealth governments, and can be amended only with their agreement. The Regulations embody the general conditions of service and the rights, duties and obligations of Secretariat employees. The Regulations form part of an employee’s contract of employment. The Secretary-General will ensure implementation of the Regulations by making, and amending from time to time, Staff Rules consistent with the Regulations as necessary and ensuring continued alignment with applicable international administrative law provisions.” (emphasis added)

58. Part 2, Section 2 of the Handbook sets out the Staff Rules. Paragraph 1.1 thereof sets out the implication of the Staff Rules to be as follows:

“These rules are supplementary to the Regulations and are designed to facilitate the operation of the Secretariat on a day-to-day basis.”

59. Paragraphs 4.1, 5.1 and 6.1 of Section 2 make clear that certain Sections of Part 5 (Sections 5, 7 and 12-14) form part of the Staff Rules and therefore form part of the contractual terms.

60. Paragraphs 7.13.3 and 7.13.4 of the Staff Rules provide:

“7.13.3 An employee recruited as overseas Recruited Professional Employee is an officer (Paypoint F-I) whose stay in the UK is contingent upon the employee’s employment with the Secretariat.

7.13.4 However, should such an employee acquire British nationality or residential status in the UK while employed in the Secretariat, the employee will cease, from the date of acquisition, to be an overseas recruited employee.”

61. Part 3 (which does not form part of the Regulations or Rules) deals with appointments to the Commonwealth Secretariat. Paragraph 2.3 thereof provides:

“Upon an offer of appointment, each employee will receive a letter of appointment and a Job Description which, together with the Regulations and Rules of the Commonwealth Secretariat, will comprise the terms and conditions of employment. On commencement, the employee would be provided with details of the Staff Handbook available via the Commonwealth Secretariat’s intranet, Compass, which incorporates the Regulations and any Rules made under them. Acceptance of the appointment will constitute an acknowledgment of agreement to be bound by the Staff Regulations and Rules in force from time to time.” (emphasis added)

62. Part 4 (which does not form part of the Regulations or Rules) deals with salaries, allowances and benefits. Section 3, paragraph 9.1 thereof provides for home leave for ORSMs as follows:

“9.1 If employment is expected to last at least 30 months, overseas diplomatic or recruited staff will be granted home leave once every three years for which the Secretariat will pay airfares for the employee, spouse and eligible dependent children.”

63. Section 13 of Part 4 deals with Diplomatic and Overseas Recruited Employees, and sets out in more detail the benefits available to ORSMs.

64. The final part, Part 5, deals with policies and procedures.

65. Section 4 of Part 5 is headed “Dignity at Work”. This Section does not form part of the Regulations or Rules. Paragraph 1 of that Section states:

“The purpose of the dignity at work policy is to promote and sustain a culture of working relationships in which everyone is treated with dignity and respect and where

it is understood that any form of discrimination, or harassment, including sexual or gender harassment, at the workplace or in connection with work, shall be prohibited. The organisation aims to foster an environment where employees have the confidence to deal with and challenge discrimination, harassment or bullying without fear of ridicule or reprisals.”

66. Section 9 of Part 5 is headed “Equal Opportunities”. This Section also does not form part of the Regulations or Rules. Paragraph 4 of that Section, which is headed “Discrimination”, provides as follows:

“4.1 The equal treatment of all employees and the avoidance of discrimination in employment is a key element of the Secretariat’s Human Resources Management principles. The criteria for selection, appointment, promotion, terms and conditions and non-contractual benefits will be fair and fully in accordance with the Equal Opportunities Policy.

4.2 There are two forms of discrimination

- (a) **Direct discrimination or unequal treatment** – this occurs when a person is treated less favourably than others because of their age, disability, gender, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation, unless the discrimination or treatment can be justified.
- (b) **Indirect discrimination or unequal treatment** – this occurs when a policy, provision, criterion or practice applies to everyone, but disadvantages a particular individual or group.

4.3 Any form of discrimination is considered to be a serious matter and will be dealt with in accordance with the disciplinary procedure.” (emphasis in original)

It is not in dispute that race includes nationality.

67. It is therefore clear that although the Staff Regulations and Staff Rules are contained in the Staff Handbook, and form part of the contract of employment, not every part of the Staff Handbook is contractual in nature. Specifically, Sections 4 and 9 of Part 5 of the Handbook, on which the Applicants rely, do not form part of the Staff Regulations or Rules, and are not incorporated into the contract of employment. There is no Regulation or Rule or any other authoritative source that makes Sections 4 and 9 of Part 5 part of the terms of the Applicants’ contracts of employment. Nor is there anything in the pre-contractual correspondence between the Respondent and DW that suggests Sections 4 and 9 of Part 5 of the Handbook would be incorporated into his contract. It is also clear from that

precontractual correspondence that DW was well aware that ORSMs were being offered generous benefits to which he was not entitled as he was a British national. It is not clear whether this was also the case with HH or HL but they have not asserted otherwise.

68. In the circumstances, the Tribunal finds that Sections 4 and 9 of Part 5 of the Handbook were not incorporated into the Applicants' contracts of employment or in the terms of their appointment with the Respondent. Accordingly, there was no contractual obligation on the part of the Respondent not to discriminate against the Applicants. Therefore, there is no breach of contract by the Respondent of the Applicants' contracts of employment, and the Tribunal so finds.
69. The Applicants also seek to rely on the provisions of the Equality Act 2010. They contend that they are entitled to rely on the provisions of this UK statute because of a statement made in a Report from the Secretary-General in June 2016, sent to all of the Respondent's staff, in which the Secretary-General said: "I will address inconsistencies in our employment practices and ensure that we fully comply with the Equality Act 2010 and our duty as a fair employer and a corporate citizen." They contend that this statement gave rise to a legitimate expectation that the Respondent would reform its policies to comply with the Equality Act 2010, or gave rise to an estoppel.
70. The Respondent has challenged the Applicants' reliance on the Secretary-General's statement as a basis for alleging discrimination and unequal treatment within the provisions of the Equality Act 2010. The Respondent argues that "it is manifestly not within the powers of the Secretary-General", under international administrative law and the Revised Agreed Memorandum of the Commonwealth Secretariat to commit the Respondent to "fully comply" with the UK Equality Act 2010. It also submits that it would be inappropriate for the Tribunal to import UK law into the Respondent's internal law where international administrative law already addresses the question and there is no gap to be filled by reference to domestic law. The Respondent contends that the Applicants cannot rely on a statement made by the Secretary-General at a point when the Applicants were already employees and had already chosen to take up the employment at the Secretariat on current terms and conditions, including ineligibility for ORSM benefits. The Respondent also notes that the Applicants have not established what action they took to their

disadvantage in detrimental reliance on the statement of the Secretary-General, or that the statement gave rise to a legitimate expectation which was then breached.

71. Under the provisions of Article XII of the Statute, the Tribunal “in dealing with a case relating to a contract of service ... shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries”. The provisions of the Equality Act 2010 do not, therefore, apply in relation to this case unless, of course, those provisions were incorporated into the contracts of employment of the Applicants. There was no such incorporation. However commendable the aspirations expressed in the Secretary-General’s statement in her June 2016 Report may have been, this statement could not have the effect of importing the provisions of that statute into the contracts of employment of the Respondent’s staff; nor could it have the effect of making the Respondent subject to the laws of the UK. The Respondent is an international organisation with specific diplomatic status under the UK’s Commonwealth Secretariat Act 1966, the International Organisations Act 2005 and the Memorandum of Understanding on the Commonwealth Secretariat: see paragraph 1.6 of Part 1, Section 1 of the Staff Handbook.
72. The Tribunal accepts the submissions of the Respondent in relation to legitimate expectation and estoppel. It rejects the contention of the Applicants that the Secretary-General’s June 2016 statement gave rise to a legitimate expectation or estoppel recognisable in law in the circumstances of this case, so as to bind the Respondent.
73. Accordingly, in the circumstances, the Applicants cannot rely on the provisions of the Equality Act 2010 in their application against the Respondent by virtue of the statement made by the Secretary-General in June 2016.
74. The Applicants have also relied on the principles of international administrative law, and the Respondent rightly considers itself bound by the principles of non-discrimination and equality of treatment laid down by international administrative law. The Tribunal therefore considers it necessary to go on to consider whether the discrimination arising from the ORSM benefits was justified or not.

Allegations of unjustified discrimination under international administrative law

75. The Applicants argue that the policy of offering ORSM benefits to ORSMs but not to British nationals is clearly discriminatory. The Respondent does not dispute that on the face of it, its ORSM benefits policy is indirectly discriminatory. The Respondent argues that indirect discrimination can be justified in international administrative law and that there are good reasons to justify why that policy is necessary. Essentially it was because the Commonwealth Governments had agreed that the cornerstone of the Respondent's staffing policy was to recruit and retain staff who met the highest standards of efficiency, competence and integrity paying due regard to the importance of recruiting staff on as wide a gender and geographical basis within the Commonwealth as possible. This policy is reflected in Regulation 11 of the Staff Regulations, which provides:

“In the appointment, transfer and promotion of staff the utmost consideration will be given to the necessity for securing the highest standards of efficiency, competence and integrity. Due regard will be paid to the importance of recruiting the staff on as wide a gender and geographical basis within the Commonwealth as possible.”

76. The Respondent considered it was necessary to offer the ORSM benefits to ORSMs so as to achieve this policy.

77. The Respondent also relies on the fact that ORSM staff experience disruption of their own and their families' lives by having to move to London, which merits compensation. The Respondent also maintains that it is common practice in other international organisations to recruit staff not only on their potential for high performance but also to recruit staff on a geographically diverse basis to reflect their member countries. These international organisations, it argues, pay benefits to staff recruited overseas who are not nationals or residents of the host country. The Respondent argues that international administrative law recognises this as a legitimate objective for such organisations, and that it is necessary for the Respondent to keep pace with the benefits offered by these other international organisations. If it was necessary to achieve the required diversity and maintain the required high standards to give a certain group of persons more emoluments than another group, albeit for the same work, that disparity or discrimination would be justified. The Respondent was clearly such an international organisation and has found this ORSM benefit policy necessary.

78. The Applicants countered that even if such a policy could justify discrimination, the Respondent must show, by evidence, that the ORSM policy does in fact help meet the objectives of Regulation 11. The Applicants maintain that the Respondent has not been able to show this. In any event, the Applicants contend that even if some disparity was justified, the disparity must be proportionate i.e. enough to achieve the objective but not so much that it would be excessive. In the present case, the Applicants contend that paying a monthly expatriate allowance to ORSMs of 14% of annual gross salary and an educational allowance of up to £18,706 per child per scholastic year was clearly disproportionate when the annual salaries of both ORSMs and British nationals at Pay Point F was £71,730 per annum gross.
79. The Tribunal has had regard to the entire case and submissions of the parties, even though we have not set out the arguments in their entirety for present purposes.
80. In the case of C v EBRD EBRDAT 01/03, the EBRD Administrative Tribunal (“EBRDAT”) set out some generally recognised principles of international administrative law as follows:

“54. The jurisprudence developed by the administrative tribunals of international organisations is a prime source for the general principles of international administrative law. This does not mean that one administrative tribunal is bound to follow the approach let alone the particular decision of another tribunal. On the other hand, it does mean that the reasoning of other administrative tribunals is persuasive.

55. The rule against unjustified discrimination embodied in section 5(a) of the Staff Regulations reflects a well established principle of international administrative law as accepted in the decided cases of administrative tribunals. In this connection the case of *Mr R v IMF* is particularly helpful because the IMF Administrative Tribunal (“IMFAT”) undertook a comprehensive review of the jurisprudence concerning discrimination and, in the process, confirmed a number of important principles that constitute the relevant generally recognised principles of international administrative law. The key points were as follows:

(1) It is a “well established principle of international administrative law that the rule of non-discrimination imposes a substantive limit on the exercise of discretionary authority in both the policy-making and administrative functions of an international organisation”.

(2) An administrative tribunal may not substitute its own judgment for that of the management of the international organisation. That necessarily means that the organisation retains a broad discretion to formulate and apply its own preferred policies.

(3) Discrimination may arise either through express differentiation between two categories of staff, or through a policy neutral on its face that involves a consequential differentiation, that is, discrimination may be direct or indirect.

(4) Non-discrimination only applies as between staff who are in the same position in fact or in law.

(5) The principle of non-discrimination is a qualified principle: a difference in treatment is contrary to international administrative law only if it cannot be justified. Thus in the *de Merode* case the World Bank Administrative Tribunal stated that, in making legislative amendments to terms and conditions of employment, the World Bank “must not discriminate in an unjustifiable manner between individuals or groups within the staff”.

56. In the *Mr R* case the question was whether the IMF discriminated against an overseas office director in denying him the overseas assignment and housing allowances afforded to a category of staff called resident representatives. After its comprehensive review of the authorities, the IMFAT formulated the test that it would apply in terms of three questions:

(1) The IMF’s reasons for the distinction in benefits had to be supported by evidence, that is, the administrative tribunal was entitled to ask whether the decision could have been taken on the basis of facts accurately gathered and properly weighed.

(2) There had to be a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification. That involved a consideration of the stated reasons for the different benefits and an assessment of whether their allocation to the two categories of staff was rationally related to their purposes.

(3) If the *De Armas* case (on which see below) was to be followed, the third question was whether the differential treatment was not only reasonably related to the greater

disadvantages suffered by the group in receipt of the enhanced benefits but also whether the benefits were proportionate to those disadvantages, or whether the disparity could be justified by some other valid distinction between the two categories of staff.

57. The IMFAT's review of the authorities thus included the decision of the Asian Development Bank Administrative Tribunal ("AsDBAT") in *De Armas v Asian Development Bank*. This decision merits separate consideration since it is particularly relevant to the present case – indeed the Respondent argued that it was indistinguishable from it.

58. *De Armas* dealt with the situation of employees of an international organisation who challenged the application of different benefits to different categories of staff. In particular, a group of home-based Filipino staff members alleged that they had been discriminated against by the Asian Development Bank ("AsDB") with respect to four employment benefits: education grant, home leave travel, *force majeure* insurance protection, and severance pay. The AsDBAT considered that it had to look closely at the policies and practices that the organisation relied upon to justify the differential treatment.

Its general approach was set out in the following passage:

"The Applicants contend that the refusal of the four benefits... constitutes discrimination against the Filipino professional staff. However, the Tribunal finds that those benefits depend not on the nationality of a staff member but on the place where he serves. An expatriate staff member, that is, one who serves outside his home country, is subject to some obvious disadvantages vis a vis a colleague who serves in his home country. On principle the grant of compensatory benefits to the former does not constitute discrimination if such benefits are reasonably related and proportionate to those disadvantages... The Tribunal will therefore examine the disputed benefits in that light: whether the "expatriate benefits" are reasonable compensation for the disadvantages which expatriates experience, particularly because of the need to attract and retain staff with the highest standards of efficiency and competence..."

59. The AsDBAT also made an important point concerning comparisons between international organisations and their variable degree of generosity in determining expatriate benefits:

“In the absence of a completely uniform practice, in regard to any particular benefit, by all organisations, it is inevitable that one organisation will be the most generous, and another the least generous. But that by itself is not proof of unreasonableness, perversity, or discrimination on the part of either. Further, the benefits reasonably necessary to attract staff with the highest standards of efficiency and technical competence, may differ from place to place.”

60. Finally, and specifically in respect of the education grant, the AsDBAT considered that the disadvantages experienced by expatriates were not purely financial. They included nonpecuniary disadvantages, notably, “the separation of the child from his parents in the case of home country education, and the weakening of other family, social and cultural links in the case of duty station education.”

The EBRDAT then considered and dealt with the education allowance, being paid in 2003 to its staff relocating to the UK as set out below. This allowance was paid from the year the child reached 4 years of age until, if he or she attended university, the year he or she attained 25 years of age:

“91. Dealing with the education allowance, the Tribunal notes the following considerations:

(1) In 2003 the average payment per recipient for an average 1.79 children ranged from £6,700 to £8,000, and based on current average length of service of 5.8 years, the expected average payment of education allowance ranged from nearly £39,000 to £46,000 (paragraph 46 above). Obviously, the allowance may go on being paid for longer periods, although the statistical evidence suggests that the Appellant made a number of assumptions, which are not necessarily valid, in calculating the theoretical maximum value of the education allowance over the longer term and, as a result, his calculations inflated its value (paragraphs 46-47 above).

(2) By virtue of the maximum amounts per child of currently £6,000 (primary/secondary) and £3,500 (post secondary), the education allowance does not necessarily cover the full cost of a child’s education. In addition, the allowance is claimable against actual expenditure evidenced by receipts. Both these points are indicative of proportionality.

(3) The amount of the allowance, including the increases that take account of the number of dependent children, is quite generous but is not in the view of the Tribunal so excessive as to break the connection with the overall aim, or to render the benefit to expatriates disproportionate in relation to that aim.

(4) Following the general approach of *De Armas*, the Tribunal accepts that the disadvantages experienced by expatriates that may appropriately be compensated include non-pecuniary disadvantages, notably, the separation of the child from his parents in the case of home country education, and the weakening of other family, social and cultural links in the case of duty station education.

(5) The Appellant suggested that a non-discriminatory education allowance would be narrowly restricted to certain specified types of education, for example, education in a school in the UK pursuing the home country curriculum. The Tribunal rejects this approach for two reasons. First, it would be likely to lead to grievances and anomalies, for example, the parents who apply to such a UK school only to find that there are no vacancies would be aggrieved, as would parents from a country that has no national school in the UK. Second, it overlooks the need to compensate for the non-pecuniary disadvantages described above.”

81. Given that the maximum amount per child (primary or secondary) under the education allowance given by the EBRD in 2003 to its staff members relocated to the UK was £6,000, the education allowance given to ORSMs by the Respondent 15 years later in 2018 of 75% of admissible education costs up to a maximum of £18,706 per child per school year is, in the Tribunal’s view, reasonable and not disproportionate.

82. The education allowance offered to ORSMs also does not cover the full costs of the child’s education. It covers up to 75% only. The Staff Handbook also provides that the allowance is claimable only against actual expenditure, evidenced by receipts: see paragraphs 6.7.1 and 6.7.4 of Section 13, Part 4.

83. The Tribunal is of the view that the amount of the ORSM education allowance, including the increases that take into account the number of dependent children, is not of an amount

as to break the connection with the original aim underlying Regulation 11 or so as to render the benefit to ORSMs disproportionate in relation to that aim.

84. The Tribunal also finds, as did the AsDBAT in De Armas v Asian Development Bank, that the disadvantages experienced by ORSMs are not purely financial and include nonpecuniary disadvantages such as the separation of the child from his parents in the case of home country education, and the weakening of other family, social and cultural links in the case of duty station education. These are not disadvantages suffered by British nationals educating their children in British schools. The Tribunal notes that the Applicants had all been living and working outside the UK when they took up employment with the Respondent. However, we consider that the reasoning above still applies to them; they do not suffer the disadvantages of ORSMs in educating their children in Britain.

85. Where the EBRDAT held that the discriminatory nature of the education grant was not justified was its continued payment to employees who had, since recruitment, become UK nationals. This is not so with ORSM benefits. Once an ORSM becomes a British citizen or becomes entitled to residence in the UK, the ORSM's entitlement to the ORSM benefits ceases. We note the Applicants' complaint that they have anecdotal evidence that some staff members have continued to receive ORSM benefits after acquiring British nationality or UK residence. However, we accept the Respondent's argument that such payments were made without the Respondent's knowledge of their newly acquired status, and that a failure to notify the Respondent of their change in status would merit disciplinary action and a demand for repayment of the benefits paid after the date of their change in status. We have seen documentary evidence that the Respondent has taken steps to investigate such cases, and has put in place stringent requirements as of May 2019 for claiming ORSM benefits, including a requirement that status and nationality are declared for every claim in every year before any ORSM benefits are paid.

86. The Tribunal is also mindful that one of the recognised principles of international administrative law is that an administrative tribunal may not substitute its own judgment for that of the international organisation. The Governments of the Commonwealth determined that its mission and objective is to recruit the best possible staff from as wide a gender and geographical spread from its member countries as possible. International

administrative law recognises this as a legitimate objective. The Respondent has decided that it needs to give ORSMs the ORSM benefits to achieve this and determined what these should be and in what amount. Unless there is something obviously wrong with the nature and/or amounts of these benefits, this Tribunal should not interfere with how the Respondent determines the nature and extent of these benefits. The Tribunal sees nothing obviously wrong in the nature of the benefits given to the ORSMs or in the amounts thereof.

87. With regard to the accommodation allowance in the C v EBRD case, the EBRDAT found as set out in paragraphs [89] and [90] of the Judgment as follows:

“89. Dealing with the accommodation allowance first, the Tribunal has regard to the following considerations:

(1) In 2003 the average amount of accommodation allowance per recipient was about £13,000 and the average mortgage subsidy was about £4,500 (paragraph 49 33 above). The statistical evidence also suggests that in relation to long service employees the gap in value between accommodation allowance and mortgage subsidy progressively narrows (paragraph 51 above).

(2) The availability of the allowance for purchasing as well as renting is related to the aim of recruiting and retaining expatriate staff.

(3) The ECA Report of 1994 showed that the abrupt termination of the accommodation allowance would frustrate the aim of recruiting and certainly retaining expatriate staff. The gradual phasing down of the allowance from years 4 to 11 and then the possibility of moving over to the mortgage subsidy, which is available to both expatriate and non-expatriate staff satisfying the criteria, are indicative of proportionality.

(4) In the Tribunal’s view the amount and the conditions attaching to the accommodation allowance do not break the connection with the overall aim of recruiting and retaining expatriates, and do not render the allowance disproportionate in relation to the disadvantages experienced by expatriates.

90. In the light of these considerations the Tribunal concludes that the eligibility criteria and other substantive provisions governing the accommodation allowance contained in the Staff Handbook are reasonably related to the aim of recruiting and retaining

expatriate staff and are proportionate to the disadvantages experienced by expatriates and thus to the achievement of the aim. It follows that the Respondent's denial of the accommodation allowance to the Appellant amounts to a justified difference in treatment of him compared with staff who are eligible to receive the allowance. By the same token the Respondent has not unjustifiably discriminated against the Appellant on grounds of nationality by denying him the allowance."

88. In the case of ORSM benefits, what used to be called the accommodation allowance (which amounted to 30% of the ORSM's gross salary) was converted in 2011 to an expatriation allowance fixed at 14% of gross salary. The Respondent has no mortgage subsidy scheme.
89. In the Tribunal's view, having an expatriate allowance fixed at 14% of gross salary for ORSMs to replace the accommodation allowance would be justified if it helps meet the objection of Regulation 11. It is the view of the Respondent that it does. The Tribunal also notes that other international organisations also recognise that an accommodation allowance (now replaced by an expatriate allowance for ORSMs) can be justified discrimination. It is the Respondent's view that 14% of gross salary is an appropriate amount. In the Tribunal's view, this amount is not excessive or disproportionate to the annual gross salary of the ORSMs, particularly bearing in mind that it is subject to deductions for internal tax and national insurance. Further, this education allowance is reviewed by the Respondent periodically and most recently in 2011.
90. The EBRD case found that that the education allowance and accommodation allowance, though discriminatory, were both justified with one exception in respect of the education allowance, which exception the Tribunal accepts does not exist under the Respondent's ORSM benefits policy. The reasons set out by the EBRDAT as to why the discriminatory allowances were justified apply just as much to the ORSM benefits in this case as they do in the EBRD case. The Tribunal agrees with the reasons given for why these allowances were justified.
91. The CSAT Tribunal has in 2012 heard and determined in the PH case a similar challenge by PH, an employee of the Respondent, that the ORSM relocation benefits package was discriminatory. In that case, the employee was recruited in Australia and had dual Australian and UK nationality. He claimed that he should be paid the repatriation allowance

payable to ORSMs and contended that “failure to accord him the benefits applicable to an ORSM was in breach of the principle of equality and non-discrimination.”

92. It is worth setting out in full paragraphs [38-53] of the PH Judgment which contains the CSAT’s reasoning as to why it found ORSM benefits were justified. Whilst the particular ORSM benefit that PH claimed should have been extended to him was the repatriation benefit, the reasons justifying the repatriation benefit for ORSMs generally apply equally to justify the other ORSM benefits:

“Equality/non-discrimination

38. The principle of equality or non-discrimination is well established in the law of the international civil service. It has been expressed in many different ways in the cases very helpfully cited to us, of which we cite three examples. The principle has been said to require as follows:

- (i) “the adoption and implementation of impartial, reasonable and objective rules which provide the same juridical treatment for similar case” ILOAT Judgment No 2979 para. 4
- (ii) “comparable situations should not be treated differently unless such differentiation is objectively justified” – *Hochstrass v Court of Justice of European Communities* (Case 147/79) (CJEU) para.7
- (iii) “persons in like situations be treated alike and that persons in relevantly different situations be treated differently ... in most cases the question is whether there is a relevant difference warranting the different treatment involved” ILOAT Judgment No2313.

39. There is no dispute that the principle is engaged where the alleged difference of treatment relates to a matter of status such as nationality. Equally it is clear that the use of nationality as a criterion for benefits or disadvantages is not necessarily discriminatory: see *Hochstrass* (above), *Serio v Commission of the EAEC* Case 62/65 [1966] ECR 561.

40. The Applicant’s case is in substance that as a naturalised Australian who is normally resident there (and who was recruited “from” Australia):

- (i) he is in a comparable situation to that of an Australian national without dual nationality (or a comparable situation to that of a person of some other nationality who is not also a UK national);
- (ii) that his UK nationality is not a “relevant difference” between his case and that of an Australian (or a person of some other nationality) who is not also a UK national;

(iii) that the difference in treatment is not “warranted” or “objectively justified” by British nationality, at least in a case such as his where prior residence was in Australia, so that he had to move to the UK to take up the job.

41. The underlying thrust of his argument is that, if any distinction is to be made as to who qualifies for the “generous” relocation “package” granted to ORSMs, it should be based on residence not on nationality. If residence were the criterion he would qualify since he was recruited from Australia. He says that to disqualify him because of the “fortuitous” feature that he holds a British passport makes no sense.

42. We have limited information as to the reason behind the definition excluding UK nationals from the ORSM benefits irrespective of residence or dual nationality but it is essentially self-evident.

43. The Respondent recruits from all of the Commonwealth countries. This is built in to its human resources equality policies which refer to maintaining an “appropriate geographical balance” (para. 3 of Recruitment and Selection policy, p. 57 Yellow Book). It is also committed to affirmative action in recruitment and selection “to reach a wider pool of applicants by circulating job advertisements to Commonwealth countries” (Para. 3 Recruitment and Selection policy, p. 57 Yellow Book). Its mission is also to secure the best candidates (see para. 9 of Introduction to Policies at p. 2 Yellow Book).

44. The Respondent has plainly judged it necessary in these circumstances to offer generous packages to include return as well as arrival.

45. However an employee who is not a UK national and whose right to remain in the UK is dependent on employment with the Respondent is in a specially vulnerable position. If the employment terminates the individual is, ex hypothesi, liable to be expelled from the UK. The generous package applicable in these circumstances (including, not least, the repatriation allowance) is clearly based on that special vulnerability. Offering such a package encourages applicants from around the Commonwealth to apply for and to accept work for the Respondent in London and provides “insurance” against financial difficulties on the termination of the contract (which could of course occur early and unexpectedly). Such “insurance” is an important safeguard given the employee’s inability to stay on in London and earn his or her return fares and relocation costs by working for another employer.

46. It seems to us that UK nationals (whether or not they hold a second passport) are not in a comparable situation to such individuals. They are not vulnerable to expulsion on the termination of employment and can seek alternative work in the UK without restriction. This is true whether they were previously resident abroad or not. They do not require the same protection.

47. Even if the situation of the UK national recruited abroad is sufficiently comparable for the purpose of the rule against discrimination, we conclude that the liability to expulsion, is a relevant difference warranting (or, if necessary, justifying) the more favourable treatment. It is legitimate for the Respondent to conclude that a

UK national having the right of abode in the UK, does not need the same protection and incentives. It must also be the case that the Respondent has fewer inherent difficulties in recruiting UK nationals (because it is located in the UK) than in recruiting nationals of other commonwealth countries.

48. Of course, it would be open to the Respondent to introduce different rules whereby either relocation benefits were equal for all or whereby they were based, for example, on residence, not nationality. We are not saying that the present rule is “better” than other rules which may be under consideration. But we see nothing illegitimate in giving special protection to those who most need it (namely those who are liable to deportation when their employment ends).

49. It is relevant also to test the natural limits of the Applicant’s argument and to explore the difficulties inherent in alternative rules.

50. His own circumstances are at one end of the scale: he is clearly normally resident outside the UK and there are no significant indications that he intended to settle in the UK once his employment with the Respondent was over. But a rule based on prior residence alone would on its face confer the benefits on all UK nationals who were living abroad (whether or not they had dual nationality) including those who planned to settle in the UK or who came to the job without fixed plans. It might also attract (although this is slightly speculative) those UK nationals who were looking merely to fund a move back to the UK.

51. Moreover, in the modern world where many people move from country to country with unfixed or ever-changing plans, the concept of residence (or normal or ordinary residence) is a far from precise one. Its application would give rise to much uncertainty and debate in individual cases. We note that in *Hochstrass* the European Court considered (see especially paragraph 13 of its judgment) that it was legitimate to use nationality (rather than residence) as a basis for certain staff relocation allowances given the objective and uniform nature of that criterion. Nationality was, it said, “directly related to the purpose of the rules, namely to compensate for the difficulties and disadvantages arising from the status of an alien in the host country”. The same is true here.

52. Of course a residence criterion could be qualified by a requirement that the individual must also be a national of a country other than the UK. But such a criterion might itself give rise to similar complaints to those the Applicant now makes: in particular from UK nationals without dual nationality living abroad who did not intend to settle in the UK after employment with the Respondent was over.

53. We conclude, after careful reflection, that the Respondent has not breached the principle of equality or non-discrimination by restricting the ORSM benefits to those liable to expulsion from the UK following the termination of employment with the Respondent.”

93. The Tribunal in the PH case considered the repatriation benefits in 2012 and considered them to be justified under international administrative law. We agree with those reasons.

94. Accordingly, the Tribunal finds that the ORSM policy, although discriminatory, is justified under principles of international administrative law. Therefore, even if Sections 4 and 9 of Part 5 of the Staff Handbook were part of the Applicants' contracts of employment (the Tribunal has found that they were not), the Respondent would not have been in breach of contract.

HL'S CLAIM REGARDING CHILDCARE AND TRANSHIPMENT COSTS

95. HL has raised two separate matters as part of this Application, namely, the non-payment by the Respondent of her transshipment costs when she commenced employment with the Respondent, and the fact that the Respondent does not provide any support for childcare costs for employees with pre-school children. The childcare complaint is not a complaint of discrimination as between employees of the Respondent; the Respondent does not offer childcare support to any of its employees.

96. The Respondent's position is that HL has not brought any grievance or exhausted internal remedies in respect of these matters. Moreover, the Respondent contends that it has already sought to address any points raised by HL on these matters. It has requested the Tribunal to decline jurisdiction in respect of these matters under Article II.3(a) of its Statute.

97. Article II.3(a) of the Statute provides, in so far as is relevant, that:

“Subject to paragraph 4 of this Article, the Tribunal shall only consider an application if:

- (a) In relation to a contract of service, the applicant has exhausted all other remedies available within the Commonwealth Secretariat... including the redress of grievance proceedings specified in the contract or in relevant Staff Rules...”.

98. Article II.3(c) then provides:

- “(c) Notwithstanding the provisions of paragraph 3(a) the Tribunal may consider an application where all other remedies have not been exhausted where:
 - (i) the Tribunal determines that the remedies available cannot adequately address the issues raised in the application, or

- (ii) the administration fails to initiate the necessary administrative procedure or measures or to take a decision within a reasonable time from the date of notification to it of the grievance or event which gave rise to the application.
- (iii) If the administration has not initiated the necessary administrative procedure or taken the necessary measures within 80 days from the notification to it of the grievance or event which give rise to the application, then subject to paragraph (4) below, the Tribunal may consider the application whether or not it considers that a reasonable time has elapsed.”

99. The relevant provisions of the Staff Handbook relating to the Respondent’s Grievance Policy are found in Part 5, Section 7 (which, as stated above, forms part of the Staff Rules). The Grievance Resolution Procedure provides for both an informal and formal process. Grievances are expected to be raised informally first, before the grievance is escalated to the formal stage of the procedure: paragraph 7.2. Where matters are not resolved informally, the formal stage requires the staff member to raise their grievance in writing, headed ‘Formal Grievance’, to the Director of Human Resources. There is provision for a formal grievance meeting and grievance resolution hearing to which the staff member will be invited. If the outcome of this hearing is unfavourable to the staff member, then the staff member has the right to appeal against the decision reached at the conclusion of the Grievance Resolution Hearing: paragraph 12.1. If no appeal is lodged within the time prescribed, the staff member will be deemed to have accepted the decision and there will be no further right of appeal. The appeal (if any) is heard by the Deputy Secretary-General (Corporate). The decision of the Deputy Secretary General (Corporate) is final and marks the end of the Secretariat’s internal grievance process. If a staff member is not satisfied with the decision of the Deputy Secretary-General (Corporate), the staff member may file an appeal with the Tribunal: paragraph 14.3.

100. In respect of HL’s complaint concerning transshipment costs, the Tribunal has been provided with a copy of a nationality and residential questionnaire completed by HL in October 2014, before she commenced employment with the Respondent. In that questionnaire, she indicated that her current employer was intending to provide her with financial assistance for flights, shipping of personal effects, accommodation in the UK, and a relocation grant to aid her return to the UK to take up employment with the Respondent. In an email from the Respondent’s HR directorate to HL on 8 February 2019, the Respondent explained that the reason HL did not receive the same relocation package as

other employees who relocated to the UK from another country (such as DW and HH) was because her previous employer had already provided her with these benefits. HL did not appear to dispute this, and does not appear to have taken this point any further.

101. In the circumstances, the Tribunal declines to hear this complaint. There is no indication that HL raised any further objection to the Respondent's stance, and she did not exhaust internal remedies in relation to that aspect of her complaint.

102. The position with HL's childcare complaint is more complicated. HL first raised an enquiry regarding childcare provision in an email to the Respondent's HR Director on 14 July 2017. She asked whether the Respondent "had considered signing up to or mirroring any of the schemes that assist staff members with childcare costs". She observed that if she were employed by an employer operating under UK law, the employer would be obliged to offer childcare vouchers or tax-free childcare, which would contribute to the nursery fees she was required to pay. HL raised the matter with Nigel Morland, the Respondent's Chief Operating Officer, in September/October 2017.

103. After the SMC decision in June 2018, HL met with the Secretary-General and Ms Lacourt to discuss the review of expatriate allowances. At that meeting, HL raised the matter of childcare provision. Following that meeting, Ms Lacourt advised HL in an email dated 26 July 2018 that as the Respondent's employees are zero-rated for UK tax purposes, it is not open to the Respondent to operate a childcare voucher scheme which operates in relation to UK tax. However, Ms Lacourt also advised that Respondent staff responsible for a child and living with them in the UK may be eligible to claim child benefit because they would be treated as falling below the UK higher income child benefit tax charge. There is no evidence of any further action taken by HL following this communication from the Respondent's Legal Counsel.

104. The Tribunal therefore accepts the Respondent's argument that HL did not raise a formal grievance in accordance with the Staff Handbook following the Respondent's email of 26 July 2018. The Tribunal does not regard HL's childcare complaint as integral to the discrimination complaint raised by the three Applicants; the complaint that the Respondent does not offer childcare assistance is not, for the reasons stated above, a complaint that the Respondent has discriminated as between different groups of its employees.

105. Nonetheless, the fact that HL brought the childcare issue to the attention of the Director of Human Resources, the Chief Operating Officer, and the Secretary-General, among others, would in normal circumstances persuade the Tribunal to exercise its discretion pursuant to Article II.3(c) to consider the complaint.

106. However, there are two reasons why the Tribunal declines to do so. First, the only decision that the Applicants appeal against is the SMC's decision, communicated on 13 July 2018, not to review or amend its policy on ORSM benefits. The Applicants do not seek to appeal against any decision in respect of childcare provision. Second, any concern arising from the Respondent's failure to make provision for childcare support is not a matter arising from or relating to the non-observance of a term of HL's contract of employment. HL's real complaint is that the Respondent has not introduced a new policy in respect of childcare. It does not constitute a breach of any term of HL's contract of employment. It follows, therefore, that it is not a matter that falls within the jurisdiction of the Tribunal under Article II.1 of the Statute.

COMPENSATION FOR PROCEDURAL DELAY

107. As part of their claim, the Applicants complain about the inadequate and dilatory way in which their complaints were handled by the Respondent, and seek compensation for the stress and inconvenience caused thereby. The Respondent acknowledges that, in the case of DW and HL, a significant period of time elapsed between them raising their concerns and the decision of the SMC on 21 June 2018. In the case of HH, the Respondent points out that he only raised a formal complaint in his email sent in January 2018. The Respondent has expressed regret at the procedural delay, and has submitted that an appropriate award in respect of procedural delay pursuant to Article X.3 of the Statute would be in the order of up to £1000 for each Applicant.

108. The Tribunal has considered its powers to award compensation under Article X of the Statute. Under Article X.1, the Tribunal only has power to order certain remedies, including an award of compensation, where it finds that the application is well-founded. Under Article X.2, the Tribunal has the power, in limited circumstances, to order the case to be remanded for institution of the required procedure or correction of the faulty procedure. Under Article

X.3, where a case is remanded, the Tribunal may order the payment of compensation, not exceeding the equivalent of three months' net remuneration, to the application for such loss as may have been caused by the procedural delay.

109. As the Tribunal has not found that the application is well-founded, and has not remanded the case, it has no power under Article X to award compensation for loss caused by procedural delay.

111. However, in the circumstances of this case, where the Tribunal agrees that there has been a significant procedural delay in dealing with the Applicants' complaints (particularly those of DW and HL), the Tribunal recommends that the Respondent consider making an ex gratia payment of £1,000 each to DW and HL, and a payment of £500 to HH, to reflect the stress and inconvenience caused to them.

DISMISSAL OF THE CLAIM

112. The Applicants' application is therefore dismissed in its entirety.

COSTS

113. The Tribunal has decided that no award of costs should be made to either party.

Given on this 11th day of October 2019

Signed:

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Chelva Rajah SC, President

.....//.....

Justice Marva McDonald-Bishop, CD

.....//.....

Catherine Callaghan QC

Member

Member

And

.....//.....
Richard Nzerem, Secretary