

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

RAM VENUPRASAD

APPLICANT

and

THE COMMONWEALTH SECRETARIAT

RESPONDENT

Before the Tribunal constituted by

**Mr David Goddard QC (Acting President);
Mr Chelva Rajah SC; Professor Epiphany Azingo SAN**

JUDGMENT No 3 on APPLICATION FOR STAY

25 January 2019

Background to application for stay

- 1 The Tribunal issued an Interim Judgment in this proceeding on 16 April 2018. The Tribunal found that the Secretariat had breached its obligations to Mr Venuprasad in a number of respects, and that Mr Venuprasad is entitled to relief including an award of compensation and costs. The Tribunal made directions for the determination of the amount of that compensation.
- 2 On 10 July 2018 the Secretariat filed an application for review of the Tribunal's Interim Judgment. The Secretariat also filed an application for a stay of the compensation phase of the proceedings before the Tribunal, pending determination of the Secretariat's application for review of the Interim Judgment. That application for a stay was dismissed, and the Tribunal proceeded to receive submissions on compensation and determine the amount of compensation payable. In the Minute dated 26 July 2018 dismissing the Secretariat's stay application, the Tribunal said that it was in the interests of justice for the amount of compensation to be determined promptly, and for any applications for review in relation to liability and compensation to be determined at the same time. The Tribunal went on to say (at [21]):

It is open to the Secretariat to seek a stay of payment of compensation, if there is a real prospect of irreversible prejudice if payment is made and a subsequent review reverses or reduces the award made. If such an application is made, the Tribunal will consider whether a stay of payment of compensation is appropriate. It would be open to the Tribunal to stay payment of some or all of the compensation awarded unless appropriate undertakings (and if necessary, escrow arrangements or security for repayment) can be provided to ensure repayment of any amount that may be repayable following a review. But none of that bears on the question of whether the Tribunal should now proceed to determine the amount of compensation that is payable based on the liability findings in the Interim Judgment. The issues raised by the Secretariat in relation to payment of compensation can and should be determined after that compensation has been quantified.

- 3 The Tribunal issued a judgment determining the amount of compensation payable to Mr Venuprasad on 21 September 2018. The Tribunal awarded compensation of £292,700. The Tribunal also awarded interest on part of this sum up to the date of the judgment, and made an order for costs in favour of Mr Venuprasad.
- 4 By memorandum dated 31 October 2018 the Secretariat applied for a stay of the compensation judgment pending determination of its application for review of the interim judgment, and of its foreshadowed application for review of the compensation judgment. The Secretariat's application for review of the compensation judgment was filed on 30 November 2018.
- 5 The sum awarded in the compensation judgment is immediately payable in the absence of a stay. And as the Secretariat's application recognises, the filing of an application for review does not automatically operate as a stay. A stay will be granted only if the Tribunal is satisfied

that it would be contrary to the interests of justice for the judgment to be given effect before the review applications have been heard and determined.

The Secretariat's arguments in favour of a stay

- 6 The Secretariat submits that a stay is appropriate in this case because:
 - 6.1 Mr Venuprasad may not have the financial means to repay the compensation awarded to him, if the Secretariat's review applications are successful in whole or in part and if the amount awarded has been spent in the interim. The Secretariat also says that it does not know where Mr Venuprasad currently resides, though this is likely to be in Chennai in India;
 - 6.2 the Secretariat will face difficulties in recovering any amount of compensation that has been overpaid. The Secretariat suggests that its ability to bring proceedings for recovery of overpaid compensation and enforce a judgment in India is uncertain, as the Secretariat enjoys a statutory immunity from suit;
 - 6.3 the Secretariat has placed the amount awarded in a separate account with ready access so that payment can be effected immediately if required after the Review Board decision. There is no doubt about the ability and willingness of the Secretariat to pay monies due to Mr Venuprasad promptly upon final resolution of the review process, or as otherwise directed.

Mr Venuprasad's submissions opposing a stay

- 7 Mr Venuprasad opposes a stay. He invites the Tribunal to order, on condition that he undertakes to repay the Secretariat any sums which upon the outcome of the review application/s the Tribunal determines that he should repay:
 - 7.1 that the sum ordered to be paid by way of remedy be paid forthwith in full;
 - 7.2 alternatively, that the majority of the sum be paid forthwith, with execution of the remainder to be stayed on condition that the Respondent undertakes to pay interest accruing on the unpaid part at the rate of 6.5% per annum.
- 8 Mr Venuprasad submits that a stay should be granted only if performance of the judgment would cause irreparable damage to the Secretariat, and says that it is only in exceptional circumstances that purely pecuniary damage can be regarded as irreparable or even as difficult to repair.
- 9 Mr Venuprasad refers to the observation of the ILOAT that a stay of execution would "seriously impair the legitimate right of the staff member concerned to benefit from immediate application of the judgment."¹

¹ ILOAT Judgment 3003 at [30].

- 10 Mr Venuprasad emphasises the lengthy period that has elapsed since his employment ended on 31 December 2016, and since the Tribunal delivered its Interim Judgment on liability. He attributes this to the Secretariat's applications for review, and to the delay in appointing the additional Tribunal members needed to enable a Review Board to be constituted. He says that the delays in the appointment process are attributable to the Secretariat.
- 11 In response to the Secretariat's submission that it faces a high risk of irreversible prejudice if a stay is not granted, Mr Venuprasad says that any prejudice is pecuniary, and that this is not normally regarded as irreparable. Even if the funds were not ultimately recovered, that would not imperil the Secretariat's survival or a significant part of its operations. The need to recover overpaid amounts from employees living in Commonwealth countries outside the UK is not unusual or exceptional.
- 12 Mr Venuprasad's submissions provide details of his residential address in Chennai. He says that no basis has been advanced for the Secretariat's assertion that enforcement of an order for repayment might be more difficult in India than it would be in the UK.
- 13 Mr Venuprasad says that it is open to the Tribunal to take into account the weakness of the Secretariat's applications for review. He says that "in key respects the Applicant's case was conceded by the Respondent at the hearing before the Tribunal, including in relation to (i) the unwarranted public attacks on the Applicant and (ii) the conducting of a disciplinary hearing in the absence of the Applicant, and almost all of the compensatory award arose from those matters."
- 14 Finally, Mr Venuprasad emphasises the prejudice caused to him by the delay in payment of the compensation awarded. He is still without full time employment, though he has part time paid work for an NGO in Chennai. He is being deprived of the use of the compensation awarded to him, and of the ability to invest those funds and earn interest.

The Secretariat's reply

- 15 In its reply submissions the Secretariat reiterates its concerns about the lack of a realistic prospect of repayment by Mr Venuprasad, should the Secretariat be successful in its application for review. It says that he has not offered to hold the funds in escrow or to provide security, and has not explained how his undertaking to repay could be relied on or enforced.
- 16 The Secretariat expresses concern about difficulties it has encountered in contacting Mr Venuprasad in India. The Secretariat says it has had difficulty contacting him at the address in India that he provided for return of certain personal effects.
- 17 The Secretariat also reiterates its concerns about its ability to bring recovery proceedings in India, saying: "as an international organisation immune from the jurisdiction of the country of Headquarters (under the terms of the UK's Commonwealth Secretariat Act 1966) there is no domestic law route open to the Secretariat to pursue enforcement and recovery of any sums owing. Furthermore, under the applicable law in India there is no law even granting the Secretariat legal capacity under the applicable domestic law jurisdiction. It follows that, even

if the Secretariat were to waive immunity, it would be unable to pursue any effective legal action.”

- 18 The Secretariat goes on to say that “The amount at issue is not a nominal one: rather it amounts to approximately 2% of budgeted staff costs and 2% of assessed contributions in the current financial year. Any unrecovered sums would have a detrimental impact on the funds the Secretariat properly receives from, and spends in accordance with the mandates of, the member Governments.”
- 19 The Secretariat rejects any suggestion that it is responsible for the delay in appointing sufficient members of the Tribunal to enable the review applications to proceed.
- 20 The Secretariat says that it would not be appropriate for the Tribunal to form a view on the merits of the review application, but that if the Tribunal is minded to consider this issue then the Secretariat submits that “the Secretariat has put forward serious, genuine, clearly arguable grounds of complaint about the reasoning and conclusions adopted by the Tribunal in the Interim Judgment and Judgment on Compensation and, in particular the basis on which the amount of compensation was awarded.”

Decision

- 21 The starting point, as noted above, is that the judgment awarding compensation is a final judgment which must be performed unless a stay is ordered. A stay will be ordered only if the Tribunal is persuaded by the Secretariat that it is in the interests of justice to do so.
- 22 The Secretariat has not explained the legal basis for its assertion that it would be unable to bring proceedings in India to recover any amount of compensation that is repayable following the determination of its applications for review. The Secretariat has legal capacity under UK law, pursuant to the Commonwealth Secretariat Act 1966 (UK). An entity that has legal capacity under the law of one State is generally recognised as having that legal capacity in other States. Thus for example a company established under the law of one country is recognised as a legal person in other countries. The Secretariat has not identified any legal basis for its suggestion that its legal capacity would not be recognized by the courts of India. Nor has the Secretariat explained why its immunity from suit would prevent it from commencing proceedings in India. Immunity does not entail legal incapacity or disability. It is common for a State which is entitled to Sovereign immunity before the courts of other States to bring proceedings in the courts of another State to protect its interests.² We are not aware

² See eg *Attorney General for Hong Kong v Reid* (New Zealand) [1993] UKPC 2, [1994] 1 AC 324; *R v Attorney-General of England and Wales* [2003] UKPC 22, [2004] 2 NZLR 577. The statutory immunity of an international organisation affects the jurisdiction of a court to entertain proceedings against that international organisation without its consent, but does not affect the ability of such an organisation to bring proceedings before the courts of a State in which it has that immunity: see eg Dicey, Morris & Collins, *The Conflict of Laws* (15th ed, 2012) ch 10 esp at 365 ff.

of any reason to think that the Secretariat could not bring proceedings before the courts of India to recover any overpaid amount.

23 Nor has the Secretariat identified any other basis for its submission that recovery proceedings in India would be significantly more difficult than in the UK. We do not have any material before us that would enable us to form a view on this issue.

24 The nub of the Secretariat's argument is that Mr Venuprasad probably does not have the means to repay large amounts of compensation paid to him, if he spends that money on living costs or otherwise dissipates it. Mr Venuprasad does not seriously challenge this proposition. His submissions about the hardship that he is suffering as a result of being deprived of these funds, and the length of time he has been without full-time employment, provide some support for the concerns expressed by the Secretariat about his financial means.

25 A lengthy period has elapsed since Mr Venuprasad left the Secretariat's employment, and since his application to the Tribunal was first filed. That is unfortunate. A number of factors have contributed to those delays. However we do not consider that the Secretariat is responsible for the delays in Mr Venuprasad receiving the compensation that he has been awarded. The amount of compensation was fixed on 21 September 2018. The delays in appointing new members of the Tribunal, while unfortunate, have not affected the progress of this proceeding either before or after that date. In particular, the Tribunal declined the Secretariat's earlier stay application in order to ensure that the compensation hearing was not delayed by the inability to convene a Review Board.

26 The Tribunal now has sufficient members to enable a Review Board to be constituted to hear the Secretariat's review applications. But the timing of a hearing of the review applications remains to be determined. That timing will depend on the availability of the members of the Review Board, and (if an oral hearing is required) of the parties' counsel. A stay pending determination of the review applications is likely to deprive Mr Venuprasad of the compensation awarded to him for some months at least, and quite possibly for a period of six months or more.

27 Taking into account all the matters raised by the parties, we consider that the interests of justice would not be served by denying Mr Venuprasad access to any of the compensation awarded to him until after the Secretariat's review applications have been heard and determined. The amount awarded was intended to compensate Mr Venuprasad for earnings he would otherwise have received in 2017 and 2018, and for certain other losses he has already sustained. He has not had any substantial alternative source of earnings in that period. The prejudice that would be caused to him by a further delay in obtaining access to those funds is self-evident.

28 We accept that the funds paid to Mr Venuprasad are likely to be spent on living expenses – most of the award represents compensation for loss of earnings, and amounts paid to him are likely to be applied to living expenses in the same way that an employee normally spends their earnings. To that extent, the funds may not be immediately recoverable following a successful review application. Nor has Mr Venuprasad offered any security for repayment of any amounts

that might ultimately be found to be repayable. But we have no reason to think that any amounts that are repayable and that have been spent on living expenses would not be recoverable over time out of future earnings.

- 29 We consider that the interests of justice are best served by requiring immediate payment of £150,000 of the compensation award to Mr Venuprasad. This will provide him with access to some funds to meet past and current living expenses. We do not consider that a requirement to pay £150,000 immediately will cause any serious irreversible prejudice to the Secretariat.
- 30 The Tribunal grants a stay of the balance of the compensation award until further order of the Tribunal, in the expectation that a Review Board will be constituted in the near future. That Review Board will then be able to make any orders that may be appropriate to modify or discharge the stay as the reviews proceed. That stay provides substantial protection for the Secretariat's financial interests in the event that its review is successful in whole or in part.
- 31 The stay is granted on condition that the Secretariat undertakes to pay interest at a rate of 3% per annum on the balance of the compensation from 21 September 2018 to the date of payment. The compensation judgment did not address the question of interest payable after the date of its delivery, as the expectation was that the sum would be paid immediately in the absence of an application for a stay. Ancillary issues such as interest on the judgment sum were left to be addressed in the context of any such application. It would be unjust for Mr Venuprasad to be denied interest on any amount of compensation that remained unpaid as the result of a stay, and that was ultimately confirmed as payable to him. However we agree with the Secretariat that there is no basis for an award of interest at a higher rate than 3%. The rate of interest payable on savings accounts in India denominated in Indian currency is not relevant to the appropriate rate of interest to be paid on an amount denominated in UK currency, as noted in the Compensation Judgment. The Secretariat's undertaking must be filed and served by Friday 1 February 2019. If the Secretariat does not provide that undertaking, the stay will lapse at 5pm on 1 February 2019 and the balance of the compensation awarded will be payable immediately.
- 32 The stay does not extend to the award of costs in favour of Mr Venuprasad. If costs have not already been paid, they should be paid forthwith.
- 33 The Tribunal accepts Mr Venuprasad's undertaking to repay any amount that is ultimately found to be repayable by him to the Secretariat. (This undertaking reinforces the obligation that Mr Venuprasad would have in any event to repay any amount paid to him pursuant to a decision of the Tribunal, which the Tribunal subsequently held on review was not payable to him. It would be inequitable for him to retain any amount ultimately found to have been overpaid, and there would be no justification for the retention of any overpaid amount as matter of international administrative law.) The Tribunal considered whether Mr Venuprasad should be required to formalise his undertaking in a deed expressed to be enforceable by the Secretariat. However the Tribunal concluded that such a deed would add little if anything in terms of practical enforceability, having regard to the recoverability of any amount held to have

been overpaid even in the absence of an undertaking, and the serious reputational consequences for Mr Venuprasad of a failure to perform an undertaking given to the Tribunal.

- 34 The Tribunal records that it did not find it necessary to consider the merits of the Secretariat's review applications in reaching this decision. Except in extreme cases where it is clear that a review application is not pursued in good faith or is plainly hopeless, it is neither necessary nor helpful for a panel to express a view on the merits of an application to review a decision previously delivered by that same panel.
- 35 Leave is reserved to either party to apply to the Tribunal to determine any matters of implementation that may arise in relation to the orders made in this Judgment.

Delivered on 25 January 2019

Signed

David Goddard QC, Acting President

Chelva Rajah SC, Member

Professor Epiphany Azinge SAN, Member

and

Richard Nzerem, Executive Secretary