THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

CHANDNI SHAH

Applicant

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Review Board constituted by
Mr Chelva Rajah SC; Mr Justice George Erotocritou; Mr Arthur Faerua; Justice Sandra Mason and Mr David Goddard QC

JUDGMENT ON APPLICATION FOR REVIEW
Introduction: the application before the Review Board

1. The Applicant, Ms Chandni Shah, has applied to review the Judgment of a three member panel (“the Initial Panel”) of the Commonwealth Secretariat Arbitral Tribunal (“CSAT”) dated 18 December 2015 (“the Judgment”). The Judgment dismissed Ms Shah’s claims arising out of the circumstances surrounding the termination of her employment with the Commonwealth Secretariat on the grounds of redundancy.

2. As required by the Statute establishing CSAT, the President of CSAT has convened a Review Board to consider the Application for Review comprising five panel members of CSAT who did not sit on the Initial Panel that delivered the Judgment.

3. The Application for Review is made on the basis that the Initial Panel acted unreasonably in making (or failing to make) certain findings, having regard to the material placed before it. The two respects in which Ms Shah challenges the Judgment of the Initial Panel relate to:

   (a) the Initial Panel’s findings at [57] – [58] of the Judgment that Ms Shah was informed that she had a right of appeal against a decision made not to redeploy her to another position. Ms Shah says that she was not sufficiently informed of that right of appeal, and that in those circumstances she had not failed to exhaust all other remedies before making her complaint to CSAT;

   (b) the absence of any findings by the Initial Panel in relation to Ms Shah’s complaint that she had been unfairly treated in connection with her terms of employment, including her salary and pension adjustments. Ms Shah says that it was unreasonable for the Initial Panel to fail to make findings on these matters.

4. Ms Shah does not challenge the Initial Panel’s finding that her employment was capable of being terminated on the grounds of redundancy.

5. The Review Board has concluded that the Application for Review should be dismissed. The Initial Panel was right to find that CSAT did not have jurisdiction to entertain Ms Shah’s application in relation to the outcome of the redeployment process on the basis that she had failed to exhaust an available remedy within the Secretariat, namely the right of appeal made available in relation to that process. The Initial Panel was also right to find CSAT did not have
jurisdiction to entertain Ms Shah’s application in relation to the alleged unfair and unequal
treatment in connection with her terms of employment, as that issue was the subject of a
continuing investigation and grievance process at the time Ms Shah made her application to
CSAT.

6. The reasons for these findings are set out below.

The facts giving rise to the dispute
7. The Initial Panel’s findings in relation to the background to Ms Shah’s complaint to CSAT
are set out at [10] to [46] of the Judgment. Ms Shah does not challenge these findings of fact.
This section of our judgment summarises those background facts, in so far as they are relevant
to this review.

8. Ms Shah had initially been employed by the Secretariat in 1977 as a secretary and shorthand
typist. She had a long and distinguished career with the Secretariat until her employment ended
on her redundancy in August 2014.

9. In 2004, Ms Shah (along with other employees) was given the option of transferring to new
Terms and Conditions of Service (“TACOS”). She was advised in writing of the pay point and
salary she would enjoy if she chose to transfer to the new TACOS.

10. Ms Shah chose not to transfer to the new TACOS in 2004. The option to transfer to the new
TACOS remained open to her, but was not taken up prior to the termination of her employment
in 2014. One significant consequence of her decision not to transfer to the new TACOS was
that her salary remained fixed at the 2004 level, and did not increase over the following ten
years of her employment. Employees who had chosen to transfer to the new TACOS did receive
salary increases over that period.

11. Ms Shah raised her concerns about the treatment of staff who remained on the pre-2004
terms, and about anomalies that she believed had arisen, on a number of occasions. In
particular, she raised these concerns with Assistant Secretary-General Steve Cutts by
memoranda dated 5 May 2010 and 19 January 2011.
12. Following an investigation into Ms Shah’s concerns, Mr Cutts replied on 28 March 2011. He did not accept that there had been any unfairness. He reminded Ms Shah that she had had many opportunities to move to the new TACOS, and that she continued to have that option.

13. In 2014 the Secretariat carried out a restructuring that aimed to reduce London staffing by some 15%, to allow for the creation of certain new positions. It was this restructuring that led to the termination of Ms Shah’s employment. The events surrounding the 2014 restructuring, and the steps taken by Ms Shah to object to the outcome of that process, are described in some detail in the Judgment at [23] – [46]. The findings of the Initial Panel that are most relevant to this Review are set out below (with footnotes omitted):

23. On 4th February 2014 there was a “Town Hall” meeting for support staff to explain relevant processes. It was chaired by interim ASG George Saibel.

24. A “Q&A” document was issued in connection with the meeting. It explained the function of the “Screening Panel” on redeployment where an employee’s post was deleted. The Screening panel would inform the employee of the most suitable vacancies (based on CV and experience). Where the employee expressed interest in such a job an interview panel would be established to “consider your suitability”. Although the Staff Handbook made no provision for appeal in relation to the screening panel process, it was announced that the Secretary-General had “exceptionally authorised a right of appeal to the Assistant Secretary-General a.i/Deputy Secretary General for Corporate Affairs”. Appeals would have to be submitted “within seven working days of notification of the panel’s decision”.

25. On 18th March 2014 Zarinah Davies, Director of the Human Resources Division, wrote to Ms Shah notifying her that her post had been disestablished. The letter asked whether Ms Shah wished to be considered for redeployment. It explained that if she did wish to be considered for redeployment a Screening Panel would be set up.

26. Ms Shah duly asked to be considered for redeployment. A Screening Panel was set up. Two potential posts were identified for consideration. They were both Executive Assistant posts (Grade K). Ms Shah indicated that she wished to be considered for both (without preference). She was duly interviewed.
27. On Friday 6th June 2014 she learned that she had been unsuccessful at interview. It is clear that she had some form of discussion about this with Ms Davies on that day. She was upset about the unsuccessful outcome of the interview process and became sick. She took sick leave from the following Monday 9th June. Over the succeeding weeks and months she remained on sick leave but sought written feedback from Ms Davies as to why she had been unsuccessful at interview. She began to raise other issues concerning her redundancy and referred to her “indefinite tenure”. She did not, however, seek to appeal against the decision not to redeploy her.

28. Ms Davies stated in her email of 13th June 2014 that she would respond “separately on your feedback request and the implications of our discussion of last Friday 6 June”. She did not, in the end, provide written feedback. In her reply to the later grievance (see below) Ms Davies was to maintain that she had supplied oral feedback when informing Ms Shah of the results of interviews on 5th June (we think that this should read 6th June but nothing turns on this) and again on 25th July 2014.

29. By a letter dated 20th August 2014 from Ms Davies (apparently received by Ms Shah on 29th August 2014) the Secretariat served formal notice of redundancy, terminating Ms Shah’s employment with effect from 31st August 2014. The letter explained her redundancy calculation. This calculation was based on the formula in the Staff Handbook which uses a multiplier of pay. We understand the calculation of pay to be based on the employee’s contractual pay at termination.

30. On 11th September 2014 Ms Shah wrote expressing her dissatisfaction and indicating that she was taking legal advice.

31. On 1st October 2014 Miss Shah produced a formal grievance. She delivered it to Ms Davies on 3rd October. The grievance was critical of the redundancy process and of the higher incentives offered to volunteers for redundancy and the failure to appoint her to one of the two posts identified for potential redeployment. It complained about lack of responsiveness on the part of the Secretariat to her email correspondence. In relation to “indefinite tenure” the grievance articulated the following case: …
32. The grievance letter goes on to assert that she considered it “discriminatory” to be paid at a lower level than that she would have enjoyed under the new TACOS.

... 

39. Ms Davies responded by letter of 21st November 1984. The letter dealt separately with the redundancy, redeployment and feedback issues on the one hand and the question of “indefinite tenure” and unfair application of terms and conditions on the other.

40. In relation to the redeployment process the letter stated shortly that the Screening Panel “considered your application and performance at interviews, but did not find you suitable for either vacancy. This marked the conclusion of the Screening Panel Procedures.”

41. The letter went on to deal with feedback and the lack of an appeal. “I informed you of the outcome of your interviews on 5 June 2014, including the option to appeal the outcome of the Screening panel process within a 7 day period, which was exceptionally provided by the Secretary-General during the restructuring process. During the meeting you requested feedback on the reasons for non-selection which I provided during the meeting and separately on 25 July 2014. You chose not to formally appeal the Screening panel outcome.”

42. In relation to “issues regarding indefinite tenure and unfair application of terms and conditions” Ms Davies’s letter stated that an external investigator, Ms Cathy Potgeiter, had been appointed to investigate the grievance.

43. Ms Shah was not prepared to await the outcome of Ms Potgeiter’s investigation. In an email dated 26th November 2014 she said that Ms Davies’s letter of 21st November 2014 had come “too late” since she had already intimated that she was preparing an application to this Tribunal. On the same day (26th November 2014) she lodged her application to the Tribunal
44. On 17th December 2014 Ms Davies wrote to Ms Shah indicating that the grievance investigation would continue despite the Tribunal application. It confirmed that Ms Potgeiter would be arranging a meeting. The letter stated “This investigation is without prejudice to your right to continue with your CSAT application on the other issues concerning the change plan, restructure, redeployment and the decision to make you redundant”

45. Ms Potgeiter duly interviewed Ms Shah and other witnesses.

46. Ms Potgeiter reported on 30th March 2015. She rejected the complaints which fell within the scope of her inquiry. She did not agree that Ms Shah’s “indefinite tenure” meant that her employment could not be terminated before she reached the age of 65. Ms Potgeiter noted that Regulation 16 of the Staff handbook made it clear that staff could be made redundant at any time. However she noted that the questions of “unfair dismissal” and redundancy terms were outside the scope of her inquiry. Ms Potgeiter also investigated at length the allegations of inconsistent treatment in relation to terms of service as between Ms Shah and three other named employees, in particular that these individuals had been “upgraded whilst retaining their indefinite tenure”. She concluded that there was no evidence to substantiate this claim, although she notes deficiencies in the paperwork relating to the comparator cases.

The Applicant’s original application to CSAT

14. Ms Shah made her original application to CSAT on 26 November 2014.

15. The application was focused on the redeployment process, and in particular the failure of the Secretariat to redeploy her to one or other of the positions identified as suitable for her, but to which she had not ultimately been appointed. It also raised concerns about alleged unfair and unequal treatment in connection with her terms and conditions of employment.

16. Ms Shah claimed “specific performance”, or alternatively compensation for loss of earnings and for discrimination, unfair and unequal treatment; moral damages and exemplary damages for failure by the Secretariat to follow its own institutional rules and procedures; costs; and any other remedies that the Tribunal might consider appropriate.
The Secretariat’s response

17. The Secretariat responded that the Application could not be considered by CSAT because internal remedies within the Secretariat had not been exhausted, as required by Article II(3) of the Tribunal’s Statute. In particular, it pointed to: (a) Ms Shah’s failure to exercise an internal right of appeal in relation to the redeployment decision; and (b) Ms Shah’s decision not to await the outcome of the grievance process initiated by her 1 October 2014 letter, before making her claim to CSAT.

18. The Secretariat also maintained, in the alternative, that there had been no relevant breach of duties owed to Ms Shah.

The decision of the Initial Panel

Redeployment issue

19. The Initial Panel held that CSAT lacked jurisdiction to consider Ms Shah’s complaint about the redeployment process, because she had failed to exhaust her internal remedies.

20. Because the Initial Panel’s findings on this issue at [57] – [58] of the Judgment are at the heart of Ms Shah’s application for review, we set them out in full:

57. It is not in dispute that Miss Shah was informed that an appeal could be brought against a decision not to redeploy. The Respondent explained the process at the Town Hall meeting and the Q&A’s specifically flagged the exceptional provision which had been made for appeal. Ms Davies says [fn: See in particular letter of 21st November 2014 in Annex 13 to Application] she reminded Ms Shah of the possibility of appeal whilst informing her that her interviews had not been successful in early June 2014. We have no reason to doubt this. Ms Shah makes the point that the potential for appeal was not confirmed to her in writing at the point when she was informed of the interview outcomes. We agree that it would have been better to have reiterated the position in writing at that point. But Ms Shah does not suggest that she was unaware of the possibility or was under any relevant misunderstanding about the scope for appeal or
the timing. At no stage did she seek to invoke the appeal process or ask for a clarification of time limits or an extension.

58. Ms Shah does not suggest that she in fact brought an appeal against the redeployment process.

21. The Initial Panel went on to find that the special right of appeal provided by the Secretariat in connection with the redeployment process fell within the expression “all other remedies within the Commonwealth Secretariat” for the purposes of Article II(3). It held that the requirement to exhaust internal remedies was not limited to remedies specified in the relevant employment contract and/or Staff Handbook. The Initial Panel said at [62]:

… the importance of exhausting internal remedies has long been recognised in international administrative law. The policy of the law is to discourage the invocation of legal remedies (with their attendant costs, formalities and delays) where more immediate, informal opportunities for relief are available within the organisation. It is not surprising that a Statute such as ours should restrict our jurisdiction in such broad terms.

22. The Initial Panel concluded that in the light of these findings, it had no jurisdiction over the redeployment issue.

Unfair/unequal treatment issue

23. The Initial Panel also held that CSAT lacked jurisdiction to consider the matters which were the subject of the investigation by Ms Potgeiter, arising out of Ms Shah’s 1 October 2014 grievance letter, as she had not awaited the outcome of that grievance process. The Initial Panel found that there was no serious basis for suggesting that the grievance process that was being undertaken was not an internal remedy in respect of the matters raised in the 1 October 2014 letter, or that Ms Shah had exhausted that remedy at the time when the application to CSAT was lodged.
24. The Initial Panel found that there were aspects of Ms Shah’s complaint that were not precluded by her failure to exhaust internal remedies, as they did not relate to the redeployment process or to the unfair/unequal treatment issues that were addressed by the internal grievance process. The Initial Panel went on to consider these issues, which related to:

(a) the lawfulness of Ms Shah’s dismissal on the grounds of redundancy. The Initial Panel held that Ms Shah’s terms of employment did not preclude dismissal on the grounds of redundancy. It was therefore lawful under her contract of employment to dismiss her for that reason;

(b) the termination payment received by Ms Shah on her redundancy, which she argued should have reflected a right to be employed until age 65. Because the Initial Panel had found that Ms Shah did not have a right to be employed to age 65, this claim fell away. The Initial Panel also rejected a claim for a termination payment based on the salary and pension contributions Ms Shah would have received if she had transferred to the new TACOS. The Initial Panel held (at Judgment [87]) that “[t]he short answer to this is that she elected not to transfer to the new TACOS and so remained on her old terms. This was a choice she made. … When she made her choice not to switch, the Secretariat respected it. She is not entitled to revoke her decision now.”

25. The Initial Panel concluded by dismissing Ms Shah’s claim.

26. No order for costs was made.

The Application for Review

27. The Application for Review raises two main issues. The first issue raised by the application is set out in paragraph [1], which reads:
“1. This application for review is brought pursuant to Article XI paragraph 5 on the basis that the Tribunal acted unreasonably having regard to the material placed before it when reaching its conclusions at paragraph 57 and 58 of the judgment”.

28. A second and logically distinct issue is raised in paragraph [10] of the application for review:

“10. The Applicant contends that it was unreasonable for the Tribunal to fail to make a finding in relation to the issues raised with Mr Cutts and which was before the Tribunal, the Applicant having referred to these issues at paragraphs 7 to 7.4 of her CSAT Application”.

29. The core of the issue raised in paragraph [10] of the application for review appears to be Ms Shah’s longstanding complaint that in denying her any salary increases or pension adjustments while she remained on her pre-2004 terms of employment, the Secretariat was treating her unfairly and unequally compared with some other staff members who had allegedly received more favourable treatment.

30. The Application for Review makes a number of complaints about the Potgeiter investigation process, and argues that it was inadequate and/or incomplete. Ms Shah asks for it to be re-opened. However there was no complaint about the investigation process before the Initial Panel (unsurprisingly, as that process had only recently begun when the application was filed in November 2014). The Potgeiter report was provided to the Initial Panel with Ms Shah’s Additional Statement in October 2015, but no criticism of it was made at that time. An application for review must relate to an issue that was raised before the Initial Panel, and that the Initial Panel either addressed or failed to address. Because the adequacy of the Potgeiter investigation process was not an issue that was raised before the Initial Panel, it cannot be raised for the first time on review.

31. As noted above, Ms Shah does not seek review of the Initial Panel’s findings in relation to the lawfulness of her dismissal, or in relation to her termination payment.
The Review Board’s approach to this application

32. Article XI (5) of the CSAT Statute sets out the grounds on which a party to proceedings before CSAT can seek review of a judgment of CSAT. It provides:

“5. A party to a case in which judgment has been delivered who challenges the judgment on the ground that the Tribunal has exceeded or failed to exercise its jurisdiction or competence, or has erred on a question of fact or law or both, or that there has been a fundamental error in procedure which has resulted in a failure of justice, or that the Tribunal has acted unreasonably having regard to the material placed before it, may apply to the Tribunal, within a period of 60 days after the judgment was delivered, for a review of the judgment.”

33. Under Article XI (10), a Review Board may affirm or rescind in whole or in part the judgment of the Initial Panel. Article XI (11) confers on a Review Board the power to substitute its own determination and make an order granting a remedy, to refuse to make any order granting a remedy, or to order a rehearing before a fresh panel.

34. The Review Board may review the Initial Panel’s judgment, and rescind it in whole or in part, only if it is satisfied that one or more of the grounds in Article XI (5) has been established. The applicant for review bears the burden in review proceedings to persuade the Review Board that one or more of these grounds is made out. In the present case, that means that the burden is on Ms Shah as the applicant for review to satisfy the Review Board that: (a) the Initial Panel acted unreasonably in reaching its conclusions at Judgment [57] – [58] concerning her right of appeal from the redeployment decision; (b) the Initial Panel acted unreasonably in not making findings about her complaint that she had been treated unfairly and unequally in connection with her terms of employment, in particular her salary and pension contributions.

35. It is not the role of the Review Board to reconsider the entirety of the Initial Panel’s Judgment. The role of the Review Board is, rather, to consider the specific errors alleged by the applicant, to determine whether the Judgment of the Initial Panel is erroneous in those respects, and if so, to determine what orders should be made under Article XI (10) and (11).
Determination of the Application for Review

Ground I: findings in relation to right of appeal from redeployment decision

36. Ms Shah’s first complaint is that the Initial Panel acted unreasonably in making the findings at paragraphs [57] – [58] of the Judgment, having regard to the material placed before it. Those paragraphs are quoted in full at [20] above.

37. Ms Shah says that the right of appeal, and the seven day period for its exercise, were not referred to in the Sutherland Handbook or in her terms and conditions of employment. She says there was no written procedure in existence setting out the right of appeal.

38. Ms Shah suggests in her application for review that a “Redeployment Q and A on the Screening panel appeal process” referred to in the Secretariat’s Answer of 23 April 2015 was not “served by the Respondent and it was not therefore before the Tribunal when their decision was made.” However it seems this criticism may be based on a misunderstanding, as the Answer did attach a document headed “Redeployment Q & A” which referred to the right of appeal, and to the seven day time limit. That document was before the Initial Panel: see Judgment [24], quoted above.

39. Ms Shah also says in her application for review that the letter she received from the Secretariat dated 21 December 2014 (referred to at Judgment [39] – [41], quoted above) incorrectly suggested that the HR Director had “again informed the Applicant of the appeal rights on 25th July 2014”. However that is not what the letter says, and the Initial Panel did not suggest otherwise in its Judgment. This criticism also appears to be based on a misunderstanding, and we put it to one side.

40. Article II(3) of the Tribunal’s Statute provides that CSAT 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 procedures specified in the contract or in relevant Staff Rules;
41. It is apparent from the material before the Initial Panel that:

(a) there was a right of appeal from the screening panel process “to the Assistant Secretary-General a.i Deputy Secretary-General for Corporate Affairs.” A right of appeal was not ordinarily available in respect of such processes, but had been authorised by the Secretary-General in the context of the 2014 restructuring. There was a seven day period within which the right of appeal could be exercised, after notification of the screening panel decision;

(b) that right of appeal was not exercised by Ms Shah.

42. The Review Board agrees with the Initial Panel that the special right of appeal provided by the Secretariat in the context of the 2014 restructuring is a relevant internal remedy for the purposes of Art II(3)(a). The internal remedies referred to in that provision include, but are not limited to, redress procedures specified in a contract of service or in relevant Staff Rules.

43. It follows that Ms Shah had failed to exhaust internal remedies in respect of the redeployment process, unless it could be said that the remedy was not genuinely available to her – for example, because it had not been adequately notified to her.

44. The position in relation to notification of the right of appeal to Ms Shah appears, on the basis of the material before CSAT, to be as follows:

(a) the right of appeal and the seven day period for its exercise were referred to at the Town Hall meeting. Ms Shah does not dispute this, but says she has no recollection of what was said at that meeting;

(b) the right of appeal and the seven day period for its exercise were referred to in the “Redeployment Q & A” document on the Secretariat’s intranet;

(c) Ms Shah was told she had a right of appeal when she was orally advised of the panel’s decision on 6 June. Ms Shah acknowledges this, but says she was not provided
with any details in respect of the right of appeal. Ms Davies’ letter of 21 November 2014 suggests, on the other hand, that information about the seven day period within which to appeal was provided orally on 6 June 2014. The Review Board cannot resolve this difference, but we will proceed on the basis most favourable to Ms Shah and assume that on 6 June she was only told there was a right of appeal, without more;

(d) Ms Shah was not given written advice of her right of appeal on 6 June 2014, or at any subsequent time while that right of appeal remained open to be exercised.

45. We agree with the Initial Panel that it would have been better for information about the right of appeal to have been provided in writing to Ms Shah on 6 June 2016. It is unfortunate that this was not done.

46. However we consider that in the circumstances set out above, it cannot be said that the right of appeal was not a genuinely available internal remedy that was available to Ms Shah, which she should have exercised before seeking to pursue the issue before CSAT. If Ms Shah was unsure about how the right of appeal should be exercised, it was open to her to ask Ms Davies at their 6 June meeting when she was advised of the right of appeal; to ask the Human Resources team at any time in the course of the following week; or to consult the Secretariat’s intranet.

47. Ms Shah refers in her Application to the letter sent to her on 17 December 2014 which, after referring to the Potgeiter investigation process, went on to say that “[t]his investigation is without prejudice to your right to continue with your CSAT application on the other issues concerning the change plan, restructure, redeployment and the decision to make you redundant” (emphasis added). Ms Shah suggests that this is an express acknowledgement by the Secretariat that she was able to pursue her complaints about these matters before CSAT. However that is not how we understand the letter. Rather, we read the letter as a whole as advising Ms Shah that the ongoing investigation does preclude a claim to CSAT about the matters that are being investigated, but does not preclude her pursuing the other complaints she has made to CSAT.
48. The letter does not suggest that the CSAT application can be pursued in so far as it relates to the issues that are the subject of the Potgeiter investigation. The letter only contemplates the CSAT application being pursued in relation to the “other issues” listed – which do not include the issue of unfair/unequal treatment in relation to terms of employment.

49. The letter does expressly refer to Ms Shah being able to continue with her CSAT application on the listed “other issues”. The most natural reading of the letter is that it does not affect in any way the CSAT application in relation to those “other issues”. Importantly for present purposes, the letter does not purport to waive any existing jurisdictional barriers there may be to pursuing those other issues before CSAT.

50. It follows that the letter of 17 December 2014 is not relevant to the Initial Panel’s finding that CSAT lacks jurisdiction to consider the complaint about the outcome of the screening panel process.

51. For the sake of completeness, we note that Ms Shah did not advance any argument to the Initial Panel or to the Review Board based on Art II(3)(c) of the Statute, which sets out certain exceptions to the bar in Art II(3)(a). We therefore do not need to consider Art II(3)(c).

52. In the circumstances set out above, the Initial Panel was right to conclude that Ms Shah had not exhausted the remedies available to her within the Secretariat in relation to the redeployment process. For that reason, it was not open to the Initial Panel to consider her application in so far as it related to this issue. Nor is it open to the Review Board to consider that issue.

*Ground II: findings in relation to complaint about unfair/discriminatory treatment relating to terms of employment*

53. Ms Shah’s second complaint is that the Initial Panel acted unreasonably in not making findings about the matters she had raised with the Assistant Secretary-General in 2010/2011, namely her complaint that she had been unfairly and unequally treated in connection with her terms of employment, including her salary and pension contributions.
54. The Initial Panel did not make findings on these issues because it held that these issues were the subject of a continuing investigation and grievance process at the time the initial application was made to CSAT. In those circumstances, the Initial Panel held, the Applicant had not exhausted her internal remedies in respect of these issues. So CSAT did not have jurisdiction to consider them.

55. The application for review is also critical of the Secretariat’s response (or perhaps, more accurately, of its failure to adequately respond) to the concerns Ms Shah raised in 2010/2011.

56. The application goes on to argue that the external investigation report prepared in relation to her grievance in 2015 “was not conclusive on this matter”, namely the question of unequal/unfair treatment, and should not have been completed by the external investigator in circumstances where some potentially relevant material was not made available by the Secretariat. However as noted above, the adequacy of the Potgeiter investigation process was not an issue before the Initial Panel, and is not an issue that can be raised for the first time in an Application for Review.

57. The issue that the Review Board must determine is whether the Initial Panel acted unreasonably in deciding not to make findings on the issues about the Applicant’s terms of employment raised in 2010/2011, on the basis that it did not have jurisdiction to do so.

58. The Review Board considers that it was clear from the material before the Initial Panel that at the time the application was made to CSAT in November 2014 there was an ongoing grievance process, of which the Potgeiter investigation formed part, concerning Ms Shah’s longstanding complaint about unfair and unequal treatment in connection with her terms of employment. As that process had not been concluded, Ms Shah had not exhausted the remedies available within the Secretariat, as required by Art II(3)(a).1

1 The Review Board notes for the sake of completeness that the ongoing investigation formed part of an internal grievance process, and fell within the reference to remedies “available within the Commonwealth Secretariat”, even though the investigation was being conducted on behalf of the Secretariat by an external investigator. The use of an external investigator to conduct an investigation on behalf of the Secretariat, in order to manage potential conflict of interest/duty issues, does not affect the “internal” nature of the investigation and grievance process for the purpose of Art II(3).
59. As discussed at [48] above, the Review Board also considers that the Secretariat’s letter of 17 December 2014 did not waive the Art II(3) jurisdictional bar to making an application to CSAT about the unfair/unequal treatment issue.

60. It follows that the Initial Panel did not have jurisdiction to consider this aspect of Ms Shah’s complaint. Nor does this Review Board.

Orders

61. For the reasons set out above, the Application for Review is dismissed.

62. The Secretariat has not sought any order for costs. We do not make any order for costs in respect of the Application for Review.

Given this day of November 2016

David Goddard QC, Presiding Member

Chelva Rajah SC, Member

Mr Justice George Erotocritou, Member

Arthur Faerua, Member

Justice Sandra Mason, Member