

CSAT APL/41

IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

DR JOSEPHINE OJIAMBO

APPLICANT

and

THE COMMONWEALTH SECRETARIAT

RESPONDENT

**Before the Tribunal constituted by
Mr David Goddard QC (Acting President), Mr Justice George Erotocritou,
Ms Justice Aruna Narain**

JUDGMENT No 1

14 December 2018

Introduction: the application before the Tribunal

- 1 The Applicant, Dr Josephine Ojiambo, was employed by the Commonwealth Secretariat as a Deputy Secretary-General from 12 January 2015 until 11 January 2018. At the time of her appointment as Deputy Secretary-General (Political) she was one of three Deputy Secretaries-General employed by the Secretariat.
- 2 Dr Ojiambo was actively recruited for this role by the Secretariat. In order to take up her appointment as Deputy Secretary-General, she resigned from her position with the United Nations as Chief of External Relations, based in New York.
- 3 Dr Ojiambo's contract of employment provided for a term of three years, which as the letter offering her the position explained "may be renewed subject to satisfactory performance and the organisation's requirements at that time." Dr Ojiambo says that at the time of her appointment Secretary-General Sharma informed her that the majority of staff in posts at this level had normally served two three-year terms.
- 4 By 2016 the Secretariat was facing significant financial constraints. Its expenditure substantially exceeded its revenue, and it was required to draw on its reserves to fund continuing operations. The newly appointed Secretary-General, Baroness Scotland QC, commissioned a comprehensive review of the organisation with a view to major structural reforms. A number of cost-saving measures were adopted to reduce expenditure in the short term, pending the outcome of that review. In that context the Secretary-General decided in 2016 that the three serving Deputy Secretaries-General would not have their contracts renewed. The roles would be retained but would be kept vacant until the review was completed and the Secretariat's financial position was resolved. The Secretary-General kept the Board of Governors of the Commonwealth Secretariat, and the Board's Executive Committee, informed about the review and about her decision not to renew the terms of the three Deputy-Secretaries-General.
- 5 Dr Ojiambo was aware of these measures and of the decision not to renew the terms of the current DSGs. One DSG left in December 2016, and another in June 2017 after an extension of his term for several months to accommodate his family circumstances. From July 2017 onwards Dr Ojiambo was the only serving DSG.
- 6 On 31 July 2017 Dr Ojiambo was advised that her contract would not be renewed. The email referred to the financial constraints affecting the Secretariat. Dr Ojiambo considered that her appointment should be renewed: her understanding was that the organisation required a DSG to carry out the functions she was performing, and that the Secretariat's finances had improved sufficiently that it could afford to renew her contract. She raised these issues with the Secretary-General in person, and by email.

- 7 Discussions and correspondence followed over the next five months. Dr Ojiambo expressed concern about the failure to renew her contract and about certain other aspects of her treatment by the Secretariat, and raised the possibility of grievance proceedings. In the course of those discussions, the Secretary-General offered Dr Ojiambo a three month extension of her contract to April 2018. Dr Ojiambo agreed to this extension, while continuing to press for concerns that she had raised about her work plan and certain other matters to be addressed. However the Secretary-General then advised Dr Ojiambo that the renewal was subject to certain conditions, including that Dr Ojiambo accept the extension “in full and final settlement of ALL outstanding issues in relation to your position as DSG without any reservation”.¹ This conditional offer was not accepted by Dr Ojiambo.
- 8 Dr Ojiambo’s contract expired without being renewed. Her employment came to an end on 11 January 2018.
- 9 Dr Ojiambo’s application to the Tribunal challenges the decision not to renew her contract. She seeks relief including the grant of a further contract for three years, and/or compensation.

The proceedings before the Tribunal

Dr Ojiambo’s Application

- 10 Dr Ojiambo filed an Application to the Tribunal dated 9 January 2018. The application sets out the background to her employment by the Secretariat, and the events leading up to the non-renewal of her contract. She summarises her concerns about non-renewal of her contract as follows:²
- (a) The non-renewal of her three-year fixed term contract is contrary to her valid, reasonable and legitimate expectation;
 - (b) The Respondent’s decision not to renew the Contract was arbitrary in nature;
 - (c) Following the Applicant’s reasonable legitimate expectation that her contract would be renewed, and following the arbitrary nature of the Respondent’s decision, the Respondent is estopped from not renewing her contract (as prior to the last appointed DSGs, the majority of DSGs were in position for two three-year terms).
- 11 She also identifies, as a central issue in this case, what she considers to be the “unlawful *de facto* vacation of the Applicant’s post.”³ She claims that having no

¹ Email dated 4 December 2017, capitalisation of “ALL” in the original.

² Application at [44].

³ Application at [45].

DSGs in post is contrary to the constitution, structure and founding documents of the Secretariat.⁴

- 12 Dr Ojiambo also complains that the Secretary-General undertook a campaign to side-line and undermine her in the period leading up to the non-renewal of her contract.⁵
- 13 Dr Ojiambo seeks relief including rescission of the decision not to renew her contract and an order by way of specific performance requiring the Secretariat to grant her a new contract of employment for a further three years, or alternatively compensation for failure to renew her contract, and compensation for stress and inconvenience in relation to her treatment by the Secretary-General from July 2017 onwards.

The Secretariat's Answer

- 14 The Secretariat's Answer dated 9 April 2018 denies that there was any breach of contractual obligations owed to Dr Ojiambo, and opposes the relief sought.
- 15 The Answer stresses the budgetary constraints facing the Secretariat at the relevant time. The Secretariat says that the decision not to renew Dr Ojiambo's first three-year term, and that of the other DSGs serving at the time, was an efficiency measure agreed with the Board of the Secretariat in the context of an organisational review. It was not an arbitrary decision. The Secretariat emphasises that employees do not have the right to an automatic renewal of contract: the grant of a new contract is subject to satisfactory performance and the needs of the Secretariat.⁶
- 16 The Secretariat says that despite several discussions and extensive email correspondence between Dr Ojiambo and her line manager, the Secretary-General, terms of reference and a work plan were not agreed. A possible short extension to the end of April 2018 was tabled but not agreed. Accordingly, Dr Ojiambo's contract expired at the end of its first term on 11 January 2018.⁷
- 17 The Secretariat refers to this Tribunal's decision in APL/16 *Monica Oyas*, in which the Tribunal confirmed that senior employees of the Secretariat holding a post under a first three-year contract have a legitimate expectation that their contract will be

⁴ Application at [48].

⁵ Application at [46], [51].

⁶ Answer at [7] – [8], and see also [15] – [16].

⁷ Answer at [10].

renewed.⁸ However in certain circumstances that expectation may not apply, or may be departed from. The Secretariat says that in the present case Dr Ojiambo was fully aware of the decision not to renew the terms of the three DSGs and of the reasons for that decision.

- 18 The Secretariat says that it was open to the Secretary-General to decide to hold the three DSG roles vacant for financial reasons. This is a matter for the Board and for the Secretary-General as chief executive of the Secretariat. The Answer records that the Secretariat is undergoing a restructuring and the DSG jobs “will be advertised externally as appropriate in due course and when the financial arrangements are clear. Dr Ojiambo would be eligible to apply as an external candidate.”⁹
- 19 The Secretariat denies that any efforts were made to undermine Dr Ojiambo in the manner alleged, or otherwise.
- 20 The Answer concludes as follows:¹⁰

The original contract term was not renewed in accordance with the business needs of the Secretariat. Despite best efforts it was not possible for the Secretary-General and the Applicant to agree terms for the delivery of the portfolio of DSG (CFTC) nor, accordingly, for any extension beyond the original contract term. The claim that this was in breach of contract is denied.

Dr Ojiambo's Reply

- 21 Dr Ojiambo filed a Reply dated 15 June 2018. The Reply sets out the circumstances in which each of the three DSGs whose terms were not renewed for a second three year period left the Secretariat's employment. Dr Ojiambo emphasises, in particular, the treatment of DSG Maharaj. She says that his employment did not terminate at the expiry of his initial three-year contract. Rather, his employment was extended at his request by some months in order to accommodate his family circumstances. She says that this stands in sharp contrast with the treatment afforded to her. Despite the fact that the Secretariat's financial position had improved, she was not given an extension of her employment as of right. Rather, an extension was only offered to her by way of what the Secretary-General referred

⁸ Answer at [17] ff.

⁹ Answer at [39].

¹⁰ Answer at [41].

to as a “settlement”, which was made conditional on Dr Ojiambo agreeing (among other things) not to pursue any grievance.¹¹

- 22 Dr Ojiambo disputes the Secretariat’s argument that she had no legitimate expectation of a renewal of her initial contract.¹² She says that the Secretariat’s usual policy is to allow staff to serve two three-year contracts, and this gives rise to a legitimate expectation on the part of the individual. This was recognised by the Tribunal in *Victor Ayeni* CSAT/12 (No 1). She notes that the Secretariat appears to accept, in its Answer, the Tribunal’s finding in *Oyas* that a person at the Applicant’s grade has a legitimate expectation that her initial three-year contract will be renewed, subject to certain specific considerations. She says that her legitimate expectation is further supported by what she was told by the former Secretary-General when he was seeking to recruit her, in an attempt to persuade her that the disruption to her and her family’s life occasioned by moving to London would be worthwhile.
- 23 The Reply sets out in some detail the reasons why Dr Ojiambo considers that the Secretariat’s arguments in relation to the existence of a legitimate expectation are incorrect.¹³ These are discussed in more detail below. Dr Ojiambo submits that the onus is on the Secretariat to show an objective reason for the non-renewal of her contract, and that it has failed to do so.
- 24 The Reply expands on Dr Ojiambo’s argument that it is not open to the Secretary-General to decide to have no DSGs in post, having regard to the provisions of the Agreed Memorandum on the Commonwealth Secretariat. Dr Ojiambo submits that the Agreed Memorandum precluded the Secretary-General from doing away with the position of the DSG altogether, and precluded the Secretary-General from removing responsibility for the CFTC from the Applicant in order to transfer it to someone other than a DSG. She says that funding could not be a sufficient reason to do this, having regard to the mandatory language of the Agreed Memorandum.¹⁴ Alternatively, she says that even if the Secretary-General did have the power to remove the CFTC from the role of a DSG, the provisions of the Agreed Memorandum were an important factor which it was necessary for the Secretary-General to take into account when exercising her discretion. The Reply submits that she failed to do so.¹⁵

¹¹ Reply at [6].

¹² Reply at [7].

¹³ Reply at [8].

¹⁴ Reply at [12] – [13].

¹⁵ Reply at [14].

- 25 The Reply also notes that the Secretariat has not suggested that any business plan or other formal analysis was drawn up making a financial case for non-renewal of the contract of Dr Ojiambo (or the other DSGs). If there was such a plan, it was never shown to Dr Ojiambo, and she was not invited to comment on it or respond to it.¹⁶ In any event, Dr Ojiambo says, by mid-2017 the Secretariat's financial situation had materially improved so that the non-renewal of her contract could not be justified on financial grounds, even if that was the case at an earlier time. Despite that change in circumstances the Secretary-General failed to reconsider the affordability of the continued employment of Dr Ojiambo. This improved financial situation was a relevant factor which the Secretary-General was obliged to take into account in her final decision not to renew Dr Ojiambo's contract. Dr Ojiambo says that the Secretary-General failed to do so.¹⁷
- 26 Dr Ojiambo says in her Reply that her primary case is that the Secretariat acted unlawfully by not renewing her contract for a further three years. But without prejudice to that primary case, she contends that the Secretariat acted unlawfully in not offering her a short extension of a matter of months, as was done in the case of DSG Maharaj. She says that the conditional nature of the offer made to her was inappropriate. Dr Ojiambo's objection to the conditional nature of the offer is summarised in the Reply as follows:¹⁸
- In imposing conditions on which a contract extension was to be offered, and in deciding not to grant the Applicant a contract extension, the SG acted (1) irrationally, (2) for an improper purpose, and (3) by taking into account an irrelevant consideration, namely the fact that the Applicant had raised concerns about her treatment and about her work, and the SG's concern that the Applicant might continue to raise such matters and to seek their resolution.
- 27 Dr Ojiambo says that this approach was inconsistent with the Secretariat's policy on grievances, which records the right of an employee to raise concerns and to have them resolved and makes clear that an employee has a right not to be subjected to detrimental treatment for having raised such a concern.¹⁹
- 28 Dr Ojiambo disputes the Secretariat's statement in its Answer that there was a failure to agree a work plan, or that the Secretary-General used "best efforts" in this regard. She says that insofar as there was a failure to agree, it was attributable to the Secretary-General's failure or refusal to meet with her to discuss the work plan,

¹⁶ Reply at [16].

¹⁷ Reply at [17] – [18].

¹⁸ Reply at [24].

¹⁹ Reply at [25] ff, referring to the Secretariat's Grievance Resolution Policy and Procedure, which forms part of Dr Ojiambo's contract of employment. See in particular [1.1] – [1.3] and [5.1] of the Grievance Policy, which forms part of the Rules by virtue of Rule [5.1].

and the Secretary-General's continuing inflexibility and intransigence in this regard.²⁰

Secretariat's Rejoinder

- 29 The Secretariat filed a Rejoinder dated 30 July 2018. The Rejoinder sets out in some detail the background to the decision not to renew the DSG contracts in the budgetary interests of the Secretariat. The Secretariat says that it was acting within its powers in doing so, and says it is not required to provide any further justification for that decision.²¹ These arguments are discussed in more detail below.
- 30 In its Rejoinder, the Secretariat submits that Dr Ojiambo has not identified any breach of her employment contract "and there is no decision under review as the Applicant was simply informed that her contract term was coming to an end."²² The Secretariat says that this was not an employment decision but an organisational one, informed by the needs and budget of the Secretariat, that is not subject to the Tribunal's jurisdiction. The Secretariat says that it complied with its procedural obligations to inform Dr Ojiambo of the end of her contract term.
- 31 The Secretariat denies that Dr Ojiambo had a legitimate expectation of renewal of her contract as a matter of law and of fact.²³ The Secretariat emphasises the need to assess questions of legitimate expectation in context. In this case, the Secretariat submits, Dr Ojiambo had no legal or factual basis to believe that her contract should be renewed in circumstances where:²⁴
- 31.1 Dr Ojiambo was aware of the Secretariat's need to keep the DSG posts vacant for budgetary purposes;
 - 31.2 Dr Ojiambo's employment contract expressly states that her contract *may* be renewed;
 - 31.3 the Rotation Policy in the Staff Handbook expressly states that there is no automatic renewal of contracts; and

²⁰ Reply at [28].

²¹ Rejoinder at [6] ff.

²² Rejoinder at [17].

²³ Rejoinder at [22] ff.

²⁴ Rejoinder at [27].

- 31.4 Dr Ojiambo was given six months' notice of the expiry of her contract pursuant to the relevant provisions of the Staff Handbook.
- 32 The Secretariat distinguishes the authorities relied on by Dr Ojiambo on the basis that in the present case she was aware of and involved in the context surrounding the decision not to renew her contract (which concerns the needs of the Secretariat), had been forewarned of the situation, and had been notified of the decision in accordance with her employment contract, the Staff Handbook and the internal law of the Secretariat.²⁵
- 33 The Secretariat submits that any representations that may have been made by the former Secretary-General when Dr Ojiambo was recruited, which it says are not admitted and have not been substantiated by Dr Ojiambo, were, if made, superseded by the language of the employment contract subsequently signed by Dr Ojiambo.²⁶
- 34 In its Rejoinder the Secretariat also advanced, for the first time, an argument that the Tribunal does not have jurisdiction to hear this case because Dr Ojiambo failed to exhaust her internal remedies before commencing these proceedings.²⁷

Further submissions

- 35 The Tribunal issued a Minute dated 3 September 2018 asking the parties to provide further written submissions on certain matters. The Minute observed that it appeared from the pleadings to be common ground that Dr Ojiambo did not have an entitlement to an automatic renewal of her contract of employment for a further three year term, but did have a legitimate expectation of renewal subject to satisfactory performance and the organisation's requirements at that time. The Minute asked the parties to address the following four questions:
- 35.1 what factors justify a departure from that expectation, and in particular whether financial constraints that make it desirable to hold a position vacant for an indefinite period to reduce the organisation's outgoings may justify non-renewal;
- 35.2 the nature of the inquiry to be undertaken by the Tribunal in relation to those factors. If financial constraints are a relevant basis for departing from the expectation, is it sufficient that the Secretariat holds the view that there are financial constraints that make it desirable not to fill the position, and therefore not to renew the appointment? Or should the Tribunal go further

²⁵ Rejoinder at [29] – [30].

²⁶ Rejoinder at [30].

²⁷ Rejoinder at [33] – [44], referring to Article II(3) of the Tribunal's statute.

and consider whether those views were reasonably open to the Secretariat, or whether there was an objective justification for those views?

- 35.3 whether, applying the relevant test, it was open to the Secretariat to depart from the legitimate expectation of renewal in this case;
- 35.4 whether it was open to the Secretariat to make the offer of a short-term extension to the end of April 2018 conditional on the Applicant agreeing not to pursue any grievances. What requirements (if any) applied to the making of such an offer, under the Applicant's contract of employment and the principles of international administrative law? Were any relevant requirements complied with? In particular, was the legitimate expectation of renewal referred to above relevant in this context?
- 36 Dr Ojiambo filed further submissions dated 5 November 2018 responding to those four questions. Dr Ojiambo's further submissions also responded to the issue about the Tribunal's jurisdiction, and the alleged failure to exhaust internal remedies, raised by the Secretariat in its Rejoinder.
- 37 Dr Ojiambo's further submissions also attached, and sought leave to adduce in evidence, an advertisement for the post of Deputy Secretary-General published by the Secretariat in July 2018. The Tribunal considers that this evidence is relevant and could not have been provided earlier, and grants leave to adduce it.
- 38 The Secretariat filed further submissions dated 26 November 2018. The Secretariat's submissions took issue with the observation in the Tribunal's Minute that it appeared to be common ground that Dr Ojiambo had a legitimate expectation of renewal subject to satisfactory performance and the organisation's requirements at that time. The Secretariat drew attention to its argument that there was no such legitimate expectation in this case, which is summarised at [31] – [33] above. Against that backdrop, the Secretariat went on to address the questions set out in the Minute.
- 39 In its further submissions the Secretariat objected to Dr Ojiambo making submissions on the issue of the Tribunal's jurisdiction and the exhaustion of internal remedies, in circumstances where pleadings had closed and no directions had been issued that provided for submissions to be made on that issue. By Minute dated 29 November 2018 the Tribunal directed that it would receive Dr Ojiambo's submissions on this issue: natural justice required that Dr Ojiambo have an opportunity to respond to the Secretariat's challenge to the Tribunal's jurisdiction. The Secretariat had not raised this issue in its correspondence with Dr Ojiambo in late 2017, or in its Answer. It took the point for the first time in its Rejoinder. It would not be appropriate for the Tribunal to determine whether it has jurisdiction

to consider Dr Ojiambo's application without the benefit of submissions from both parties.

- 40 The Tribunal granted leave to the Secretariat to make submissions in reply to Dr Ojiambo's submissions on the issue of jurisdiction. The Secretariat filed submissions pursuant to that leave on 6 December 2018, advising the Tribunal that it was withdrawing its argument on exhaustion of internal remedies and was no longer maintaining its argument that the Tribunal should decline jurisdiction. This issue is addressed briefly at [46] – [47] below.
- 41 Dr Ojiambo filed brief submissions in reply on the four issues identified in the Minute on 7 December 2018.
- 42 The parties' further submissions are discussed in more detail below, in the sections of the Judgment that address the questions of legitimate expectation of contract renewal, and the Secretary-General's conditional offer of a short extension of Dr Ojiambo's contract.

Tribunal hearing

- 43 The Tribunal met in London in the week of 10 December 2018 to consider and determine Dr Ojiambo's application.
- 44 At the time Dr Ojiambo filed her Reply, she requested an oral hearing of her claim before the Tribunal. The Secretariat opposed that request. The Tribunal then issued the Minute dated 3 September 2018 referred to above, seeking further written submissions on certain issues. The Minute advised the parties that a decision on whether to hold an oral hearing would be made following receipt of the parties' further submissions, but that the Acting President's initial view was that an oral hearing would not be necessary. The Secretariat's further submissions dated 26 November 2018 reiterated the Secretariat's opposition to an oral hearing. In her reply submissions dated 7 December 2018 Dr Ojiambo advised the Tribunal that due to financial constraints she would not be able to be represented at any oral hearing.
- 45 The Tribunal considers that an oral hearing is not necessary, and would not serve any useful purpose. The Tribunal has carefully considered the parties' written submissions, and all the evidence placed before it, in reaching its decision on the Application.

The Tribunal's jurisdiction to consider this application

- 46 The Secretariat has abandoned the argument it advanced in its Rejoinder that the Tribunal does not have jurisdiction to consider this application because Dr Ojiambo

failed to exhaust the internal remedies available within the Secretariat as required by Article II(3) of the Tribunal's Statute.

- 47 The issue of jurisdiction having been raised, however, we record that we have considered the issue and we are satisfied that the Tribunal does have jurisdiction to consider this application. We doubt that there was any available internal remedy. But what is plain is that there was no available remedy that could adequately address the issues raised in this application. We are therefore able to consider this application in accordance with Article II(3) of the Tribunal's Statute.

The role of the Tribunal

- 48 The Statute that establishes the Tribunal provides that it has jurisdiction to hear and determine applications brought by a staff member of the Secretariat which allege the non-observance of a contract in writing with the Secretariat, including, in relation to a contract of service, the non-observance of the contract of employment or terms of appointment of the staff member.
- 49 It is not the role of the Tribunal to review the merits of a decision made by the Secretariat on employment matters, if the decision has been made in accordance with the terms (express and implied) of the relevant staff member's contract of employment.
- 50 Nor is it the role of the Tribunal to review the merits of a decision made by the Secretariat on organisational matters, provided that decision does not breach any express or implied term of an employee's contract of employment.
- 51 However it is well established as a matter of international administrative law that there is an implied term in contracts of employment that discretionary powers affecting the employment of an employee must be exercised properly. The decision-maker must have the authority to make the decision. The decision-maker must act rationally. The decision-maker must make the decision for a proper purpose, and not for an improper purpose. The decision-maker must take relevant considerations into account, and must disregard irrelevant considerations. The decision must be reasonably related to the object which it was intended to achieve.²⁸

²⁸ *Ayeni* CSAT APL/12 (No 2) at [53]; *Faruqi* CSAT/5(No 2) at 8. See also *Re Ballo* ILOAT Judgment No 191; *de Merode* WBAT Reports [1981], Decision No 1 at 34; Amerasinghe, *The Law of the International Civil Service* (2nd ed, 1994) vol 1 ch 21, esp at 280-282, 289-295, 298-302 and vol 2 ch 4

52 In its further submissions, the Secretariat helpfully summarises the Tribunal's approach to reviewing exercises of discretion by the Secretary-General in the following terms:²⁹

11. It is common ground between the parties that the Tribunal's approach to reviewing exercises of the Secretary-General's discretion in relation to employment contracts is correctly stated in *Ayeni*: "*The discretion which resides in the Secretary-General in matters of recruitment of staff must be exercised properly and judicially and this Tribunal has the jurisdiction to review how that discretion was used.*"

12. This reflects the well-established principle of international administrative law that in exercising its jurisdiction a tribunal should not substitute the organisation's reasonable judgment with their own, nor can they consider which alternative(s) would have been best or more effective to attain the desired objectives of reform. It follows that the Tribunal should only interfere with a discretionary decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was an abuse of authority, otherwise there is no violation of the contract of employment. Accordingly, the Applicant must demonstrate a fundamental flaw in the decision-making process.

53 The Tribunal is in general agreement with that summary, which is consistent with the approach outlined at [51] above.

Did Dr Ojiambo have a legitimate expectation that her contract would be renewed for a second term?

54 Dr Ojiambo's contract of employment included the following express terms:

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.

...

Appointments are on limited term contracts of usually three years. Contracts may be renewed by mutual agreement and subject to fully satisfactory performance. Staff at this level may normally serve for not more than two three-year contracts. The Secretary-General will retain the flexibility to approve or decline extensions as circumstances warrant.

55 The Staff Regulations and Staff Rules, which form part of a staff member's contract of employment, contain provisions to similar effect. In particular, they provide that employment of senior staff is subject to the Secretariat's Rotation Policy. That Policy provides (at [2.5]) that "Employees do not have the right to an automatic renewal of a contract. In particular the granting of a new contract is subject to fully satisfactory performance and the needs of the Secretariat."

²⁹ Secretariat's further submissions at [10] – [11], footnotes omitted.

56 The Tribunal has previously held that these standard provisions in relation to renewal of the fixed term contracts of senior staff members give rise to a legitimate expectation of renewal for a second three year term, in the absence of a good reason not to renew the contract. In *Oyas* the Tribunal said:³⁰

(7) Did the Claimant have a legitimate expectation as to renewal?

118. Yes

119. We accept that by virtue of the rotation policy, a person at the Applicant's grade holding a particular post under a first three year contract has a legitimate expectation that it will be renewed.

120. Where a restructuring is taking place and the post of the staff member is to disappear and the staff member is notified of non-renewal in good time, the expectation may not apply. To this extent we agree with the Management Committee's stance at the meeting of 2nd June 2009 quoted above. Here, however, the Respondent did not give notice of non-renewal to the Applicant. It did not tell her that her post would definitely disappear. Instead, it confirmed that her position as Head of Section would continue for the time being subject to further consideration once the Director was in place. In these circumstances she retained and retains the legitimate expectation that she would be granted a further contract running to the end of September 2013. This legitimate expectation is unaffected by the grant of the injunction in her favour or by the lifting of that injunction by this judgment. We so declare.

57 At the time of her appointment as Deputy Secretary-General, Dr Ojiambo had a legitimate expectation that she would be granted a second three-year term in that position in the absence of a good reason not to renew her contract. Good reasons not to renew her contract would include unsatisfactory performance in the role, or changes in the needs of the organisation relating to that role.

58 That legitimate expectation was founded on the express terms of her contract of employment, and the usual practice of the Secretariat. The information that Dr Ojiambo says she was given by the Secretary-General at the time of her recruitment was wholly consistent with, and confirmed, that expectation.

59 One of the central issues in this case is whether that legitimate expectation of renewal in the absence of a good reason for non-renewal remained applicable at the time of the Secretary-General's decision – or perhaps, decisions – not to renew Dr Ojiambo's contract, and (if so) what that legitimate expectation required of the Secretary-General at that time.

³⁰ *Oyas* CSAT APL/16.

Can the Tribunal review the Secretary-General's decision not to renew Dr Ojiambo's contract?

- 60 Before we address the question set out at [59] above, however, we must address the Secretariat's argument that in this case there was no decision capable of review by the Tribunal, as Dr Ojiambo was employed under a fixed term contract which simply expired. The Secretariat argued in its Rejoinder that the expiry of the contract was not the result of any decision made by the Secretary-General, but rather came about through the effluxion of time.
- 61 The Secretariat's argument that the Secretary-General did not make any relevant decision in this case, because Dr Ojiambo's contract simply came to an end at the expiry of its term, is in our view plainly wrong as a matter of fact and law.
- 62 As a matter of fact the Secretary-General did decide not to renew Dr Ojiambo's contract of employment for a further three year term. That decision is recorded in the parties' correspondence, including the Secretary-General's emails of 31 July 2017, 6 September 2017, 14 and 29 November 2017 and 4 December 2017. The Secretariat's letter dated 22 December 2017 expressly records that the request that Dr Ojiambo's contract be renewed on existing terms for a further three year period "is denied". The Secretary-General also made positive decisions to offer a short term (approximately 3.5 months) extension of Dr Ojiambo's contract, and to make that offer conditional on Dr Ojiambo waiving all claims and grievances she might have in relation to her employment. The Tribunal can consider a claim that these interrelated decisions were made in breach of the express or implied terms of Dr Ojiambo's contract of employment.
- 63 As a matter of law, if it had been the case that the contract had simply expired without the Secretary-General turning her mind to the question of renewal, that would in itself amount to a breach of Dr Ojiambo's contract of employment. The effect of the express and implied terms referred to above, and the legitimate expectation to which they give rise, is that the Secretary-General was contractually obliged to turn her mind to the question of renewal and consider whether there was a good reason to decline to renew the contract. As this Tribunal put it in *Ayeni*, Dr Ojiambo "was entitled to be considered for extension of his contract as it appeared to be the normal practice This normal practice was deliberately departed from in the case of the Applicant and there ought to be good reasons why that practice was not followed."³¹

³¹ *Ayeni* at [45]. International administrative tribunals have consistently rejected the argument that the non-renewal of a fixed term contract of employment is not a reviewable decision: see *Amerasinghe* vol 2 at 92 ff.

64 But that legal issue does not arise in this case, as it is clear from the evidence before us that the Secretary-General did actively consider, and make decisions in relation to, the future employment of Dr Ojiambo. In particular, the Secretary-General decided not to offer Dr Ojiambo a further three year term, and instead decided to offer her a short term extension of her contract conditional on waiver of all existing rights to pursue a grievance in connection with her employment, among other matters.

Was it open to the Secretary-General to decide to hold the DSG positions vacant?

65 Dr Ojiambo says that the Secretary-General was not entitled to make the decision to have no DSGs in office, and in particular was not entitled to decide that there would be no DSG with responsibility for the CFTC. This argument is founded on the provisions of the Agreed Memorandum,³² and in particular clause 29 which provides:

In consultation with governments, the Secretary-General will appoint Deputy Secretaries-General and allocate responsibilities among them in light of the Secretariat's needs and work programs. One Deputy Secretary-General shall have responsibility for the administration of the Commonwealth Fund for Technical Cooperation.

66 Dr Ojiambo submits that the Agreed Memorandum is “the Secretariat’s core constitutional document and a centrally important source of its law”.³³ She says that it imposes mandatory requirements on the Secretary-General, which the Secretary-General does not have the discretion to depart from.

67 In particular, Dr Ojiambo says that it is mandatory for there to be one or more DSGs, and that there must be a DSG with responsibility for the CFTC. Alternatively, she argues that the Agreed Memorandum is a mandatory relevant consideration that the Secretary-General was required to take into account, but failed to take into account, when she made the decision that the contracts of the three DSGs would not be renewed, and their roles would be held vacant.

68 The Secretariat says that the Agreed Memorandum is not a Treaty which sets out legally binding rights and obligations in international law, “although it still holds importance in relation to the ability of member states to hold the Secretariat to its

³² More precisely, the Revised Agreed Memorandum on the establishment and functions of the Commonwealth Secretariat, published at the conclusion of the 1965 meeting of Commonwealth Heads of Government in London, and amended by member governments following the 2002 meeting of Commonwealth Heads of Government in Australia, and following the enactment of the International Organisations Bill in April 2005.

³³ Applicant’s further submissions at [12].

political commitments and provides a framework for the Secretariat's operations".³⁴ The Secretariat says that Dr Ojiambo has no standing to raise the issue of compliance with the Agreed Memorandum, and the Tribunal is not competent to determine that issue.³⁵ The thrust of the Secretariat's argument is that the Agreed Memorandum does not impose legally enforceable constraints on the Secretary-General's decision-making in relation to the administration of the Secretariat: rather, it is a document that operates at a political level as between member States and the Secretariat.

69 This Tribunal has previously treated the Agreed Memorandum as an important background document that can be referred to for the purpose of shedding light on the origin and structure of the Secretariat, and informing the interpretation of the Tribunal's Statute and Rules.³⁶ However we are not aware of any decision of the Tribunal which has addressed the question of whether the Agreed Memorandum imposes constraints on the exercise of the Secretary-General's powers that are justiciable before this Tribunal.

70 The Tribunal accepts the Secretariat's submission that the Agreed Memorandum does not give rise to constraints on the powers of the Secretary-General that are justiciable before the Tribunal at the suit of an employee of the Secretariat. We have reached that conclusion having regard to:

70.1 the character and purpose of the Agreed Memorandum;

70.2 the fact that some but by no means all of the provisions of the Agreed Memorandum are reflected in provisions of the Staff Regulations and the Staff Rules, which do form part of a staff member's contract of employment. This appears to reflect a deliberate choice about which provisions are intended to have contractual effect, and about the manner in which those provisions should be given contractual effect;

70.3 the absence of any express reference to incorporation of the Agreed Memorandum in staff members' contracts of employment, which contrasts with the express reference in the standard contracts (including that of Dr Ojiambo) to the incorporation in those contracts of the Staff Regulations and Staff Rules. The Regulations, which are made by Commonwealth Governments, provide expressly that they embody the general conditions of service and the rights, duties and obligations of the Secretariat's employees,

³⁴ Secretariat's further submissions dated 26 November 2018 at [17].

³⁵ Rejoinder at [51].

³⁶ *Faruqi* CSAT/5 (No 1).

and form part of an employee's contract of employment. The absence of any provision for incorporation of provisions of the Agreed Memorandum in contracts of employment, whether in the Agreed Memorandum itself or in the Regulations or in individual contracts of employment, is in our view a strong indication that the provisions of the Agreed Memorandum were not intended to have contractual effect as between the Secretariat and staff members.

- 71 However we consider that the Agreed Memorandum forms part of the backdrop to the Secretary-General's decision-making in this case. The Agreed Memorandum recognises the important role played by DSGs in the governance of the Secretariat. The importance of that role is also reflected in the many provisions of the Staff Handbook that expressly provide for decision-making by a DSG.³⁷ The importance of the DSG post is in our view a factor that the Secretary-General was required to take into account when making her decision on whether to renew the contract of employment of the only remaining DSG in the second half of 2017.

Did the decision not to renew Dr Ojiambo's contract breach the obligations owed to her?

- 72 The sole reason given by the Secretariat for the non-renewal of Dr Ojiambo's contract for a second three-year term was the financial constraints affecting the Secretariat, and a pressing need to make savings while pursuing a significant structural reorganisation. The Secretariat does not suggest that the performance of Dr Ojiambo in her role as Deputy Secretary-General had any bearing on the decision not to renew her contract.
- 73 Those financial constraints were real and exigent. They were the subject of consideration and discussion by the Board of the Secretariat, and by the Board's Executive Committee, over an extended period.
- 74 Dr Ojiambo does not directly challenge the decision taken by the Secretary-General in 2016 that the contracts of the three DSGs should not be renewed having regard

³⁷ See eg Staff Regulations Regs 18 and 22; Staff Rules 3.4, 3.7, 7.4.3; Part 3 Section 1 at [4.2], Part 4 Section 1 at [3.3], [3.5], [3.6], [4.5] and Section 3 at [6.3.1], Section 5 at [11.3], [12.2], [13.4.1], [13.4.2], [13.4.3], [13.5.1], [13.5.2], [14.1], [14.2], [14.5], Section 7 at [13.2], [14.1], [14.2], [14.3], Section 10 at [6.3], [6.4], [6.5], [6.8], Section 12 at [10.3.1], Section 14 at [19.6.5], [19.6.6], Section 15 at [2.2.4.3], [2.5.5], [2.2.6.2], [2.2.7.2], [2.2.8], Section 16 at [4.3.1], [6.2], [8.4.2.3], [8.4.2.5], [8.5.7], [8.5.8], [8.5.11], [8.5.12], [8.5.13], [9.2.1], Section 21 at [3.8], [4.8], [4.9], [5.6], [9.3.4], [11.3], [12.4], [12.8], [12.9], [16.1.5], [20.1], Section 23 at [3.2]. Thus for example the provisions of the Disciplinary Procedure and the Grievance Policy and Procedure all assume that there is a DSG in office, and could not be implemented without some adaptation in the absence of any serving DSG.

to the financial constraints affecting the operation of the Secretariat at that time. But Dr Ojiambo submits that:

- 74.1 the DSG roles were not abolished. Rather, they were to be held vacant until the financial position of the Secretariat had been satisfactorily resolved;
- 74.2 she was entitled to have the renewal of her contract considered at the time that her contract was due to come to an end ie in mid to late 2017. The Secretary-General needed to turn her mind to the question of renewal of Dr Ojiambo's contract at that time, and could not simply apply the policy decision made in 2016 without further consideration;
- 74.3 in determining whether to renew her contract in 2017, the Secretary-General needed to have regard to the circumstances that existed at that time. The Secretary-General could not simply base the decision on circumstances that existed in 2016, but that were no longer applicable. The relevant circumstances in late 2017 included the improved financial position of the Secretariat at that time, the importance of the position of DSG, and the fact that Dr Ojiambo was the only remaining DSG.

75 We consider that Dr Ojiambo was entitled to have the Secretary-General consider, in late 2017, whether there was a good reason not to renew her contract for a further three year term *at that point in time*. In making that decision the Secretary-General could take as her starting point the decision she made in 2016 that financial constraints justified the non-renewal of all three DSG contracts. But she could not properly stop there, and make a decision in 2017 by reference to circumstances that existed in 2016. She needed to turn her mind to whether it remained the case that the Secretariat faced such serious financial constraints that there was a good reason not to renew Dr Ojiambo's contract of employment. In asking herself that question, the Secretary-General needed to take into account the importance of the DSG position for the operation of the Secretariat, as reflected in the Agreed Memorandum, the Staff Regulations and Staff Rules, and other provisions of the Staff Handbook.

76 Suppose for example that the financial difficulties facing the Secretariat in 2016 had been fully resolved by mid-2017, and the Secretariat was adequately funded to employ several DSGs as part of its continuing staff complement. It would make no sense to say that there were good financial reasons not to renew Dr Ojiambo's contract of employment in late 2017, by reference to financial constraints that were no longer operative at that time.

77 As noted above, there is no direct challenge to the Secretary-General's 2016 decision. We do not therefore need to consider the circumstances in which a policy

decision of that kind might be challenged before the Tribunal. We do however accept Dr Ojiambo's submission that this policy decision was not conclusive when the time came to consider renewal of her contract: her legitimate expectation that her contract would be renewed in the absence of a good reason not to renew it required the Secretary-General to consider whether there was a good reason not to renew her contract at the time that renewal decision fell to be made ie in the second half of 2017.

- 78 The 2016 policy decision by the Secretary-General was not a decision to abolish the position of DSG. If an organisational review results in the abolition of a position because it is no longer required by the organisation, that decision need not be revisited when considering whether to renew the contract of a person in that position. But in this case, the positions of the DSGs remained in existence. The policy decision that was made in 2016 was a decision not to renew the incumbents' contracts and to hold the positions vacant for the time being, pending resolution of the financial difficulties facing the Secretariat. This was a temporary measure that was intended to respond to immediate financial pressures, to give the Secretariat some breathing space while its finances were put in order and a review of its needs was completed. It was inherent in the nature of that decision that the circumstances that underpinned it could change over time as steps were taken to resolve financial challenges, and as the review progressed. It was therefore necessary to consider, at the time when Dr Ojiambo's initial contract was about to expire, whether any relevant changes had occurred and whether there was at that time a good reason not to renew her contract.
- 79 The Secretariat submits that the 2016 decision, which Dr Ojiambo was aware of, meant that Dr Ojiambo had no legitimate expectation that her contract would be renewed in 2017. This submission misunderstands the nature of the legitimate expectation identified in the Tribunal's previous decisions. The legitimate expectation of a person in Dr Ojiambo's position is that her contract will be renewed unless there is a good reason not to renew it. If some time before renewal is due it seems likely that there will be a good reason not to renew the contract when it falls due for renewal, then the staff member may not be confident of renewal of the contract at that future time. That is, the staff member may not in fact expect their contract to be renewed at that future time. But the staff member continues to have a legitimate expectation of renewal unless there is a good reason not to renew at the time that decision falls to be made. And the Secretariat continues to have an obligation to consider renewal at the relevant time, and to consider whether there is a good reason not to renew the contract at that time.
- 80 Thus the 2016 policy decision, and Dr Ojiambo's knowledge of that decision, did not mean that she had no legitimate expectation that her contract would be renewed unless there was a good reason not to do so. The decision put her on notice that

there was a real risk of non-renewal, because there might well be good reasons relating to the needs of the organisation not to renew her contract. But she remained entitled to have the question of renewal considered at the relevant time, in the second half of 2017, and to have the Secretary-General ask herself whether there was a good reason for non-renewal at that time.

- 81 There is evidence before the Tribunal to support the inference that there had been material improvements in the financial position of the Secretariat by mid-2017, as Dr Ojiambo submits.³⁸ We have not seen any evidence to the contrary.
- 82 The Secretariat has not provided any evidence that the Secretary-General did reconsider whether there continued to be good reason to decline to renew Dr Ojiambo's contract of employment in the period July 2017 to December 2017. We have not seen any document recording such a reconsideration, and setting out the factors that were taken into account in reaching the decision not to renew her contract. We have not been shown any financial analysis of the likely savings in future years from not renewing her contract, or any analysis of alternative options for making similar savings. Dr Ojiambo notes that other staff members were hired in the course of 2017. That is not of itself determinative. But it does underscore the need for the Secretary-General to turn her mind to whether the limited funds available to the Secretariat at that time should be used to renew the contract of the only remaining DSG, or should be used for other purposes. We would have expected to see a clear record of the Secretary-General turning her mind to these issues, having regard to the institutional significance of the position of DSG. But there is no evidence before us that this occurred.
- 83 On the basis of all the evidence before us we find that the Secretary-General did not reconsider the question of renewal of Dr Ojiambo's contract in the second half of 2017 having regard to all relevant factors, and in particular did not turn her mind to the critical question of whether *at that time* there was a good reason consistent with the express and implied terms of that contract to decline to renew her contract. As this Tribunal's decisions in *Oyas* and *Ayeni* confirm, the Secretary-General was required to turn her mind to this issue and ask herself this question. It follows that the Secretariat breached its contractual obligations to Dr Ojiambo in connection with the renewal of her contract.

³⁸ See in particular the Board Minutes of 1 June 2017 at pp 1 and 15, the Executive Committee Minutes of 5 October 2017 at p 2, and the decision made in mid-2018 to advertise for a DSG.

84 We address the question of remedies below, after considering the implications of the Secretariat's conditional offer of a short extension of Dr Ojiambo's contract of employment.

The conditional offer of a three month contract extension

85 The possibility of a brief extension of Dr Ojiambo's contract of employment appears to have first been raised by the Secretary-General's Chief of Staff in a discussion with Dr Ojiambo in August 2017, shortly after the letter of 31 July 2017 advising Dr Ojiambo that her contract would not be renewed for a second three-year term.³⁹ That possibility also appears to have been discussed between Dr Ojiambo and the Secretary-General at a meeting in early October 2017 that is referred to in an email dated 10 October 2017 sent by Dr Ojiambo to the Secretary-General. Dr Ojiambo sought confirmation in writing of that extension. The Secretary-General responded by email on 11 October 2017, saying:

As you know, and as I have made clear to the Board and the Executive Committee on several occasions, the Secretariat's budgetary situation means that there are no funds to pay for a DSG role at present and DSG staff costs are being met from reserves. Your term of office comes to an end in January. However, notwithstanding our fiscal difficulties, and in order to settle this matter amicably, I am prepared to offer that you remain in position during the Commonwealth Heads of Government meeting in April and that your appointment should be extended until the end of April 2018. In the circumstances this is the most I can do. I hope you will feel able to accept this offer.

86 Dr Ojiambo then sent an email on 23 October 2017 seeking an answer to certain matters raised in her 10 October email, and saying that until her queries had been responded to in full, she reserved her position on the raising of a grievance.

87 The Secretary-General replied on 1 November 2017, saying (among other things):

I regret that you feel the need expressly to reserve your position on the raising of a grievance if the matters to which you referred are not responded to in full, and to observe that in your email you did not accept my offer to extend your contract to the end of April 2018. As you know, the non-renewal of a contract (as distinct from working conditions during employment) is not a basis on which a grievance may be brought. Contract renewal is subject to the needs of the Secretariat (Handbook Part 4 Section 9).

88 The Secretary-General concluded the email by asking for "a definitive response as to whether you are minded to accept or refuse the extension proposed as a full settlement of the issues outstanding."

³⁹ Email from Dr Ojiambo to SG dated 17 August 2017.

- 89 On 7 November 2017 Dr Ojiambo sent a lengthy email to the Secretary-General which concluded by saying:

Finally, in connection with your comment on the extension of my contract term, I will of course accept this but subject to the work plan being agreed to my satisfaction and without prejudice to any grievance I may still raise about the matters I have communicated with you.

- 90 On 8 November the Secretary-General responded, saying:

The offer of an extension to the end of April was made as a way of bringing about an honourable settlement of the outstanding issues and without prejudice to the notice given to you that your term of office would otherwise terminate pursuant to your contract [sic] in January. It was to that conditional offer I invited your response. May I please have a reply? I hope it will, on mature reflection, be a favourable one however the decision is of course yours.

As you appreciate the other matters are materially affected by your substantive response to that conditional offer.

- 91 On 14 November the Secretary-General sent a further email seeking a definitive reply to her conditional offer.

- 92 Dr Ojiambo replied on 18 November 2017. In the course of a lengthy email she responded to the offer as follows:

I will be emailing my concerns about the "honourable settlement" you mentioned in your email of 8 November (sent 2:55). You talk about a conditional offer, but this is the first time that such conditions are mentioned by you. I understand an extension to my contract was requested about 2 months ago and advised by senior colleagues, and is seen as a benefit to the Secretariat, and yourself in particular, for the purpose of ensuring the delivery of a successful CHOGM. Further, any cost involved in the extension of my contract to at least the end of the CHOGM meeting would be offset by the benefit I would bring in assisting and performing my expected duties and from the proposed projects and programs that would be mandated by the Heads.

...

SG, why won't you engage with me to resolve this so we can work together until the end of my contract, for which I believe I have a legitimate expectation that it will be extended? I am available at short notice to meet with you one on one to discuss my concerns and thoughts on how we can move forward together. I await to hear from you urgently.

- 93 Following a meeting between Dr Ojiambo and the Secretary-General, Dr Ojiambo sent an email dated 21 November 2017 that suggested, among other things, an extension of her contract until 31 August 2018.

- 94 The Secretary-General responded with an email headed "FINAL OFFER – expires Monday 4th December". The body of the email read as follows:

Dear DSG

FINAL OFFER

I write to acknowledge receipt of your email of 21 November in which you ask for your contract to be extended to 31 August 2018. I regret that for reasons explained to you in my previous letters and in conversation, I am not in a position to accede to your request. I have previously offered to extend your contract, which comes to an end on 11 January 2018, by a little over three months to the end of April 2018, an offer which you have so far refused to accept. Further to my emails of 1, 8 and 13 November, this is a final opportunity to accept that offer. Please indicate acceptance of this final offer by close of business Monday, 4 December, 2017. Failing a reply accepting by that time, I expect you to make all the appropriate arrangements with HR relating to the end of your contract and related entitlements and obligations on 11 January 2018.

Your sincerely

SG

95 Dr Ojiambo responded as follows on 1 December 2017:

Dear SG,

I refer to your email below, of Wednesday 29th November 2017, sent at 16:39 hours.

I am happy to confirm my agreement to the extension of my contract of employment (all on current terms) to end April 2018. But, we must also resolve my other queries (including my terms of reference and a relevant work plan), which remain to be discussed. I am happy to deal with that as soon as we are able to meet. When might that be? If we can meet, then this will remove the need for any formal grievance at this stage. I think we would both prefer that.

[] thanks and best wishes,

DSG.

96 The Secretary-General responded later the same day, saying:

Dear DSG

Thank you for your email. I'm content if your agreement and acceptance of this without prejudice offer of an extension was in full and final settlement of ALL outstanding issues in relation to your position as DSG without any reservation.

I will also expect to receive your detailed response as to how you propose to discharge the duties outlined to you in the emails sent to you.

I hope this can all be settled by the close of business on Monday.

Yours sincerely

SG

97 On 4 December 2017 Dr Ojiambo responded, saying:

I refer to your email of 1 Dec at 3.44pm concerning the deadline on your "Final Offer". I responded to your "Final Offer" to indicate I was happy to accept the extension to my contract (on existing terms) but mentioned that we needed to address the other work related matters I had raised in earlier communications with you.

You have now stated that my acceptance must be unequivocal and without condition. But I cannot respond in that [] as to do so would make no sense. We must talk about my terms of reference and workplan, otherwise how am I to fulfil my duties and responsibilities? I have made a reasonable request to meet with you to discuss and resolve this. If I accepted your "Final Offer" on your terms, we would not be able to do that. That is, with respect, an awkward [sic] situation, and if I may say, is rather unreasonable.

Your position puts me in the regrettable situation where I now have to start a grievance.

98 This led to the following response by the Secretary-General, later that same day:

Dear DSG

My without prejudice offer for an extension of your contract until the end of April 2018, which expired at close of business today, was clear that the same was made on the basis that it would be in full and final settlement of ALL outstanding issues relating to your position as DSG and I also expected your detailed response to the work plan which was sent to you by me. It was for you to submit your detailed proposal as to how you proposed to discharge your role as DSG CFTC within the framework I instructed by close today.

Your emails have failed in both regards to date and thus my offer to you expires. You have chosen not to accept the extension by way of full and final settlement and have not submitted a detailed response as requested. Could you please now take the necessary steps to conclude your term of office with the Secretariat which will determine on 11th January.

99 On 20 December 2017, Dr Ojiambo's solicitors sent a detailed letter before action to the Secretary-General. In relation to the offer of a short extension of her contract, the letter said:

Regarding your proposed short extension of our client's existing contract to end April 2018, we note that this was made on condition that acceptance was unconditional and would result in a full and final settlement of all outstanding matters. As was pointed out to you, the proposed extension was reluctantly accepted, but our client explained that it could not be accepted on the basis required by you, as that would have prevented discussion on residual matters such as the work plan, and other practical issues on work arrangements. This was set out in an email to you dated 4th December 2017 ...

100 The Secretariat's response dated 22 December 2017 addressed this topic as follows:

Despite several extensions of time, Dr Ojiambo was unable to accept the offer of the contract extension without conditions, and had failed to engage over the content of the workplan or how she would discharge the CFTC mandate. Accordingly, no agreement was reached to extend Dr Ojiambo's contract to the end of April 2018 or at all. Notification of intention to bring a grievance is not a reason to extend a contract: a grievance may be considered on a voluntary basis even after expiry of the contract period.

101 The Secretariat's letter went on to say:

The extensive email exchanges prior to those sent late on 4 December (your Attachments 3 and 4), which you will undoubtedly have seen, illustrate the unfortunate failure to reach agreement on how Dr Ojiambo should fulfil her functions in accordance with the reasonable requests of the Secretary-General, who is the Chief Executive of the Secretariat and to whom Dr Ojiambo is responsible. It was maintained by Dr Ojiambo throughout that other work-related matters raised in earlier communications, not limited to her terms of reference and a relevant work plan, had to be resolved or a grievance would be brought. In the circumstances the Secretary-General does not consider that a contract renewal as requested would provide the Secretariat generally and the Secretary-General in particular with full and effective support and service.

The implications of this offer

102 The making of this offer indicates that by late 2017 the financial constraints on the Secretariat were not so severe that they precluded renewal of Dr Ojiambo's contract for at least 3.5 months. That confirms that there was no good reason based on financial constraints to decline to renew her contract for this period at least.

103 We have not seen any analysis of the affordability of renewal of the contract for a period greater than 3.5 months. If that question had been addressed, we would have expected to see some record of the analysis underpinning a conclusion that a longer extension was not affordable and/or was not justified having regard to the needs of the Secretariat and the competing demands on its limited funds. The absence of any such record provides further support for the inference that the Secretary-General did not ask herself the right question, and did not take into account relevant considerations, when she decided to offer renewal for a period shorter than a full three year second term.

Was the conditional nature of this offer a breach of the Secretariat's obligations?

104 Was there any good reason other than financial constraints for declining to renew Dr Ojiambo's contract until at least the end of April 2018? The Secretariat argues that it was entitled to decline to renew the contract for this period because Dr Ojiambo failed to agree to the conditions imposed on renewal by the Secretary-General: agreement to settle "ALL" claims that Dr Ojiambo might have against the Secretariat, and acceptance of the draft work plan prepared by the Secretary-General.

- 105 The Tribunal is firmly of the view that Dr Ojiambo’s unwillingness to abandon any existing rights she may have had to pursue a grievance in respect of her treatment by the Secretariat was not a good reason to decline to renew her contract. It is not one of the reasons for non-renewal expressly contemplated by her contract: it does not relate to unsatisfactory performance on her part, or to the needs of the organisation in any relevant sense. We do not rule out the possibility of other good reasons not to renew a contract for a second term: but the Secretariat’s desire to prevent Dr Ojiambo from pursuing any grievance she may have had, internally or before this Tribunal, does not qualify as a good reason for non-renewal.
- 106 To the contrary, we consider that the use of the Secretariat’s discretion in relation to renewal of a staff member’s contract for the purpose of preventing a grievance from being pursued was a misuse of that power. It was inconsistent with the Secretariat’s own Grievance Policy, which provides at [5.1] that “Staff members are assured of the ability to raise a grievance without fear of retaliation. This extends to the following: (a) making a complaint in good faith ...” The conditional offer of an extension was a form of retaliation – in other words, of unfavourable treatment directed at Dr Ojiambo because she had raised the prospect of pursuing a grievance against the Secretariat. The Secretariat should have let any grievance process take its course, and should not have attempted to use the power to renew contracts to prevent access to an appropriate independent process for determining whether any grievance on Dr Ojiambo’s part was justified.
- 107 We accept the submission that imposing this condition breached the Secretariat’s obligations to Dr Ojiambo, on the basis that in imposing this condition the Secretary-General took into account an irrelevant consideration (Dr Ojiambo’s foreshadowed grievance proceedings) and acted for an improper purpose (to prevent Dr Ojiambo from exercising her rights under the Grievance Policy, and under her contract of employment).
- 108 We record that we would have reached the conclusion that this conditional offer was a breach of the Secretariat’s obligations to Dr Ojiambo independently of the Secretariat’s positive obligation to identify a good reason for non-renewal of Dr Ojiambo’s contract, on the alternative basis that it breached the Secretariat’s duty to treat staff members with dignity. That duty can also be expressed as a duty on the part of the employer not to conduct itself in a manner calculated or likely to destroy or seriously damage trust and confidence between employer and employee without proper and reasonable cause.⁴⁰ Requiring a staff member to abandon rights

⁴⁰ See *Bandara v Commonwealth Secretariat* CSAT APL/22 (No 2) (2015) esp at [74]; *Singh v Commonwealth Secretariat* CSAT APL/27 (2015) esp at [85]; *Addo v Commonwealth Secretariat* CSAT APL/21 (2014) esp at [80] – [82]; *Venuprasad v Commonwealth Secretariat* APL/40 esp at [102] – [103].

that she wished to pursue in good faith against the Secretariat as the price of renewal of that staff member's contract of employment, depriving her of accrued rights and shielding the Secretariat from accountability, are in our view inconsistent with that duty.

- 109 The inclusion of this condition in the offer of an extension was in and of itself a breach of the Secretariat's obligations to Dr Ojiambo.
- 110 We also accept Dr Ojiambo's submission that it was reasonable for her to request a meeting with the Secretary-General to discuss her terms of reference and work plan before these documents were finalised. It was not a good reason to decline to renew Dr Ojiambo's contract that she had sought such a meeting, rather than simply agree to the draft tendered to her. A reasonable employer would not refuse to extend a contract of employment on the basis that the employee wished to meet with her line manager to discuss her work plan before it was finalised.
- 111 The question of remedies is addressed below.

Other matters raised by Dr Ojiambo

- 112 The Application sets out certain longstanding concerns raised by Dr Ojiambo in relation to the adequacy of the Secretariat's efforts to assist in obtaining visas for her family members to join her in the United Kingdom following her appointment in 2015. We do not consider that these concerns are relevant to the application before the Secretariat in relation to the events of 2017, and in particular to the non-renewal of Dr Ojiambo's contract of employment.
- 113 Dr Ojiambo also complains that she was side-lined and undermined by the Secretary-General in a number of respects in the period from 31 July 2017 onwards. Her complaints are summarised in her Application as follows:

46. Since 31st July 2017, there have been ongoing issues involving what appears to be a campaign to side-line the Applicant from her effective operation as DSG (Political). This is evidenced by communications in which the Applicant regularly asked for clarity and detail to be provided regarding her new role and the variation of her position to DSG (CFTC), including:

- a. deliberate actions making it difficult for the Applicant to make travel plans, with uncertainty surrounding whether she was required to attend key meetings (as required by the Respondent's new Strategic Plan) and if so, what she would be required to do at such meetings;
- b. uncertainty regarding resources to be applied to the new role and details of her responsibilities, targets and objectives for her to work to, to include the agreement of an appropriate work plan as required for operation within the Respondent's new Strategic Plan;

- c. the removal of the Applicant's name from an organogram showing management structure and reporting lines, its public posting, and then its quiet subsequent correction following her complaint; and
- d. refusals by SG of several requests for meetings in order that the Applicant may obtain SG's guidance as her Line Manager.

114 We have carefully considered the various matters raised by Dr Ojiambo under this head. We are not persuaded that these events, singly or taken together, were so significant as to amount to a breach of any contractual obligation owed to Dr Ojiambo by the Secretariat. This limb of the Application is therefore dismissed.

Summary of findings

Findings on liability

115 We have found that the Secretariat breached its contractual obligations to Dr Ojiambo by:

115.1 declining to renew her contract of employment for a further term without considering whether there was, at the time of that decision in 2017, a good reason not to renew; and

115.2 making an offer of renewal on a short term basis that was conditional on Dr Ojiambo settling all outstanding issues in relation to her position as DSG, and in particular abandoning her stated intention to pursue grievance proceedings against the Secretariat arising out of the non-renewal of her contract for a full three year term, and certain other matters.

116 We have dismissed Dr Ojiambo's claim for compensation arising out of other aspects of her treatment in the period from 31 July 2017 onwards.

Remedies

117 It seems clear on the evidence before us that if the Secretariat had not breached its obligations in the manner described above, it would have made an unconditional offer of renewal of Dr Ojiambo's contract for a period of at least 3.5 months, and possibly longer. It also seems clear that Dr Ojiambo would have accepted such an offer.

118 Dr Ojiambo has sought rescission of the decision not to renew her contract, and an order by way of specific performance requiring the Secretariat to offer her an extension. We do not consider that this is an appropriate case for such orders. An

order providing for the reinstatement of Dr Ojiambo as a DSG after almost a year out of her post would be impractical and inappropriate.⁴¹

- 119 We consider that the appropriate remedy is an award of compensation to Dr Ojiambo in respect of the loss she has suffered as a result of the Secretariat's breaches. That loss includes both financial loss and the stress and inconvenience caused by those breaches.
- 120 We do not at present have sufficient evidence before us to quantify that loss. In its Answer the Secretariat says that in the event of an order for compensation, it puts the Applicant to proof of damage by reference to the Statute and the Rules. The Tribunal generally expects the parties to address all issues, including the amount of any compensation claimed, in their pleadings. But in this case neither party has engaged with the issue of quantum. In those circumstances, we consider that the appropriate course is for us to issue directions that provide for the parties to make submissions on the amount of compensation to be awarded. This is therefore an interim judgment that determines questions of liability, with the amount of compensation to be determined in a subsequent judgment if necessary.
- 121 The formal orders set out below include directions to enable the amount of compensation to be determined by the Tribunal, should that prove necessary. However the Tribunal encourages the parties to seek to resolve the question of quantum by agreement, to avoid the time and expense involved in a further determination by the Tribunal.
- 122 The Tribunal has power to award interest in order to put an applicant in the position they would have been in but for a breach by the Secretariat.⁴² If Dr Ojiambo claims interest on the compensation payable to her, the period for which interest is claimed and the rate of interest claimed should be addressed in her submissions on quantum of compensation. If the Secretariat wishes to limit its exposure to an award of interest, it is of course open to it to make a payment to Dr Ojiambo on account of the compensation payable to her in advance of determination of the amount of that compensation.

Costs

- 123 Dr Ojiambo has been substantially successful in her claim. The Tribunal considers that this is an appropriate case in which to award costs to the successful applicant.

⁴¹ The approach of a number of international administrative tribunals to the making of reinstatement orders is discussed in Amerasinghe vol 2 at 140-149. The importance of practical considerations is well established.

⁴² *H K v Commonwealth Secretariat* CSAT APL/19 (2012) at [95] – [96]; *Venuprasad* at [171].

If costs were not awarded, the amount of compensation awarded to Dr Ojiambo would be unfairly eroded by the cost of obtaining that compensation. In principle, Dr Ojiambo should recover the actual and reasonable costs that she has incurred in connection with her application to the Tribunal. The Tribunal considers that costs to date should be determined and paid promptly, pending determination of the amount of compensation. The formal orders set out below provide for submissions to be made on the question of costs, if those costs cannot be agreed by the parties.

Formal orders

124 The Tribunal makes the following orders:

124.1 the Tribunal declares that the Secretariat breached its obligations to Dr Ojiambo by declining to renew her contract of employment for a further term without considering whether there was, at the time of that decision, a good reason not to renew her contract;

124.2 the Tribunal declares that the Secretariat breached its obligations to Dr Ojiambo by making an offer of renewal on a short term basis that was conditional on Dr Ojiambo settling all outstanding issues in relation to her position as DSG;

124.3 the Tribunal reserves leave to the parties to make submissions on the amount of compensation to be awarded to Dr Ojiambo in respect of the breaches by the Secretariat of its obligations. Dr Ojiambo must file submissions (and any supporting evidence) on quantum by Friday 25 January 2019. The Secretariat must file submissions (and any supporting evidence) in response by Friday 22 February. Dr Ojiambo may file brief submissions strictly in reply by Friday 8 March. The Tribunal will then determine the amount of compensation payable on the papers;

124.4 Dr Ojiambo is entitled to costs in respect of this application to the Tribunal. If costs cannot be agreed by the parties they will be fixed by the Tribunal on the basis of the parties' written submissions. Dr Ojiambo's claim for costs to date, and any supporting material, should be filed by Friday 25 January 2019 (a date we have fixed to allow the parties time to seek to reach agreement on the question of costs). The Secretariat's response should be filed within ten working days of receipt of Dr Ojiambo's costs submissions. Dr Ojiambo may file submissions strictly in reply within 5 working days.

Delivered on 14 December 2018

Mr David Goddard QC, Acting President

Mr Justice George Erotocritou, Member

Ms Justice Aruna Narain, Member

and

Richard Nzerem, Executive Secretary