IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

(1) NAVDEEP SINGH DADHWAL
(2) SANDEEP ANGRA
(3) SURMUKH SINGH

Applicants

and

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal constituted by

Mr Christopher Jeans QC, President, Justice George Erotocritou, member and Mr Arthur Faerua, member

JUDGMENT

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Introduction and overview

1. For many years prior to November 2013 the Applicants worked for the Respondent under ill-defined contractual arrangements.

2. In November 2013 they received important news.

3. There had been a regrading exercise.

4. Five aspects are of present significance.
   (i) the Applicants would each be issued with formal fixed term contracts governing their continuing employment;
   (ii) their jobs had been reclassified to a grade which would entail a pay increase for each of them;
   (iii) they would be issued retrospectively with formal fixed term contracts for periods of past service running back to dates at (or close to) the start of their respective periods of employment;
   (iv) the pay increase would be backdated;
   (v) the backdating would run from 1st July 2011.

5. The Applicants were content with most of this. They had wanted their contractual relationship with the Respondent to be regularised; and a pay rise is always welcome.

6. As regards (v) however, they were dissatisfied. They thought the pay increase should be backdated to dates before 1st July 2011. Since the Respondent was issuing them with retrospective contracts for periods before that date it was only logical, as they saw it, that the backdating should run throughout the periods of those retrospective contracts.

7. Following “without prejudice” negotiations, Respondent agreed with each Applicant to make payments in respect of certain benefits for periods before July 2011.
8. The Respondent declined, however, to backdate the new salary to a date before 1st July 2011 (although it did backdate other benefits). This date had been selected as the date from which all backdated salary arising from re-grading would be awarded. No exception would be made for the Applicants.

9. Did the Respondent breach the law in not backdating the Applicants’ pay increase to dates before July 2011? This is the issue the Tribunal must now decide. The cases arise from common facts and we deal with them together.

The Facts

10. We derive the facts from the pleadings and the Annexes to each. Whilst there appears to be little or no dispute about the central facts, the background picture presented by the documents is in some respects fragmentary. At certain points we have had to draw inferences from the material provided in order to reach our findings. Where facts were not agreed, we made our findings on the balance of probabilities.

11. All three Applicants worked for the Respondent at the Commonwealth Youth Programme (“CYP”) Asia Centre Chandigarh, India, until their employment terminated on redundancy in February 2014.

12. Each Applicant gave long and loyal service. In each case, the Applicant’s work and qualities were commended in appraisals. Each Applicant received a certificate of appreciation for his service, signed by the Secretary–General.


14. It appears that all three Applicants were for some time classified as “Interns”.

15. Mr Angra produces a “letter of agreement” dated 24th February 2003. It describes him as “the intern”. It provides for an initial three month period of employment.

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1 Annex IV to Mr Angra’s Application
16. Mr Dadhwal produces a similar “letter of agreement”\(^2\), in his case dated 1\(^{st}\) July 2004, describing him as “the intern”. It provides for an initial six month period of employment.

17. Both Mr Angra’s and Mr Dadhwal’s “letters of agreement” provide that extension of the fixed period of employment was conditional on “the intern’s performance and the Centre’s requirements”.

18. Mr Singh does not produce any similar letter but states\(^3\) he was a regular staff member from the point of joining the Centre in September 2001.

19. However, as we record below, over many years all three were mentioned in documentation as lacking “regular” status and as late as 2012 all three are described as “interns”.

20. We have no information as to precisely how the Applicants’ respective duties evolved in the very early days of their service but it is not disputed that Mr Dadhwal and Mr Singh worked in ICT functions whilst Mr Angra worked in the Library and Stores.

21. Rule 4.2 of Respondent’s Rules for the Recruitment of Local Staff provides that the maximum duration of a “temporary” appointment is six months but that

“in certain cases, for example where a temporary appointee is assisting with a special project, the regional director has a discretion to extend this period.”

22. It is not clear whether the employment of all or any of the Applicants was initially regarded as “temporary” within rule 4.2 or whether the Regional Director exercised a conscious or explicit discretion under the Rule. Each Applicant states that the Regional Directors “kept on extending my term”\(^4\). Mr Angra produces documentary evidence of one six month extension in 2003\(^5\). Otherwise, no such extensions are documented in our papers and there is some material, discussed below, which suggests that some the Applicants may not even have had “temporary” status - at least in the mind of one Regional Director, Mr Raj Mishra who assumed the post in 2006.

\(^2\) Annex IV to Mr Dadhwal’s Application
\(^3\) Mr Singh’s Application, paragraph 5
\(^4\) Paragraph 7 of his Application
\(^5\) Annex IV to Mr Angra’s Application.
23. It is not in dispute, however, that all three continued to do their jobs. Indeed as the Regional Director would later emphasise, their responsibilities were “no less than those performed by regular staff”.6

24. It was, we infer, of concern to the Applicants that they had not been issued with contracts which conferred an official post or some degree of job security.

25. In July 2006 Mr Dadhwal applied, as he put it, to be “regularized” in the position of “CYPTEC faculty/Web Designer”. A typed memo bearing the name of the Chairperson of the Staff Grievances Committee and the Admin Officer refers to this as a “representation” for the creation of a “permanent position”. There is a manuscript entry on this memo

“agreed as proposed. I have discussed with the RD [presumably Regional Director] on 4/8/06”.

However, whatever had been agreed between any managers, no further contract was issued to Mr Dadhwal at this stage.

26. In November 2006 Mr Angra wrote9 to the Regional Director (by this point Mr Raj Mishra) stating that he had been expecting “to be considered for a regular appointment to the post of Library and Stores Assistant” when new terms and conditions were introduced for staff generally in January 2007 “if not earlier”. He recorded his disappointment that such an appointment was not planned and sought the Regional Director’s assistance in obtaining “a regular appointment” to the post.

27. In 2008 all three Applicants secured pay increases, without being issued with further contracts. A management memo dated 27th February 2008 summarised their employment histories. It mentioned Mr Singh having joined the Respondent as a “helper”, Mr Angra as “Library Intern” and Mr Dadhwal as an “IT Intern”. It suggested that pay increases could be aligned with the increase for “casual staff”. In a memo dated 25th September 2008 to Fatiya Serour, Director and Head of Youth Services Division, Mr Mishra proposed specific salaries for each. He pointed out that each of

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6 Memo dated 25th September to Fatiya Serour, Annex VIII to Mr Angra’s Application
7 Annex V to his Application; and see Annex VII
8 Annex VI to his Application
9 Annex VII to his Application
10 Annex VII to Mr Angra’s Application
11 Annex VIII to Application of Mr Angra
them discharged “jobs and responsibilities which were no less than those performed by regular staff”.

28. Mr Mishra’s salary proposals were put into effect by an “Office Order”\textsuperscript{12}, signed by him and dated 1\textsuperscript{st} October 2008. This stated that salaries in the amounts proposed would be awarded to the Applicants

“until a decision to create temporary/regular posts to man these jobs are created in the Centre upon which the staff concerned can also compete for the posts.”

The reference to the possibility of “creating” temporary posts to “man these jobs” may suggest that in the mind of Mr Mishra, at least, the Applicants did not then have even “temporary” status.

29. Some four years later the “regularization of temporary staff” was formally raised as an issue by the Commonwealth Youth Programme Asia Staff Association (“CYPASA”). A memo\textsuperscript{13} from CYPSA to “The Director – YAD” dated 16\textsuperscript{th} May 2012 flagged this as a priority issue for early resolution. One of the schedules in documentation attached to the memo referred to each of the Applicants individually as being “temporary” and compared the duties of each to what we take to be established positions held in the Africa CYP.

30. Another attached schedule listed their positions as follows:

(i) Mr Angra as “Intern” “Library cum Stores Assistant”
(ii) Mr Dadhwal as “Intern” and “ICT Officer”
(iii) Mr Singh as “Intern” and “ICT Assistant”.

In each case 30\textsuperscript{th} June 2008 was, mysteriously and without explanation, shown as a “contract end date” with the words added: “No contract letter issued”. A commentary by the side of each name refers to each Applicant as having been appointed as an “Intern” but “shouldering additional responsibility”, which is then individually described.

\textsuperscript{12} Annex X to Mr Angra’s Application
\textsuperscript{13} Answer to Mr Angra Annex III
31. The Applicants’ positions were finally “regularised” in November 2013\textsuperscript{14}. This was done in conjunction with the introduction of new Terms and Conditions of Service (“New TACOS”) for both CYP and London based staff. We refer to this process as “the 2013 Review”. The New TACOS themselves reflected the implementation of a job evaluation scheme.

32. The Applicants were each issued with fixed term contracts covering both the future and the past. They signed by way of acceptance all the contracts with which they were issued.

33. The contracts issued\textsuperscript{15} to the Applicants as part of the 2013 Review were as follows:

(a) in the case of Mr Dadhwal, contracts to employ him as “ICT Officer”
   (i) from 2\textsuperscript{nd} July 2005 to 30\textsuperscript{th} June 2008
   (ii) from 1\textsuperscript{st} July 2008 for three years (ie to 30\textsuperscript{th} June 2011)
   (iii) From 1\textsuperscript{st} July 2011 for a further three years (ie to 30\textsuperscript{th} June 2014);

(b) in the case of Mr Agra, contracts to employ him as a “Library and Stores Assistant “
   (i) from 21\textsuperscript{st} February 2004 until 30\textsuperscript{th} June 2008
   (ii) from 1\textsuperscript{st} July 2008 for three years (ie to 30\textsuperscript{th} June 2011)
   (iii) from 1\textsuperscript{st} July 2011 for a further three years (ie to 30\textsuperscript{th} June 2014);

(c) in the case of Mr Singh, contracts to employ him as “ICT Assistant”
   (i)  from 24\textsuperscript{th} September 2001 until 30\textsuperscript{th} June 2008
   (ii) from 1\textsuperscript{st} July 2008 for a further three years (ie to 30\textsuperscript{th} June 2011)
   (iii) from 1\textsuperscript{st} July 2011 for a further three years (ie to 30\textsuperscript{th} June 2014).

34. In each case it was only the current contract (iii) which specified the applicable salary. The salary specified in contract (iii) was, we infer, the salary applicable to the new job evaluated grade for each of the jobs: in Mr Dadhwal’s case GO6, in Mr Angra’s case and Mr Singh’s GO4.

\textsuperscript{14} See Paragraph 7 of the respective Applications and eg paragraph 14 of the Answer in Mr Angra’s case
\textsuperscript{15} Annexes I II and III of the Respective Applications.
35. A letter in standard terms dated 7th November 2013\textsuperscript{16} was sent to each Applicant by Zarinah Davies, Director HRD for counter-signature. Its language is important so we set it out in full (emphasis added):

“Following the approval from the Management Committee, I confirm that the role you hold [specified] has been reclassified from Intern to [GO4/GO6]. \textbf{The implementation date of this decision will be backdated to 1 July 2011.}

Your new gross salary will be [specified]. Whilst your service commenced with the CYP Asia Centre on 21/02/2004 \textbf{you will also be paid any arrears effective 1 July 2011} ….

Please note that the education allowance is now included in your pay. You will continue to receive Provident Fund contributions at 12% and gratuity at 15% and medical allowance as per the existing limit…”

Each Applicant countersigned the letter sent to him.

36. As a result of “without prejudice” exchanges the Respondent agreed to make further payments to each Applicant covering gratuity payments PPF Cover Medical and education allowances for specified periods of employment before 1st July 2011.

37. The Respondent was not however prepared to backdate salary before the 1st July 2011. The Applicants maintained it should do so.

38. By way of exhausting internal remedies, each of the Applicants escalated a dispute on the issue to the Secretary General. The Secretary-General responded in letters\textsuperscript{17} respectively dated 27th November 2014 (Mr Dadhwal) and 24th February 2015 (Mr Angra and Mr Singh). The Secretary-General’s letters were in similar terms. All made the point that the respective Applicants had accepted contracts which provided for backdating to 1st July 2011 only and that this date applied to all CYP and London based staff affected by changes in terms and conditions.

39. The employment of each Applicant ended in February 2014 by reason of redundancy when the CYP was closed.

40. There is no dispute about the termination of the Applicants’ employment or the termination payments made. There is no dispute about emoluments other than salary and no dispute about salary for the period from 1st July 2011.

\textsuperscript{16} Annex 11 to Answer to Mr Dadhwal’s Application; Annex XX to Mr Angra’s Application; Annex XVII to Mr Singh’s Application.

\textsuperscript{17} Annex XX to Mr Dadhwal’s Application; Annex XVIII to Mr Angra’s; Annex XV to Mr Singh’s Application.
41. The sole claim made in the Applications to the Tribunal is for backdating of salary before 1st July 2011.

42. It is common ground that the Applicants have properly exhausted internal remedies and that their claims are brought in time.

**The contentions of the parties**

43. The Applicants put their cases in near-identical terms.

44. Their central argument is that it is illogical to restrict back-payment of salary to the period from 1st July 2011. Each points out that he was doing the same job immediately before 1st July 2011 as afterwards. Moreover, as part of the 2013 Review the Respondent issued retrospectively to each Applicant contracts for periods prior to 1st July 2011 in which each Applicant is shown as having precisely the same job title and status as that conferred by the contract for the latest period (ie the period running from 1st July 2011). It makes no sense, they say, to limit back-payment to the period of the latest contract only and not to apply it to the periods of the earlier contracts.

45. The Respondent says that the award of new salaries and the introduction of new grades are matters for its discretion; that backdating of salary increases consequent on regrading must equally be a matter for its discretion; that there is nothing objectionable in the date chosen; that this date was applied consistently to all affected by the New TACOS; and that the Applicants agreed to the date by countersigning the contracts issued and the 7th November 2013 letter.

46. Further points are raised incidentally in the course of the pleadings which we will also consider. Is the position affected by the Respondent's agreement to pay certain sums in respect of non-salary benefits for the period before July 2011 following "without prejudice" negotiations? Is it relevant that the regularisation of contractual arrangements did not occur more promptly? Is there an element of unfairness, inequality or injustice and if so what follows?

47. We first address the central debate discussed in paragraphs 44 and 45 above: was the Respondent contractually entitled to restrict backdating of salary to the period from 1st July 2011? We then address the other questions arising in turn.
48. On all issues we apply international administrative law.

(1) **Was the Respondent contractually entitled to restrict backdating of salary to the period from 1st July 2011?**

49. Yes.

50. As the Respondent submits “the setting of pay scales is at an organisation’s discretion”: *Shiffman, Siwy and Young* ILOAT 1498 paragraph 14. The employing organisation also enjoys considerable latitude in “adopting and applying internal grading schemes and in applying rates to grades”: *Dogra v Commonwealth Secretariat* CSAT APPL/28 paragraph 14.

51. This discretion must apply equally to the backdating of pay – for example when new scales are introduced or when jobs are re-classified or re-graded. In the absence of any internal rules, terms, customs or promises which might, exceptionally, require backdating of an increase, there is no duty in international administrative law to backdate an increase in pay at all. If the organisation has a free choice whether to backdate an increase, it must (ordinarily at least) have a free choice as to when the backdating takes effect. That was the case here.

52. It makes no difference that the Respondent was implementing a job evaluation scheme. There is no rule of international administrative law that job evaluation schemes must be given retrospective effect or that any retrospectivity the organisation chooses to confer must run from a particular time.

53. So the Respondent was contractually entitled to choose a date from which the backdating would take effect. It did not matter that the date was later than that on which the Applicants started their jobs. It did not matter that the chosen date did not coincide with the periods of the earlier retrospective contracts it issued.

54. The offer made to the Applicants in the letter of 7th November 2013 to backdate their pay increase to 1st July 2011 was therefore a lawful one. Binding contracts to backdate to 1st July 2011 (and not before) arose when the Applicants accepted that lawful offer by countersigning the letter.

(2) **Is the position affected by the Respondent’s Agreement to make payments in respect of non-salary benefits in respect of periods before 1st July 2011?**
55. No.

56. The Respondent made “without prejudice offers” to pay sums in respect of gratuity payments, PPF cover, medical and education allowances in respect of periods of employment before 1st July 2011. In each case the offer was accepted\(^\text{18}\) (on a date in June 2014) on the signing by each Applicant of a standard form produced by the Respondent. The form described the payments as “backdated gratuity, PPF medical and education payment”.

57. The Respondent states\(^\text{19}\) that these payments were based on the Applicant’s salaries for the pre-1st July 2011 periods and not on the salaries applicable to the grades awarded in 2013.

58. However the offers were calculated, they do not affect our analysis of the position as regards backdated salary.

59. It was open to the Respondent to make, and the Applicants to accept, an offer which, once accepted, would reduce the area of dispute between the parties. By making the offer “without prejudice” the Respondent indicated that it was not thereby admitting liability in any respect. It was entitled to do this and we draw no inference from the making of the offer.

60. It may seem illogical to the Applicants that the Respondent should be prepared to reach a settlement in relation to non-salary benefits prior to 1st July 2011 but not in relation to backdating of salary. But the terms on which the settlement was reached entail no admission of liability and afford no basis on which backdating of salary prior to 1st July 2011 can be claimed.

**3) Delay in regularizing the Applicants’ contractual position**

61. A subsidiary point which recurs in the Applicants’ pleadings is the suggestion that the Respondent breached the Rules relating to Recruitment of Local staff in not regularizing their status or contracts earlier. They call attention to the principle in Rule 4.2 that the maximum duration of a temporary appointment is six months.

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\(^\text{18}\) Annex XIII to Mr Dadhwal’s Application, Annex XIII to Mr Angra’s and Annex X to Mr Singh’s

\(^\text{19}\) Answers paragraph 18
62. We do not think it is necessary in the present case to decide whether the Applicants’ appointments were “temporary”. Nor do we need to decide whether, if they were “temporary” the Regional director had exercised (or should be taken to have exercised) his discretion under Rule 4.2 to extend the appointments. Nor is it necessary to decide what the consequence would be if they were not “temporary” or the Regional Director failed to exercise discretion in circumstances where they nonetheless continued to be employed (though it is not obvious to us that they would necessarily thereby become “entitled” to “regularized” contracts).

63. The short point is this. Even if it could be concluded (and we reach no determination on this) that the Applicants’ employment ought to have been regularised sooner, this would give them no entitlement to the further back-payment of salary which they claim. Had they been given “regular” contracts in say 2006 or 2010, this would not have accelerated an entitlement to salaries awarded in the job evaluation and New TACOS exercise undertaken in 2013 (“the 2013 Review”). The entitlement to salaries at GO4 level (for Mr Angra and Mr Singh) and GO6 level (for Mr Dadhwal) arose only from the 2013 review. The Respondent decided to make the results retrospective but only to 1st July 2011 as it was entitled to do. The backdating of the new salaries would have been to the same date (1st July 2011) even if the Applicants had held regularised contracts sooner than they did.

64. So in the end, whilst we sympathise with the anxieties the Applicants may have felt in waiting for their positions to be regularised, nothing turns on this delay.

(4) Inequality unfairness and injustice

65. The Applicants’ pleadings make some general allusions to equality justice and fairness.

66. Suffice it for us to say that in the present case we do not detect any sustainable legal ground of complaint under these headings.

67. An important feature is that the date chosen to which employees’ salaries would be backdated following the 2013 review was the same for all CYP and London based staff. The Applicants were not treated unfavourably in comparison to other re-graded staff. Indeed, it may be that other staff would have had grounds for complaint or
grievance if the Applicants had been singled out for more favourable treatment by having their salaries backdated to an earlier date.

68. Mr Dadhwal raises a specific point about the African CYP. He states and the Respondent accepts that the post of ICT coordinator was regularised at GO6 level at the Africa CYP well before November 2005, though the Respondent maintains that the duties were very different.

69. Leaving aside any comparison of duties, the fact that a “regularised”, non-temporary, contract has been granted in one CYP did not in itself entitle Mr Dadhwal to such a contract in another CYP. Nor, more specifically, did it affect his backdating entitlement when his contractual status was changed in 2013. No case is advanced of discrimination on grounds of race or other prohibited ground. So comparison with the Africa CYP does not assist Mr Dadhwal.

Conclusion

70. Our conclusion is that the claims fail and are dismissed.

71. The Respondent was entitled to limit to a date of its choosing the backdating of increased salaries awarded as a result of the 2013 review. The date chosen was the same date for the Applicants as for all other employees, whether employed at CYPs or in London. No legal obligation was infringed in treating the Applicants consistently with other employees whose terms changed as a result of the 2013 review.

72. Nothing we say in this judgment detracts in any way from recognizing the loyal and distinguished service which each Applicant has rendered to the Respondent.

73. We would also like to thank the Applicants for the helpful way in which their cases were presented.

Costs

74. Each party should bear its own costs.
Given this 10th day of March, 2016

Christopher Jeans Q.C., President

Justice George Erotocritou, member

Mr Arthur Faerua, member