

**IN PROCEEDINGS BEFORE THE  
COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL  
BETWEEN:**

**DR TAWANDA HONDORA**

**APPLICANT**

**-and-**

**THE COMMONWEALTH SECRETARIAT**

**RESPONDENT**

**Before the Tribunal constituted by  
President Aruna Narain, Judge Catherine Callaghan, Judge Carol Roberts**

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**JUDGMENT**

**25 June 2024**

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## **INTRODUCTION**

1. The Applicant (Dr Tawanda Hondora) was employed by the Respondent (the Commonwealth Secretariat) as Adviser and Head, Rule of Law Section from 1 September 2020 to 1 September 2023.
2. The Applicant challenges the Respondent's decision not to renew his contract of employment for a second and final three-year term. He seeks an award of damages.

## **FACTS GIVING RISE TO THE DISPUTE**

3. The Applicant commenced employment with the Respondent on 1 September 2020, in the post of Adviser and Head, Rule of Law Section in the Governance and Peace Directorate ("GPD"). The Respondent's written offer of employment dated 23 June 2020<sup>1</sup> stated that the salary for the post was at Pay Point E, signifying that the post holder was a member of diplomatic staff.
4. The Job Description, attached to the offer letter, stated that the Applicant's post reported to the Senior Director of the GPD.<sup>2</sup> It noted that the GPD is the lead directorate in the Respondent for the promotion of democracy, human rights, rule of law and good governance in the Commonwealth. Within that directorate, the Rule of Law Section delivers programmes aimed at assisting countries to develop legal and judicial initiatives to strengthen judicial independence and legal and regulatory frameworks to promote the rule of law. The task description for the post holder included the following:

"Oversees the Section's compliance with the Strategic Plan and the Delivery Plan and promotes effective management and delivery of the Section's work, including planning, resource allocation, leadership of the team and accountability for results."

"Reporting to, and supporting the Senior Director, [the post holder] plans, prepares and services high level meetings of Commonwealth Law Ministers and Senior Officials of Law Ministries, and Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions held on a biennial cycle."<sup>3</sup>

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<sup>1</sup> Annex AA/01.

<sup>2</sup> Annex AA/02.

<sup>3</sup> Annex AA/02.

5. At all material times, the Senior Director of the GPD (and therefore the Applicant's direct line manager) was Professor Luis Franceschi. From 1 July 2022, Professor Franceschi also held the position of Assistant Secretary General ("ASG"). For convenience, he is referred to hereafter as the ASG. The ASG was a member of the Respondent's Senior Management Committee ("SMC"). The ASG reported directly to the Secretary-General.<sup>4</sup>
6. It is apparent from the contemporaneous documents annexed to the parties' pleadings that, by mid-2022, the Applicant's working relationship with the ASG (and others within the organisation) was under strain. There was friction between the Applicant and the Adviser and Head, Office of Civil and Criminal Justice Reform ("OCCJR"), a role also located within the GPD, about the boundaries of their respective roles and responsibilities.<sup>5</sup> In July 2022, the ASG asked Human Resources to provide assistance to clarify and delineate their roles.<sup>6</sup> In November 2022, Human Resources concluded that the two roles were distinct and that the "challenges" being experienced could be associated with, among other things, "inter-personal relationship management between the two heads of Units/Sections".<sup>7</sup> Human Resources recommended intervention to resolve the people management aspects.<sup>8</sup>
7. The Tribunal has seen emails and memoranda in which the Applicant set out his belief that the ASG and the Adviser and Head of OCCJR were working together to undermine his role, and to remove parts of his role and transfer them to the latter.<sup>9</sup> The Applicant informed the ASG and the Adviser and Head of OCCJR that he intended to file a grievance against them regarding their alleged efforts to force him to hand over part of his role and responsibilities to her.<sup>10</sup> The Adviser and Head of OCCJR subsequently resigned from the Respondent.<sup>11</sup>
8. In early November 2022, the ASG instructed the Applicant not to attend the forthcoming 2022 Commonwealth Law Ministers Meeting ("CLMM"), where the Applicant had

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<sup>4</sup> Annex CC.

<sup>5</sup> Annex to Answer, p6; Annex DD to Reply.

<sup>6</sup> Annex to Answer, p6.

<sup>7</sup> Annex to Answer, p9.

<sup>8</sup> Annex to Answer, p9.

<sup>9</sup> Annex BB/01 and Annex DD to Reply.

<sup>10</sup> Annex BB/01 pp10 para 21.4 & p15 para 26.1.

<sup>11</sup> Annex to Answer, p8.

intended to discharge his role as Deputy Conference Secretary.<sup>12</sup> This was in response to the ASG's concerns that the Applicant was struggling to meet deliverable objectives in relation to the Respondent's Cyber Project to the satisfaction of donors, and that he needed to focus his time and energy on meeting these objectives.<sup>13</sup> The Applicant found this experience humiliating and distressing.<sup>14</sup>

9. On 12 January 2023, the Applicant sent a memorandum to Dr Umakant Panwar (the Respondent's Director of Human Resources and Facilities Management Division, hereafter "HR Director"), Mr Ben Spittles (Human Resources – Business Partnering, hereafter "HR Business Partner") and Ms Joyce Kamau (Business Partner, Employee Relations, hereafter "ER Business Partner") headed "Framework for the resolution of employment challenges" in which he set out the "challenges" he was having with his line manager, the ASG, and setting out how he would like the situation to be resolved.<sup>15</sup> In the Applicant's own words, the ASG had:

“a) created and/or permitted to develop an extremely hostile working environment for me and my team;  
b) abused his authority and subjected me to bullying and harassment by undermining my role, removing from me key responsibilities and handing these over to [the Adviser and Head of OCCJR], and excluding me from key missions and meetings; and  
c) breached my right to dignity and privacy”.

10. The Applicant stated that he wanted the situation to be resolved by the ASG and the Respondent affirming the role and function of the Rule of Law Section and his responsibility for the effective justice frameworks programme of work, by the ASG reversing his decision to remove key projects from that programme, by the ASG affirming the Applicant's role as deputy conference secretary, and by respecting his "right to privacy".

11. There followed extensive attempts by the Respondent's Human Resources department to mediate between the Applicant and the ASG to resolve the issues between them.<sup>16</sup> At the

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<sup>12</sup> Annex to Answer, pp17-23.

<sup>13</sup> Annex BB/01 and Annex to Answer, pp20-23.

<sup>14</sup> Annex to Answer, pp12-13.

<sup>15</sup> Annex to Answer, pp37-43.

<sup>16</sup> See, for example, Annex to Answer, pp25-26, 35-38, 77-81, 87-90.

Applicant's request, an independent external mediator was appointed to facilitate an informal dispute resolution process.<sup>17</sup> However, the external mediation process ultimately concluded in mid-2023 without a resolution of the underlying issues between the Applicant and the ASG.

12. In the meantime, on 22 November 2022, the Applicant made a wide-ranging Data Subject Access Request ("DSAR") in which he sought, among other things, personal data in work emails exchanged between the ASG and other members of staff, and in mobile phone messages between the ASG and other members of staff.<sup>18</sup> The Respondent responded to the DSAR in February 2023, and provided him with access to some of the personal data requested.<sup>19</sup>
13. Having reviewed that data, on 13 March 2023, the Applicant sent a Report to the Respondent's Legal Counsel and Data Protection Officer, complaining that the ASG had committed breaches of the Respondent's data policy and breaches of confidentiality, and requesting an investigation.<sup>20</sup> Specifically, the Applicant complained that the ASG had improperly copied a number of other Respondent employees into email correspondence between himself and the Applicant concerning his instruction to the Applicant not to attend the CLMM and concerning the tensions between the Applicant and the Adviser and Head of OCCJR. In a separate, second Report to the Legal Counsel/Data Protection Officer dated 20 March 2023, the Applicant complained that the ASG had forwarded to him confidential communications concerning a possible application by Zimbabwe for readmission to the Commonwealth, at a time when the Applicant was a prospective employee.<sup>21</sup>
14. On 5 April 2023, the Legal Counsel/Data Protection Officer asked the Applicant to refer his Reports to Human Resources under the Disciplinary and Grievance Procedures in the Staff Handbook to action an investigation.<sup>22</sup>
15. Instead of doing that, on 17 April 2023, the Applicant sent a Report to the HR Director in which he sought to make a whistleblowing complaint and a complaint of gross misconduct

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<sup>17</sup> Annex to Answer, pp77, 87-90

<sup>18</sup> Annex to Answer, pp32-34.

<sup>19</sup> Annex to Answer, pp44-46.

<sup>20</sup> Annex BB/01.

<sup>21</sup> Annex BB/02.

<sup>22</sup> Annex BB/03.

against the ASG concerning the ASG’s alleged data protection breaches (“Whistleblowing Complaint”).<sup>23</sup> At paragraph 264 of the 78-page Whistleblowing Complaint, the Applicant requested “protection” from detrimental treatment as a result of lodging the complaint and asked the HR Director to “consider changing my line management from the ASG to another senior Director or the Deputy Secretary General pending the investigation of this Whistleblowing report”.

16. From around March 2023, the Applicant raised the issue of the renewal of his contract in periodic meetings with the ER Business Partner, who told the Applicant the Respondent was considering the matter. On 21 June 2023, the Applicant emailed the HR Director to request an update about whether his contract would be renewed.<sup>24</sup> The HR Director replied the same day to say that: “The proposal for renewal of your contract is still under consideration of the SMC. HR will update you as soon as we have a decision”.<sup>25</sup>
17. On 20 July 2023, the HR Business Partner notified the Applicant by email that his Whistleblowing Complaint would be investigated by an external organisation, TCM Group, and provided him with the name of the investigator.<sup>26</sup> On 25 July 2023, the Applicant replied by email, expressing concerns about the experience and skill set of the proposed investigator.<sup>27</sup> He also complained that the Respondent was not protecting him from the ASG’s “retaliation” against him for filing the Whistleblowing Complaint and the “ongoing bullying and harassment”.
18. On 28 July 2023, the HR Business Partner replied, stating that the Respondent was satisfied that the investigator and TCM were suitably qualified to undertake the whistleblowing investigation. The HR Business Partner asked the Applicant to provide details of any retaliation and specify what interventions he was seeking to protect him. He also drew the Applicant’s attention to the Respondent’s Grievance Policy, and invited him to lodge a grievance if he had experienced retaliation, bullying or harassment.<sup>28</sup>

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<sup>23</sup> Annex BB/05.

<sup>24</sup> Annex AA/05.

<sup>25</sup> Annex AA/05.

<sup>26</sup> Annex AA/06.

<sup>27</sup> Annex AA/06.

<sup>28</sup> Annex AA/06.

19. At 4.06pm on 3 August 2023, the Applicant replied to the HR Business Partner's aforementioned email.<sup>29</sup> This is a significant email in the context of this case and it is therefore addressed in some detail. The Applicant began by asking questions about the investigator's terms of reference. Under the heading "Retaliation", the Applicant then gave two examples of what he considered detrimental treatment post-dating his filing of the Whistleblowing Complaint. The first example of alleged retaliation was that, for the past three months, whenever Heads and other members of staff in the GPD wrote emails to him, they copied in a Legal Advisor in the Rule of Law Section. In relation to this, the Applicant stated:

"The ASG's conduct is unnecessary. It also compounds what is already an extremely hostile working environment. The ASG's conduct also violates my right to be treated with dignity and respect.

I asked HR and the DSG to have me moved and be managed by a different line manager to protect me from this and other egregious violations of the organisation's policies not least the breaches of confidentiality, privacy and data protection of which you are now well aware. My requests have not been acted upon and I have not been offered any support, save the reference to an Occupational Health Practitioner." (emphasis added)

20. The second example of alleged retaliation related to the renewal of his contract. In this regard, the Applicant stated:

"Like all other employees, I am entitled to be given six months' notice of termination/renewal of my contract.

You are aware that my contract terminates on 30 August 2023.

I have reached out to Joyce and Umakant at different times over the past four or so months and both have assured me that this issue of my contract renewal was being handled per usual and that I would soon receive communication on the same.

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<sup>29</sup> Annex AA/06.

In the past four months, the contracts of ALL my colleagues in the Rule of Law Section have been renewed, extended or affirmed. Mine remains outstanding. There can be no doubt that there is more at play. In the absence of a clear and reasonable explanation, there is no doubting that my direct line manager is penalising me for raising workplace grievances and lodging a whistleblowing report against him.” (emphasis in original)

21. Finally, the Applicant thanked the HR Director for facilitating mediation between the ASG and him, noted that the internal and external mediations had taken eight months, and asked whether “this part of the workplace dispute resolution process has run its course”.

22. At 5.22pm on 4 August 2023, the HR Business Partner replied to the Applicant.<sup>30</sup> He began by clarifying that the investigator would investigate all of the concerns raised by the Applicant in his Whistleblowing Complaint of 17 April 2023. He noted that, in regard to the mediation, his understanding was that an agreement was not reached, and therefore the process had ended, concluding this part of the dispute resolution process. The HR Business Partner asked the Applicant to provide him with copies of the emails copying in colleagues. The HR Business Partner also stated:

“In response to your request for a change of line management, there are limited options given your seniority and the size of the organisation, however we will provide a more substantive reply to this and in relation to your contract renewal as soon as possible.”  
(emphasis added)

23. At 6.13pm on the same day, the Applicant replied to the HR Business Partner, saying that he would provide the relevant emails the following week, and asking what action the organisation would take in relation to those emails.<sup>31</sup> The Applicant did not comment on the part of the HR Business Partner’s email concerning the Applicant’s request for a change of line management, or seek to correct it.

24. The Tribunal has seen no evidence that the Applicant ever provided the Respondent with the emails he referred to.

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<sup>30</sup> Annex AA/06.

<sup>31</sup> Annex AA/06.

25. On 15 August 2023, the HR Director emailed the Applicant (who was at that time on annual leave) saying that he would like to have a call with him regarding his contract extension, preferably on 17 August.<sup>32</sup> Ten minutes later, the Applicant replied, asking whether the HR Director would be able to have a meeting that day, because the issue had been causing him considerable stress.<sup>33</sup> The HR Director acceded to the Applicant's request and they held a Teams meeting later that day.
26. The Applicant recorded the meeting with the HR Director (apparently using the 'dictate' function on the Microsoft Word programme on his computer) but did not tell him he was doing so nor seek his consent to do so.<sup>34</sup> The Applicant has produced what he describes as a "transcript" of that meeting and seeks to rely on it.<sup>35</sup> The Respondent does not dispute that the transcript is an accurate record of the meeting, and also seeks to rely on it. For that reason, the Tribunal is content to treat it as admissible and reliable evidence. However, the Tribunal deprecates clandestine recordings within the workplace and reserves in other circumstances its competence to exclude from evidence materials obtained by deception.
27. In summary, during the meeting, the HR Director told the Applicant that his contract was "going to be renewed" but because the Applicant had "issues with line management", the proposal was as follows:
- "Moving forward to give you a new role. I mean where the work mostly will be what you were doing before and maybe some other added responsibilities, but moving the whole thing out of Management by [the ASG]. So and probably planning it outside in SPPD with Joshua or something. So something has been kind of roughly sketched out, but I don't have much detail. I understand it continues to be the same level as you were before. And most of the work will be also staying but I think some responsibilities will not."
28. The Applicant said in reply that he had "no problem in principle into looking into a possible move. To a different department. In the near future" but that he was concerned about losing the bulk of his work which concerned the justice sector. The HR Director told him that

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<sup>32</sup> Annex AA/07.

<sup>33</sup> Annex AA/07.

<sup>34</sup> Annex to Answer, p270.

<sup>35</sup> Annex AA/08.

although the details hadn't been worked through, he would retain his cybersecurity work but that other work would not follow him. The HR Director said that: "The idea is to give you a more amicable, more, you know. Friendly. Place to work wherever you feel more comfortable. You are able to deliver and perform better." He noted that the relationship between the Applicant and the ASG "despite considerable efforts, is not going to be the same", and that "moving to a different management reporting line and bringing with you maybe half the work or more than that and then getting some new work" would be "very good for you and obviously for the organisation". The HR Director said that his advice to the Applicant would be to expect "to lose some work".

29. The HR Director went on to say that the organisation was trying to achieve two objectives: first, ensuring that the Applicant could continue to work in the organisation for a "full six year" term, and second, "sorting out cyber work". The HR Director said that: "If I were working under [the ASG] and I was bothered like this, my preference would be to first get out and then do my full six years, even if it means compromising a little bit on my choice of work. I can do other work, but I can still do good work." The Applicant replied: "Yeah, OK. No, I hear you. And I share your view on that."
30. The HR Director told the Applicant that he would draft a job description and share it with him, and that "we can continue to work on the JD" after extending the Applicant's contract. In response, the Applicant said "Yeah, I think that's the approach that I would prefer. You know, the issue for me is making sure that my contract does not terminate".
31. The HR Director finished the meeting by saying that he would talk to the ASG and others about "how much content can be brought over or not brought over" and that he would "ask HR to prepare the extension of contract for you". The Applicant replied "Yes, yes, please. Yes, please".
32. The next day, on 16 August 2023, the HR Director wrote a letter to the Applicant offering the Applicant a new contract for a period of three years ("New Contract Offer").<sup>36</sup> As this letter is important, we set it out in full:

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<sup>36</sup> Annex AA/09.

“I am pleased to confirm that the Secretary-General has approved that at the expiry of your present contract with the Secretariat on 31 August 2023, you be offered a new contract for a further period of three years.

Given your request for a change of line manager, the Secretariat has considered whether, in the interests of the organisation, you might be redeployed on a lateral transfer to another post for the duration of a second and final 3-year term reflecting the Rotation Policy. Accordingly, the Secretariat is offering you a role of equal status at Paypoint E in the Strategy, Portfolio, Partnership and Digital Division, reporting to the Senior Director, Joshua Setipa.

If this offer is acceptable to you, we will arrange a meeting with the Senior Director SPPD to discuss the proposed Job Description.

Your employment will continue to be subject to the Commonwealth Secretariat Staff Regulations and Staff Rules as laid down and amended from time to time by member Governments and/or the Secretary-General. A copy of your updated terms and conditions of service is attached.

Please let me know if you will accept the new contract by returning the signed scanned copy of this letter and contract acceptance to me by **23 August 2023.**” (emphasis in original)

33. On 20 August 2023, the Applicant responded to this letter by emailing the HR Business Partner and the HR Director, stating that he was “pleased to accept the renewal of his contract of employment with the Commonwealth Secretariat” but also stating that “renewal must be the same terms and conditions as my current contract that is terminating on 31 August 2023”.<sup>37</sup> He stated that: “In the interests of full transparency, I asked for a change of my line manager because of the extensive and well documented bullying and harassment I faced (and continue to face) from the ASG.” The Applicant said that he was unable to accept any offer that “enables the ASG to achieve his goal through the back door i.e. by leveraging my request for Whistleblowing protection to remove me from discharging my

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<sup>37</sup> Annex AA/10.

role and responsibilities as Head – Rule of Law” and “removes key functions from me as well as the line management responsibilities over the organisation’s respective legal advisors”. He said that his “major concern” with the New Contract Offer is that it is “obvious that I will not be able to take with me and discharge under SPPD the role and functions/responsibilities that are integral to Head – Rule of Law function”. He went on to say that if renewal of his contract on his current terms and conditions was not acceptable to the organisation, then he was “open to entering into a without-prejudice-basis conversation on the termination of my employment with the Secretariat on mutually agreed terms.”

34. On 21 August 2023, the HR Director replied to the Applicant to say that: “It is not clear from your reply (below) if you have accepted the offer or not”.<sup>38</sup> The HR Director went on to say:

“Please be advised that the offer of a new contract extended to you will carry the same terms and conditions of service as your previous contract at pay point [E]. However, the contract is for a new role in SPPD reporting to the Senior Director in consideration for your request for a change of Line Manager. As advised in Ben’s email to you, the detailed scope of responsibilities and functions under the new role will be worked out in consultation with the Sr Director and yourself.

This is to clarify that the Rule of Law Section and it’s (sic) functions/responsibilities will continue to [be] located under GPD and cannot be brought over to SPPD following the redeployment. However, to the extent possible, a good part of work under EBR relating to cyber security can be transferred to SPPD and allocated to your new role.”

35. The HR Director attached a first draft of a job description to his email, and stated that: “This draft is only a starting point and is open to modification and expansion of scope in consultation with both Sr Directors of SPPD and GPD”. The HR Director noted that “Since your current contract is due to expire shortly (Aug 31, 2023), in the interest of time, if you agree to the approach proposed above ... kindly accept the offer of appointment by signing and returning a copy of the offer letter”.

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<sup>38</sup> Annex AA/11.

36. The draft job description stated that the job title was “Adviser and Head Commonwealth Cyber Resilience”, that it would be located within the Strategy, Portfolio, Partnerships and Digital Division (“SPPD”), would report to the “Senior Director” of SPPD and would be at Grade E.<sup>39</sup> The job summary stated as follows:

“The Adviser and Head of Commonwealth Cyber Resilience leads the Secretariat’s strategic response to cybercrime in member countries.

Reporting to the Senior Director SPPD, the role will manage existing Extra Budgetary Resources in relation to cyber security and lead on the identification of new funding sources including the development of a private sector consortium for Cyber resilient Commonwealth.

In addition, the role leads on the review, development and implementation of stand-alone projects providing legal advice and guidance in relation to the visa and tax status’ for the Secretariat’s staff and offices.”

37. On 22 August 2023, the Applicant responded to the HR Director’s email.<sup>40</sup> He stated that he was only willing to accept a renewal of his contract of employment on the basis of his current job description. He stated that he had a legitimate expectation of being granted a second and final three-year contract in his current position. He went on to say that he did not request the organisation to change his job description as a solution to the ASG’s breaches of the organisation’s policies in relation to him.

38. On 28 August 2023, the HR Director replied to the Applicant’s email.<sup>41</sup> The HR Director clarified again that the offer was for a “lateral transfer to a new role with exactly the same status and at the same pay point E in the [SPPD] reporting to the Senior Director, Joseph Setipa”. He explained again that the offer was not for the post of Adviser and Head of the Rule of Law section. The HR Director also stated:

“You have been offered this role in consideration of your request to move your reporting line out of the GPD directorate. You made that request on grounds of not being able to

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<sup>39</sup> Annex AA/12.

<sup>40</sup> Annex AA/13.

<sup>41</sup> Annex AA/14.

function effectively in your role as adviser and head Rule of Law due to alleged misconduct of your line manager for which you have raised a complaint which, as you are aware, is under investigation.”

39. In the same email, the HR Director stated that “The offer of renewal of your contract satisfies your legitimate expectation of continuation of service for the second and final 3-year term”. He said: “The change in your JD is made to serve the business needs of the organisation for which the Secretary General is assigned the responsibility and authority under the recruitment and selection policy”. He also said: “It is simply not possible for you to continue in your existing position serving one directorate and report to another”.

40. In the Applicant’s reply dated 29 August 2023,<sup>42</sup> two days before his contract of employment was due to expire, the Applicant said that he would “consider” the offer of a lateral transfer “over the course of the next few weeks”. He claimed that he had not been given adequate time to consider the offer and its implications. He also stated that he interpreted the 16 August 2023 offer letter to mean that the Secretary General had agreed to renew his current contract of employment. He said that if this was not the case, the Respondent should give him reasons why the organisation had decided not to renew his current contract. For the first time, the Applicant referred to his email to the HR Business Partner of 3 August 2023, and said that his own reference to a different line manager “appears to have been taken out of context”. In particular, he said that his earlier statement “was not a request for an immediate change of my line manager”, nor was it “a statement that I was looking for a permanent change of line manager”. He asserted that “in the past 12 months, I have not requested a change of my line manager” and said he wished to “set the record straight” by clarifying that he wanted to remain in his current post.

41. On 30 August 2023, the HR Director emailed the Applicant as follows:

“I write to formally confirm that your contract as Adviser and Head, Rule of Law Section (Paypoint E) in the Governance and Peace Directorate will not be renewed. Your last day of service in that role will be 31 August 2023.

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<sup>42</sup> Annex AA/15.

The offer for a new role at SPPD was made to you on 16<sup>th</sup> August. As is evident from your detailed email responses since then, you have had ample time to consider the offer. However, the Secretariat will extend your tenure for an additional day, to Friday 1 September 2023, to allow you more time to consider the SPPD offer by that deadline. If you wish not to accept the offer of a new role at SPPD, your contract with the secretariat will end on Sept 1, 2023<sup>43</sup>.

42. On 31 August 2023, the Applicant replied to the HR Director, asserting that he had not been given reasons for the decision not to renew his contract of employment, and seeking clarification whether the decision to terminate his current contract was made by the Secretary-General, and if not, to inform him who took the relevant decision.<sup>44</sup>
43. Having not received a response to this email, the Applicant emailed the HR Director on 1 September 2023,<sup>45</sup> noting that he no longer had access to the organisation's email system, and asking why.
44. As the Applicant did not accept the offer of the new contract in the new role by the deadline of 1 September 2023, the contract came to an end on this date. (The parties agree that the contract was terminated on 1 September 2023<sup>46</sup> but disagree about the mechanism by which that was done. This dispute is addressed below.)
45. Following the termination of the Applicant's contract, there was further correspondence between the Applicant and the Respondent. Relevantly, on 5 September 2023, the HR Director emailed the Applicant, explaining that, given his request for a change of line manager, the Secretariat offered him a different role of equal status in the SPPD, and noting that he had not accepted the offer.<sup>47</sup> The HR Director noted that, due to administrative error, the Applicant's access to his emails was suspended at the end of his original contract (on 31 August 2023), and was restored on 1 September, and lasted until 5 September 2023. The HR Director formally confirmed that the Secretariat had not renewed his contract as Adviser and Head, Rule of Law Section. The HR Director also stated that:

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<sup>43</sup> Annex AA/18.

<sup>44</sup> Annex AA/19.

<sup>45</sup> Annex AA/20.

<sup>46</sup> See for example, page 1 of the Application and paragraph 3 of Respondent's Answer.

<sup>47</sup> Annex AA/22.

“For the effective delivery of the RoL portfolio, it is essential that the Adviser and Head of RoL has an effective working relationship with senior management. The Secretariat is aware of a number of difficulties you have raised about your working relationships and we are trying to resolve these”.

46. In the same email, the HR Director noted that the Applicant’s last day of service was 1 September 2023, that he would be paid up to that date, and that “the balance of six months’ notice from 16 August 2023 will be paid in lieu, based on salary, emoluments and any allowances after appropriate deductions.”
47. On 7 September 2023, the HR Director wrote to the Applicant to respond to points and queries raised in the Applicant’s emails of 29 August and 1 September 2023.<sup>48</sup> The HR Director noted that the Applicant chose to decline the offer of a new role without acting on the invitation to discuss the new role and outline job description with the Senior Director, SPPD. He stated that the Applicant’s position was not comparable to other Advisers and Heads (whose contracts had been renewed) because they did not request a change of line manager. He stated that the decision not to renew the Applicant’s existing contract was taken by “the Senior Management”. He apologised for any inconvenience caused by the Applicant being temporarily shut out of the Respondent’s email system. He denied that the Applicant was victimised and said that: “The Secretariat considered that it was in the interests of the organisation to offer another role, which was done”.
48. On 19 September 2023, the Applicant sent a letter before action to the Secretary-General, demanding compensation and damages for unlawful non-renewal of his contract of employment.<sup>49</sup>
49. On 13 October 2023, the investigator completed his investigation report into the Whistleblowing Complaint (“Investigation Report”).<sup>50</sup> The Investigation Report concluded that the ASG did not make unlawful disclosures of the Applicant’s personal data to unauthorised third parties, and that there was no case to answer in relation to the Applicant’s

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<sup>48</sup> Annex AA/23.

<sup>49</sup> Annex AA/26.

<sup>50</sup> Annex to Answer, pp114-266.

complaints of wrongful disclosure of data. The Investigation Report concluded that the issues raised by the Applicant should have been raised as a grievance and did not qualify as a whistleblowing complaint, because the complaints raised were not in the public interest but instead related to his employment contract. The Investigation Report concluded that the Applicant's complaints were not made in good faith, and were vexatious. It further stated that had the Applicant continued in post or accepted the New Contract Offer, "it would be recommended that disciplinary procedures be initiated."<sup>51</sup>

50. The Investigation Report also concluded that:

"Had [the Applicant's] contract been renewed given the breakdown in trust and working relationship between both parties the Applicant and ASG but also others it is likely the working relationship would be damaged further thereby impacting Commonwealth Secretariat significantly in its delivery of its work".<sup>52</sup>

51. On 20 November 2023, the HR Director replied to the Applicant's letter before action on behalf of the Respondent, rejecting the Applicant's allegations of unlawful non-renewal of his contract of employment.<sup>53</sup> In that letter, the HR Director explained, among other things, the Respondent's delay in considering the Applicant's contract renewal. As the Applicant relies on the language used in that part of the letter, we set out the relevant part below.

"16. SMC normally considers contract renewals six months before expiry. At that time, as you know, you had initiated informal dispute resolution procedures against your line manager, [the ASG], who is a member of SMC. You had met HR on 11 January 2023 and set out your employment concerns in a memo dated 12 January 2023. The informal process involved internal and (as you requested by email on 22 March 2023) external mediation. These efforts ended without resolution (email to you from Ben Spittles, 4 August 2023).

17. No renewal recommendation having been made by your line manager, HR invited the SMC to consider the renewal of your contract at their meetings on 28 March 2023

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<sup>51</sup> Annex to Answer, p188.

<sup>52</sup> Annex to Answer, p137.

<sup>53</sup> Annex to Answer, pp267-277.

and 1 June 2023. At each meeting, SMC decided to defer the decision regarding the renewal until completion of the informal grievance resolution procedures. The renewal would then be considered by Senior Management, when the outcome of the mediation was known and all factors could be taken into account.

18. HR colleagues confirmed to you the contract renewal was being considered by Senior Management on 21 and 26 June 2023 when you approached them for an update. The last mediation meeting took place on 7 July 2023, following which HR received a summary from the mediator on 22 July 2023. Had the mediation been successful, this would have been taken into account in any decision taken by Senior Management.

19. The next SMC meeting was held on 2 August 2023. I was on annual leave at this time and SMC therefore decided that the decision would be made by Senior Management out of meeting. The decision was made on or around 9 August 2023, though there was a slight gap before this was communicated to you because I was on annual leave at this time. I returned from annual leave on 14 August 2023 and communicated the outcome to you verbally on 15 August 2023 before making a written offer on 16 August 2023, as described above at paragraph 9.”<sup>54</sup> (emphasis added)

52. On 17 January 2024, the Applicant was appointed as a Judge of the High Court of Belize.

## **THE PROCEEDINGS BEFORE THE TRIBUNAL**

### ***The Application***

53. On 15 November 2023, the Applicant filed an Application in the Tribunal in which he complained that the Respondent’s decision on 30 August 2023 not to renew his contract of employment was unlawful.

54. The Application was 96 pages long, and in the Tribunal’s view, was unnecessarily complex and repetitive. Primarily, the Applicant alleged that the non-renewal decision breached his legitimate expectation of the renewal of his contract of employment for a second and final three-year term. More particularly, the Applicant contended that Staff Regulation 13, the Rotation Policy and the case of *Ojiambo v Commonwealth Secretariat* CSAT APL/41

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<sup>54</sup> Annex to Answer, p269.

established that he had an enforceable legitimate expectation that he would be offered a second three-year term in his original position on the same terms and conditions as his original contract of employment. He denied that he had any difficulties in his working relationships with senior management, denied that he had asked for a change of line manager, or that the Respondent was entitled to offer him a new role under a new contract of employment in light of those matters.

55. The Applicant also argued that the Respondent had “disapplied” the Rotation Policy, which provides at paragraph 2.5 that “Employees do not have the right to an automatic renewal of a contract. In particular (sic) the granting of a new contract is subject to fully satisfactory performance and the needs of the Secretariat”. The Applicant argued that, as the Rotation Policy provides only two grounds upon which a contract may not be renewed, and as the Respondent had not relied on either of those two grounds when deciding not to renew his contract, the non-renewal decision was unlawful for breach of the duty to give reasons for such non-renewal, for lack of any legal basis, for breach of an acquired right to renewal of his contract of employment, and further was ultra vires Staff Regulation 13.
56. The Applicant further complained that the non-renewal decision was tainted by a conflict of interest and due process violations on the basis that the decision was taken by “senior management”, the ASG was a member of senior management and therefore, the ASG must have taken part in the non-renewal decision. He also argued, conversely, that the non-renewal decision was taken by the HR Director, without the authority of the Secretary-General, who was the only person competent to terminate his contract of employment.
57. The Applicant also contended that his employment was summarily terminated by letter dated 30 August 2023, without notice, contrary to the requirements of Staff Regulations 16, 17 and 18.
58. Finally, the Applicant contended that the non-renewal decision constituted “victimisation” for “protected acts”, namely, his reports alleging data breach by the ASG and his Whistleblowing Complaint and his “request for protection from retaliation” made on 3 August 2023.

59. The Applicant sought damages for the non-renewal of his contract of employment, in an amount representing his actual loss of salary, benefits and entitlements for the period 1 September 2023 to 31 August 2026, plus interest. He requested an order compelling the Respondent to “erase” all references in the Applicant’s personnel record to him not having “an effective working relationship with senior management”. He also sought exemplary damages in the sum of £100,000 for victimisation, and damages in the sum of £20,000 for moral injury. He also requested payment of his legal costs (unspecified), anonymity in any of the Tribunal’s decisions, judgments or orders, and disclosure of certain documents held by the Respondent.

### ***The Respondent’s Answer***

60. The Respondent filed its Answer on 26 January 2024, denying all the Applicant’s allegations.

61. Specifically, the Respondent asserted that although the Applicant had a legitimate expectation that his contract would be renewed, this did not extend to a legitimate expectation that he would continue to perform the same role. The Respondent contended that it satisfied the Applicant’s legitimate expectation by offering him a new role under a new contract, with the same status and remuneration. The Respondent contended that *Ojiambo* was authority for the proposition that an employee will not have a legitimate expectation of renewal of an existing contract if there is a “good reason” not to do so at the time the decision falls to be made. The Respondent argued that the Applicant’s rejection of the offer of a new contract constituted a good reason not to renew his contract and brought the Applicant’s employment to an end. The Respondent stated that the Applicant was offered a new role because he had requested a change of line manager, which necessitated a move outside GPD and therefore a different role.

62. The Respondent contended that it applied the Rotation Policy correctly because a new contract with the same status and remuneration was offered, but was rejected. It argued that the Respondent provided reasons for the non-renewal decision on at least six occasions: first, in the telephone call on 15 August 2023; second, in the letter dated 16 August 2023; third, in the email dated 21 August 2023; fourth, in the email dated 28 August 2023; fifth, in the email dated 5 September 2023; and sixth, in the letter dated 7 September 2023. The legal basis for the non-renewal decision was that his contract as Adviser and Head of Rule

of Law section would not be renewed and would expire unless he accepted the offer of the new role under a new contract. There was no breach of an acquired right to renewal, and there was no action which was ultra vires Regulation 13 of the Staff Regulations.

63. The Respondent denied that the non-renewal decision was tainted by conflict of interest or due process violations. The decision to offer the Applicant a new role under a new contract and not to renew his contract was taken by the Secretary-General (the most senior member of management), after taking advice from Human Resources and the Deputy Secretary-General, and was communicated by the HR Director. The ASG's involvement in the decision-making process was limited to obtaining his agreement to relinquish the cyber-resilience project from the Rule of Law section so that it could be transferred with the Applicant to SPPD.

64. The Respondent denied that the Applicant's contract of employment was summarily terminated without notice. The Respondent accepted that, following *In re Tebourbi* ILOAT Judgment No.2104, it was required to give the Applicant "reasonable notice" of non-renewal and that paragraph 2.5.1 of the Rotation Policy required it to give the Applicant at least six months' notice. The Respondent complied with its notice obligations because the Applicant was given notice, from 15 August 2023, that the continuation of his tenure depended on him accepting a new role. He was paid up until 1 September 2023, and the balance of six months' notice from 16 August 2023 was paid in lieu, as the Respondent was entitled to do pursuant to Part 3, Section 3, paragraph 1.5 of the Staff Handbook. Therefore, the Applicant had the extra benefit of serving out the entirety of his contract (plus one day, extending his tenure to 1 September 2023) plus five and a half months' payment in lieu of notice thereafter. The Respondent argued that Staff Regulation 16 did not concern summary termination and that Regulations 16, 17 and 18 were irrelevant because the non-renewal decision was not taken pursuant to those Regulations. The Respondent says that the Applicant's contract expired by the effluxion of time.

65. The Respondent denied that the non-renewal decision constituted "victimisation" for "protected acts". The independent investigator found that none of the complaints raised by the Applicant amounted to whistleblowing; he found they simply amounted to personal grievances, were not made in good faith, and were vexatious. The Applicant did not suffer any adverse treatment because of the complaints he had made. Rather, the Respondent

sought to accommodate the Applicant's own request for a change of line manager, after the Applicant himself had identified that he had a difficult working relationship with his line manager. A change of line manager in the Applicant's case necessitated a move out of GPD because the ASG was the Senior Director in charge of GPD. The non-renewal decision was brought about by the Applicant's own conduct in rejecting the offer of a new role under a new contract.

66. The Respondent denied that the Applicant was entitled to any relief. There was no breach of contract, and therefore the Applicant was not entitled to any damages for breach of contract. His victimisation claim was unfounded, and therefore there was no entitlement to exemplary damages. The Applicant's claim to have suffered moral injury was unfounded. The Tribunal had no jurisdiction to make an "erasure order". The Respondent opposed any application for costs. The Respondent opposed the request for disclosure and anonymity.

### ***The Applicant's Reply***

67. The Applicant filed his Reply on 18 March 2024. The Reply was 120 pages long, which in the Tribunal's view was unwarranted. The Reply (and the Rejoinder) should be focused, address the issues in dispute between the parties, and not repeat or expand existing arguments. In brief, the Applicant repeated his previous arguments but also added an argument that the Respondent's letter of 20 November 2023 (which post-dated the Application) should be interpreted to mean that the decision not to renew his contract was taken on or around 9 August 2023, as a result of the ASG making a "formal recommendation" that the Applicant's contract should not be renewed. According to the Applicant, the 20 November 2023 letter supported his argument that his "due process rights" had been breached, that the Respondent had breached its duty of candour and "conspired" not to disclose the ASG's recommendation to him, and that the non-renewal decision was unlawful as a consequence.

68. The Applicant contested the Respondent's argument that a legitimate expectation of contract renewal would not extend to a second three-year term in the same position. He contended that "renewal" must be given its ordinary grammatical meaning, namely the continuation or extension of the existing or original contract. The Applicant contended that, at the time of his appointment, he had a legitimate expectation that he would be granted a second three-year term in the same position, in the absence of a good reason not to renew,

and that the only permissible good reasons for non-renewal were either poor performance in that role or changes in the needs of the organisation relating to that role. As the Respondent had not relied on either of those two grounds, the non-renewal decision was unlawful.

69. The Applicant again denied that he had requested a change of line manager, but contended that if he had made such a request, the Respondent was not obliged to accede to such a request; and if the Respondent did accede to such a request, then unless the terms were to his satisfaction, then “the contract status quo ante retained”.
70. The Applicant argued that the Respondent was required to give him actual notice of its decision not to renew his contract, between six months and one year before the expiry of his contract, and that it was not entitled to pay him in lieu of notice. The Respondent had no discretion to terminate his contract of employment outside the parameters of Regulations 16-18.
71. The Applicant contended that the fact that the proposed Cyber Resilience Section and the new role of Advisor and Head Cyber Resilience were never established proved that the Respondent’s conduct was “tainted” by mala fides and improper motives. The Applicant considered that, in order to set up a new role and section, the Respondent was required, but failed, to comply with Regulation 16 and the Lateral Transfer Policy, produce a business case for the establishment of a new section and role, engage the Applicant in the establishment of the new section, and consult with all affected staff, the staff association and the Executive Board of Governors. The Respondent’s failure to do so demonstrated that the non-renewal decision was not taken to meet the Respondent’s business needs. The Applicant also asserted that as cyber resilience represented only 25% of his role in the Rule of Law Section, the new role could not have the same status as his Rule of Law role, and was an “effective demotion”.
72. The Applicant also asserted that the Respondent had not produced any “evidence and/or witness statements” in support of its submissions and therefore that its case should be rejected.

73. Finally, the Applicant disclosed in his Reply that he secured appointment as a Judge of the High Court of Belize on 17 January 2024.

### ***The Respondent's Rejoinder***

74. The Respondent filed its Rejoinder on 22 April 2024. First, the Respondent stated that the Applicant's interpretation of the HR Director's letter of 20 November 2023<sup>55</sup> was incorrect. The Respondent clarified that the renewal decision, on the basis of the offer of a lateral transfer (the "New Contract Offer"), was made on 9 August 2023 and communicated verbally to the Applicant by the HR Director on 15 August 2023, and the decision not to renew the Applicant's contract was made on 30 August 2023, after he had rejected the New Contract Offer. The Respondent also denied that the ASG had made any recommendation that the Applicant's contract should not be renewed. The Applicant's reliance on paragraph 17 of the 20 November 2023 letter was misplaced: that paragraph did not say that the ASG had made a formal (or any) recommendation not to renew. Rather, it said that, in the absence of a renewal recommendation being made by the ASG, Human Resources had invited the SMC to consider the issue, and that such decision was deferred until around 9 August 2023. Therefore, there was no basis for the Applicant's contention that there was a "conspiracy" on this issue or that his due process rights were infringed.

75. The Respondent contended that the offer of a new role complied with the Lateral Transfer Policy, because there was a vacant post although the details had to be finalised. The offer of a new role in a new section never progressed beyond the embryonic stages because the Applicant rejected it. Accordingly, there was no opportunity to make a recommendation pursuant to the Lateral Transfer Policy. The Applicant's contract terminated by effluxion of time because he did not accept the offer of the new role.

76. The Respondent denied that the proposed new role was not of equal status to the Applicant's old role and represented a demotion. The new post was an "Advisor and Head" role, at the same remuneration level, reporting to a senior director, like his old role. The fact that the new role only overlapped with his previous role by 25% merely demonstrated that they covered different areas.

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<sup>55</sup> The Respondent referred to this letter as the "30 November 2023" at paragraph 13 of its Rejoinder but this is assumed to be a typographical error. It is clear from the context that the Respondent is referring to The HR Director's letter of 20 November 2023.

77. The Respondent contended that it was not able to give notice until after the decision not to renew his contract had been made, and that it was entitled to pay the Applicant in lieu of notice, which gave the Applicant the benefit of an extra five and a half months' pay beyond the expiry of his contract.

### ***The Tribunal's Orders***

78. The President of the Tribunal issued a number of interlocutory orders, which it is not necessary to address in this judgment. However, it is relevant to note that in the Second Order issued on 20 February 2024, the President noted that:

“... the Tribunal's function is not to conduct its own investigation. Rather, consistent with the principles of international administrative law, the role of the Tribunal is to undertake a limited review of the impugned decision in order to determine whether it (i) was taken by a competent authority; (ii) was taken in accordance with the applicable procedure established by the Respondent; and (iii) was not arbitrary or abusive.”

79. The Tribunal's Fifth Order, issued on 13 May 2024, largely concerned the oral hearing in the case fixed for the afternoon of Thursday 23 May 2024. The Order set out what the Tribunal considered to be the main issues in the case, as follows:

- a. First, whether the Respondent's conduct in August 2023 breached the Applicant's legitimate expectation of the renewal of his contract of employment for a second and final three-year term. This entails consideration of two sub-issues:
  - i. First, whether as a matter of law the doctrine of legitimate expectation of contract renewal incorporates an entitlement to continue to encumber the same role; and
  - ii. Second, if so, whether as a matter of fact the Applicant possessed a legitimate expectation that he would be offered a contract renewal in respect of the same role.
- b. Second, whether the Respondent's conduct in August 2023 breached the Applicant's contract in any other way. This entails consideration of the Applicant's allegations that the Respondent's conduct was unlawful for failure to give reasons or lack of a

legal basis, constituted an unlawful breach of an acquired right, was tainted by due process violations or was ultra vires Staff Regulations 13 or 16-18.

- c. Third, whether the Respondent's conduct in August 2023 constituted victimisation or retaliation for the Applicant's complaints, including his whistleblowing complaints.
- d. Fourth, what, if any, remedy or relief the Applicant is entitled to.

80. The Order required the parties to submit written skeletons of their oral argument addressing those issues by 20 May 2024. In the Order, the Tribunal addressed the structure of the oral hearing, refused the Applicant's request for anonymity, and ordered the oral hearing to be held in public (to be achieved by offering staff of the Commonwealth Secretariat the opportunity to view the hearing through a video-link).

### ***Skeleton Arguments***

81. The Applicant's Skeleton Argument largely repeated the submissions made in his earlier Application and Reply, and did not engage with the issues identified by the Tribunal. The Applicant added that even if the HR Director's letter of 20 November 2023 should be interpreted to mean that the ASG did not provide any recommendation for renewal of the Applicant's contract, that had the same effect as a recommendation against renewal, and he should have been informed of that fact, to exercise his Staff Rule 6.1 due process rights. He also asserted that, in the absence of a witness statement or any objective evidence being provided by the Respondent, the Tribunal should assume that the ASG participated in the non-renewal decision.

82. The Respondent's Skeleton Argument emphasised that the Respondent's conduct in August 2023 was driven by a desire to help the Applicant continue his employment with the Respondent. In answer to the first issue identified by the Tribunal, the Respondent explained that its primary case was that renewal of employment does not mean a continuation of precisely the same role, and that the word "renewal" has to be construed in the context of the relevant contractual provisions which provide the Respondent with a degree of contractual flexibility when considering how a renewal operates in practice. A change of role, provided it is not a demotion, is within the parameters of that flexibility.

83. Alternatively, if it was wrong in its primary case, then the Respondent argued that the doctrine of legitimate expectation of contract renewal only extends to renewal in the same post unless there is a good reason not to renew at the time the decision falls to be made. In this case, there was a good reason not to renew the contract on exactly the same terms as before because the relationship between the Applicant and the ASG had broken down and the Applicant had asked for a move and change of line manager. The Respondent was entitled to interpret the Applicant's request as a long-term, rather than temporary, measure. The needs or requirements of the organisation must include the ability to ensure, as far as possible, the existence of a harmonious working environment. Where an employee has said that he does not want to work with another employee but would like to stay in the organisation, it must be open to the Respondent to provide an appropriate alternative, provided that it is of equal status, which the offer of a new role was.

84. The Respondent contended that as a matter of fact, the Applicant did not possess a legitimate expectation that he would be offered a renewed contract in respect of the same role. To the contrary, he was told on several occasions that that would not be the case. The HR Director made it clear that the offer of a new role in the SPPD was being made to accommodate the Applicant's request for a move and change in line management. The reality was that the possibility of a second term in the same role became untenable because the relationship between the Applicant and his line manager had broken down and the Applicant had requested a move and change of line manager. There was nobody else that the Applicant could have reported to as Head of the Rule of Law Section. Consequently, the only way to change his line manager was to move him out of the GPD and into a different directorate but to ensure that his new role was of equal status. In the proposed new role, the Applicant would have brought part of his duties with him (namely, the cyber resilience project) and the remainder of his role was to be the subject of consultation with the Applicant. The Applicant never engaged with the scope of the new role.

85. In answer to the second issue identified by the Tribunal, the Respondent contended that its conduct in August 2023 did not breach the Applicant's contract in any other way. The Respondent provided reasons and a legal basis for its conduct in August 2023, on no less than six occasions. There was no decision to disapply the Rotation Policy (on the contrary, it was followed), and no breach of Regulation 13. There was no right to automatic renewal

of his contract. The non-renewal decision was not tainted by due process violations: the ASG's only involvement in relation to the renewal of the Applicant's contract was to agree to relinquish the cyber-resilience project from the Rule of Law Section so that it could be transferred with the Applicant to the SPPD. The fact that the ASG agreed to the release of this project, to enable the Applicant to continue to be employed, was inconsistent with the Applicant's contention that the ASG recommended non-renewal. Regulations 16-18 were irrelevant because the Applicant's contract was not terminated in accordance with those provisions. The Applicant's contract expired because he failed to accept the offer of the new role.

86. In answer to the third issue identified by the Tribunal, the Respondent contended that its conduct in August 2023 did not constitute victimisation or retaliation for the Applicant's complaints. The Applicant did not suffer any harm as a result of raising complaints. The ASG did not make any recommendation, one way or the other, because he did not think it appropriate to do so. The Applicant was offered a second term in a new role of equal status and remuneration, which arose because of his own request for a change of line management. This offer was not an act of victimisation: it was an attempt to keep the Applicant within the organisation. His tenure came to an end because he chose not to accept that offer.

87. In answer to the fourth issue identified by the Tribunal, the Respondent contended that the Applicant was not entitled to any relief. It contended that the Applicant was not entitled to damages for breach of contract because he had suffered no loss: on the contrary, he was paid the balance of six months' notice from 16 August 2023 in lieu, and secured a role as a Judge of the High Court of Belize on 17 January 2024, on a higher salary than his salary from the Respondent. The Respondent repeated its other arguments regarding relief.

### ***The Oral Hearing***

88. The Tribunal met in London on 23-24 May 2024 to consider and determine the Applicant's Application. The Tribunal held an oral hearing on the afternoon of 23 May 2024 (which was conducted remotely by videolink) where it heard the parties' oral submissions on the four issues before the Tribunal. The Tribunal had the opportunity to question the parties about their respective legal submissions.

## **THE JURISDICTION AND ROLE OF THE TRIBUNAL**

89. Article II of the Statute that establishes the Tribunal provides that it has jurisdiction to hear and determine an application brought by a member of staff of the Secretariat which alleges 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. In this case, the Applicant alleges that the non-renewal of his contract of employment was an unlawful breach of his contract. The Tribunal is satisfied that it has jurisdiction to consider this application.

90. The parameters of the Tribunal's jurisdiction have been set out in *Ojiambo v Commonwealth Secretariat* CSAT APL/41 at paragraphs 49-53 as follows:

“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 the 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 to which it was intended to achieve.

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:

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.”

91. The Tribunal agrees with that description of the limited nature of its role, as well as the President’s statement outlined in paragraph 78 above.

## **DETERMINATION OF THE LEGAL ISSUES**

*(1) Whether the Respondent’s conduct in August 2023 breached the Applicant’s legitimate expectation of the renewal of his contract of employment for a second and final three-year term*

92. The Applicant’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”.<sup>56</sup>

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<sup>56</sup> Offer letter - Annex AA/01.

“Appointments are on limited term contracts of usually three years. Contracts may be renewed by mutual agreement subject to fully satisfactory performance, the organisation’s requirements at that time and availability of funds. The Secretary-General will retain the flexibility to approve or decline extensions as circumstances warrant.”<sup>57</sup>

93. The Staff Regulations, which form part of a staff member’s contract of employment, contain provisions to similar effect. Regulation 13 states:

“The Secretary-General may make appointments of varying duration. Appointments in the diplomatic and professional grades (CS1-7) will be for not more than 3 years and will be subject to the Secretariat Rotation Policy.”<sup>58</sup>

94. The Respondent’s Rotation Policy<sup>59</sup> provides at paragraph 2.1 that the policy applies to employees in the diplomatic and professional grades. Paragraph 2.2 provides that employees at Pay Point E “may serve a maximum of 2 three-year contracts”. Paragraph 2.5 states that:

“Employees do not have the right to an automatic renewal of a contract. In particularly (sic) the granting of a new contract is subject to fully satisfactory performance and the needs of the Secretariat.”

95. The contract of employment did not give the Applicant any contractual right of renewal. However, the Tribunal has previously held that these contractual provisions in relation to renewal of the fixed term contracts of senior staff members, combined with the usual practice of the Respondent, 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: see *Oyas v Commonwealth Secretariat* CSAT APL/16 at [119]-[120] and *Ojiambo* at [56].

96. In this case, there is a dispute between the parties about the meaning of the word “renewal” in this context, and specifically, whether (as the Applicant contends) the doctrine of

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<sup>57</sup> Summary of Terms and Conditions for Pay Point E - Annex AA/03.

<sup>58</sup> Annex to Answer, p280.

<sup>59</sup> Annex to Answer, pp318-319.

legitimate expectation of contract renewal incorporates an entitlement to continue to occupy the same role or whether (as the Respondent contends) the concept of “renewal” is flexible enough to accommodate a change in role so that there is no entitlement to continue to occupy precisely the same role, provided the new role is not a demotion.

97. The Tribunal considers that “renewal”, in the context of a contract of employment, means the extension or continuation of the original or existing contract of employment, or alternatively, the grant of a new contract on identical terms and conditions of employment as the original or existing contract of employment. Either way, “renewal” of the contract of employment would entail that the postholder remains in the same post or role, with the same responsibilities and tasks, as the original or existing contract of employment.
98. The Tribunal considers that this is the natural and ordinary meaning of the word “renewal” in this context. The word “renewal” would not naturally be used to describe a situation where a contract of employment has come to an end and is replaced by a different contract of employment, which contains different terms and conditions, such as a different role, responsibilities, status or salary. In those circumstances, it would be more accurate to say that the employee’s tenure has been extended but under a new or replacement contract.
99. The Tribunal considers that its interpretation is consistent with both *Oyas* and *Ojiambo*. In *Oyas*, the Tribunal stated at [119]: “We accept that by virtue of the rotation policy, a person in the Applicant’s grade holding a particular post under a first three year contract has a legitimate expectation that it will be renewed” (emphasis added). In *Ojiambo*, the Tribunal stated at [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” (emphasis added).
100. Therefore, we accept that, at the time of his appointment, the Applicant had a legitimate expectation that his contract of employment in which he was employed as Adviser and Head of the Rule of Law Section would be renewed for a further three-year term, in the absence of a good reason not to renew it. But that is merely the starting point.
101. The central issue in this case is whether, at the time the Applicant’s contract fell due for renewal, he still had a legitimate expectation that he would be granted a second three-year term in that post.

102. The contract of employment provided for two circumstances in which a contract may not be renewed: (1) unsatisfactory performance in the role or (2) the requirements (or needs) of the organisation (see paragraphs 92-94 above). There was some dispute between the parties about whether a good reason not to renew a contract would extend beyond those two circumstances. The Tribunal does not consider it necessary to resolve that dispute, because the case can be decided on the basis of the express provisions of the contract. The Tribunal considers that the “requirements” or “needs” of the Secretariat is already an expansive category, encompassing any factor reasonably related to the achievement of the Secretariat’s objects and purposes.

103. The Respondent has not at any stage sought to argue that the Applicant’s performance in his post was unsatisfactory. To the contrary, it is clear from the contemporaneous communications between the parties that the Respondent wished to retain the Applicant within the organisation and to continue to utilise his skills.

104. The Tribunal considers that the Respondent has a broad discretion to manage its workforce in the way it considers best meets the organisation’s requirements or needs; and that the Respondent is entitled to consider that its “requirements” or “needs” include the ability to ensure, as far as possible, the existence of an efficient and effective working environment in which employees work together successfully to deliver the organisation’s objectives.

105. In this case, the Tribunal considers that the Respondent was entitled to take the view that it required the Adviser and Head of the Rule of Law Section to have an effective working relationship with his direct line manager, the Senior Director of the GPD, for the effective delivery of the Rule of Law portfolio, and that this was no longer possible because the relationship between the two employees had broken down. The Respondent was also entitled to take the view that the Applicant had requested a different manager, something that could practically be achieved either by replacing the Applicant’s line manager or by moving the Applicant to a different department to be line managed by someone else. In those circumstances, the Respondent was entitled to reach the conclusion that its needs or requirements would be met by moving the Applicant out of the GPD and into a different directorate to be line managed by a different Senior Director, which necessitated a different

role. Conversely, the Respondent was entitled to take the view that its needs or requirements would not be met by retaining the Applicant in his role as Adviser and Head of the Rule of Law Section, where he would continue to be line managed by the ASG.

106. The Applicant denies that he did not have an effective working relationship with the ASG or that their relationship had broken down. He denies that he asked for a different line manager or to be moved. He denies that the Respondent sought to rely expressly on a change in its requirements or needs when offering him a new contract involving a new role or, when he failed to accept that new contract, deciding not to renew his contract.

107. The Tribunal finds that the Applicant's denials are impossible to maintain in light of the contemporaneous evidence.

a. The Applicant's communications with Human Resources demonstrated that he believed the ASG had created a "hostile working environment" for him. The Applicant had accused the ASG of bullying and harassment, and of committing gross misconduct. Attempts to resolve the issues between the Applicant and the ASG had concluded unsuccessfully. In those circumstances, the Respondent was entitled to conclude that the working relationship between the two employees was not effective, and had broken down.

b. The Applicant's email of 3 August 2023 stated in terms: "I asked HR and the DSG to have me moved and be managed by a different line manager." Whatever may have been the terms of any previous request made by the Applicant, the Tribunal considers that it was reasonable for the Respondent to interpret this statement as a request by the Applicant to be moved out of GPD and to be managed by a different line manager on a long-term rather than temporary basis. Indeed, the Tribunal considers that, when the Applicant sent his email of 3 August 2023, that is precisely what the Applicant wanted, which is why he took no steps to query or correct the Respondent's response on 4 August 2023. The Applicant may well have changed his mind once he realised that such a move would necessitate a different role or job description, but we consider the Respondent was entitled to maintain its position that its needs or requirements would best be served by moving the Applicant out of his current post and reporting line, and into a new position in a different directorate

where he would report to someone else. While the Respondent could have sought to resolve the difficulties between the two employees in a different way, it is not the Tribunal's role to interfere with an appropriate exercise of the Respondent's broad discretion to manage its own workforce in the way it considered best met the organisation's requirements or needs.

- c. The Respondent's contemporaneous communications with the Applicant made clear, in our view, that the Respondent sought to rely on changes in the needs or requirements of the organisation to justify offering the Applicant a new position, and when he refused to accept that offer, to justify its decision not to renew his contract of employment. For example, in the Teams meeting on 15 August 2023, the HR Director told the Applicant, in the context of offering him a new role in a different department, that "moving to a different management reporting line" would be very good for the Applicant "and obviously for the organisation". In the letter of 16 August 2023, which contained the New Contract Offer, the HR Director stated: "Given your request for a change of line manager, the Secretariat has considered whether, in the interests of the organisation, you might be redeployed on a lateral transfer to another post for the duration of a second and final 3-year term reflecting the Rotation Policy". In the HR Director's email of 28 August 2023, he stated that: "The change in your JD is made to serve the business needs of the organisation for which the Secretary General is assigned the responsibility and authority under the recruitment and selection policy". In the HR Director's email of 5 September 2023, he stated that: "For the effective delivery of the RoL portfolio, it is essential that the Adviser and Head of RoL has an effective working relationship with senior management".

108. Accordingly, the Tribunal concludes that the Respondent had a good reason not to renew the Applicant's contract in the same role for a second three-year term, and instead to offer the Applicant a new contract in a new role, namely, that it was necessary for the effective functioning of the Rule of Law Section, and the GPD more generally, for the Applicant to be moved out of that directorate and to be line managed by someone else. In those circumstances, we consider that the Respondent complied with Staff Regulation 13 and the Rotation Policy, and did not breach or "disapply" those provisions. In other words,

consistent with *Ojiambo* at [51], the Respondent's discretionary powers affecting the employment of this employee were exercised properly, and for a proper purpose.

109. The question then becomes whether, as a matter of fact, the Applicant could have had a legitimate expectation, at the time his contract fell due for renewal, that he would be offered a renewal of his contract in respect of the same role. That issue must be determined on the basis of an objective assessment of the communications passing between the employee and the employer. Having considered those communications, the Tribunal concludes that the Applicant could not have had any legitimate or reasonable expectation that he would be offered a contract renewal in respect of the same role.

110. The Applicant was never told that he could expect to be offered a renewed contract in respect of the same role. In response to the Applicant's queries about contract renewal, he was initially told that the SMC was considering the matter. From 15 August 2023 until his contract came to an end on 1 September 2023, the Applicant was clearly and repeatedly told that he was being offered a new contract on the basis of a new role in a different department, reporting to a different line manager. The Applicant was obviously free to reject that offer, but it must have been obvious to him that if he did not accept the offer, his contract in respect of his current post would not be renewed. The Applicant's own communications with the Respondent indicated that he did not want to continue to work with the ASG, and he wanted to be moved and to have a different line manager. In those circumstances, it must have been obvious to the Applicant that the possibility of a second three-year term in the same role reporting to the same line manager was untenable.

111. Accordingly, the Tribunal concludes that the Respondent's conduct in August 2023 did not breach any legitimate expectation that the Applicant's contract of employment would be renewed for a second and final three-year term. Specifically, at the time of contract renewal, the Applicant could not reasonably have had any legitimate expectation that he would be offered a renewal of his contract in respect of the same post. When he failed to accept the offer of a new contract in a new role by the deadline of 31 August 2023 (which was extended to 1 September 2023), his fixed term contract was not renewed and accordingly, came to an end or expired on 1 September 2023.

***(2) Whether the Respondent’s conduct in August 2023 breached the Applicant’s contract in any other way. This entails consideration of the Applicant’s allegations that the Respondent’s conduct was unlawful for failure to give reasons or lack of a legal basis, constituted an unlawful breach of an acquired right, was tainted by due process violations or was ultra vires Staff Regulation 13 or 16-18***

*Failure to give reasons?*

112. In accordance with general principles of international administrative law, an international organisation has a duty to give adequate and clear reasons for every administrative decision which is adverse to a staff member, including a decision not to renew a staff member’s contract of employment, so that the affected staff member has an adequate opportunity to evaluate whether the decision should be challenged: see *Ayeni v Commonwealth Secretariat* CSAT APL/12; *In re Tebourbi* ILOAT, No. 2104; *NK v European Southern Observatory* ILOAT, No.2124; *AA v International Criminal Court* ILOAT No.3903.

113. The Applicant contends that the Respondent’s “30 August 2023 decision” did not provide any reason or any good reason for not renewing his contract. But the Respondent’s letter of 30 August 2023 cannot be looked at in isolation. It is necessary to have regard to the entire chain of communications, starting from 15 August 2023, when the Respondent first raised the suggestion of offering the Applicant a new contract in a different role, up until the Applicant filed his Application on 15 November 2023.

114. Having considered those communications as a whole, we take the view that the Respondent gave the Applicant sufficient and clear reasons to understand why his contract was not going to be renewed. The Respondent explained to the Applicant on a number of occasions that he was being offered a new contract in a new role, reporting to a different line manager. We consider that the Applicant must have understood that this was being offered instead of a renewal of his contract in the same post, and that if he did not accept the offer, his contract would not be renewed. The Respondent also explained to the Applicant on a number of occasions that the reason he was being offered a new contract in a new role was because he had requested a change of line manager, and because it was essential to the effective running of the organisation that the Adviser and Head of the Rule

of Law Section had an effective working relationship with his line manager, the Senior Director of the GPD. We refer to our earlier findings above in relation to those matters.

115. In particular:

- a. On 15 August 2023, in a Teams meeting, the HR Director told the Applicant that he was going to be offered a “new role” which was likely to be located in SPPD and he would no longer be line managed by the ASG. He was told he would retain his cybersecurity work but that other work would not follow him. The reason given for this offer was to give the Applicant a more “amicable” and “friendly” place to work where he was able to “deliver and perform better”, which would be good for both the Applicant and the organisation. We appreciate that the HR Director said at the outset of the conversation that the Applicant’s contract was “going to be renewed” but we think it was tolerably clear by the end of this conversation that the Applicant was not being offered a continuation or extension of his current contract, or the grant of a new contract on identical terms and conditions, but instead a new contract in a new role with some of the same responsibilities as his current job but also some new or different responsibilities.
- b. In the Respondent’s letter dated 16 August 2023, the Applicant was clearly told that “the Secretary General has approved that at the expiry of your present contract with the Secretariat on 31 August 2023, you [will] be offered a new contract for a further period of three years”. The reason for this was clearly stated: “Given your request for a change of line manager, the Secretariat has considered whether, in the interests of the organisation, you might be redeployed on a lateral transfer to another post for the duration of a second and final 3-year term reflecting the Rotation Policy”.
- c. In the Respondent’s email of 21 August 2023, the Applicant was clearly told that “the contract is for a new role in SPPD reporting to the Senior Director in consideration of your request for a change of Line Manager”. The email attached a job description which made it clear to the Applicant that what was being offered was a new contract in a newly created position, not the continuation of his existing contract in his existing position.

- d. In the Respondent's email of 28 August 2023, the Applicant was told in terms that the offer was not for the post of Adviser and Head of the Rule of Law section, and that instead, he was being offered a 'lateral transfer' to a new role with the same status and salary. He was told that if he did not sign and return the New Contract Offer by 1 September 2023, it would be assumed he wished to terminate his contract with the Respondent. It was again explained that he was being offered a new role in consideration of his own request for a different line manager. The Respondent's email stated expressly: "The change in your JD is made to serve the business needs of the organisation...". We note that the Applicant's reply email dated 29 August 2023 indicated that he understood that this was an offer of a new contract in a new position. We consider that the Applicant's further assertion in that email - that he understood the 16 August 2023 offer letter to mean that the Secretary General had agreed to renew his current contract of employment and that the issue of renewal of his current contract should be regarded as separate from his acceptance of the new contract - as wilfully obtuse. We consider that the Applicant should have realised, at the latest by this point, that if he did not accept the new offer, the organisation would not renew his current contract.
- e. In the Respondent's email of 5 September 2023, the HR Director specifically told the Applicant that he was being offered a new role "given your request for a change of line manager" and because "For the effective delivery of the RoL portfolio, it is essential that the Adviser and Head of RoL has an effective working relationship with senior management."
- f. In the Respondent's email of 7 September 2023, the HR Director explained that: "The Secretariat considered that it was in the interests of the organisation to offer another role, which was done".

116. The Tribunal notes that the latter two emails post-dated the termination of the Applicant's contract of employment on 1 September 2023. However, contrary to the Applicant's assertion at paragraph 127 of his Application, there is no authority for the proposition that *ex post facto* reasons for a non-renewal decision should be disregarded; the authority of *NK v ESO* on which he relies merely states that reasons which are given "only after a complaint has been brought" should be disregarded. In this case, the explanations

given by the Respondent (which are recited in the previous paragraph) all pre-dated the Application filed on 15 November 2023 by several months. The Applicant had more than enough information to understand why his contract was not renewed, in sufficient time to determine whether to challenge that decision.

117. Accordingly, we reject the Applicant's argument that the Respondent's decision not to renew his contract was unlawful for failure to give reasons or adequate reasons.

*Lack of a legal basis?*

118. The express provisions of the contract of employment, and Staff Regulation 13 read together with the Rotation Policy, permitted the Respondent not to renew the Applicant's contract of employment for a second and final three-year term, and instead to offer the Applicant a new contract of employment in a new role, which the Respondent reasonably considered best met the needs or requirements of the organisation. When the Applicant failed to accept that offer, the Respondent was entitled to decide not to renew his contract of employment. Therefore, we reject the Applicant's argument that the non-renewal decision lacked a legal basis.

*Breach of an acquired right?*

119. The Applicant had no "acquired right" to have his initial three-year contract renewed. The Applicant's contract of employment and Staff Regulation 13 read together with the Rotation Policy expressly provided that renewal of his contract for a second and final three-year term was subject to satisfactory performance and the needs or requirements of the Secretariat. In this case, any entitlement to renewal of his contract was displaced by the needs or requirements of the organisation at the time of renewal.

*Non-renewal decision tainted by due process violations?*

120. The Applicant contends that the non-renewal decision was tainted by a conflict of interest and due process violations because the ASG was part of "senior management", the Respondent had stated in its letter of 7 September 2023 that the non-renewal decision was taken by "Senior Management", and therefore it is inconceivable that the ASG was not involved in the process that resulted in the non-renewal of the Applicant's contract. He says that the only person competent to terminate his contract of employment was the Secretary-General, and that the Secretary-General did not take the relevant decision in this case, the

HR Director did. The Applicant also relies on the Respondent's letter of 20 November 2023, which he interprets to mean that the decision not to renew his contract was taken on or around 9 August 2023, as a result of the ASG making a "formal recommendation" that the Applicant's contract should not be renewed.

121. Recruitment decisions and decisions not to renew a staff member's contract must be taken by the competent authority. Staff Regulation 10 confers power on the Secretary-General to appoint staff. Staff Regulation 3 confers power on the Secretary-General to assign staff for any of the activities or departments of the Secretariat. Staff Regulation 22 enables delegation of duties from the Secretary-General. It is also a general principle of international administrative law that an official who is responsible for taking a decision affecting the rights or duties of other persons subject to his or her jurisdiction must withdraw in cases in which his or her impartiality may be open to question on reasonable grounds: see *C v International Fusion Energy Organisation (ITER)* ILOAT, No.4679. The case of *C v ITER* also states that:

"An allegation of conflict of interest or lack of impartiality has to be substantiated and based on specific facts, not on mere suspicions or hypotheses. The complainant bears the burden to prove a conflict of interest."

122. In this case, the Respondent's letter of 16 August 2023 (which contained the New Contract Offer) stated that: "the Secretary-General has approved that at the expiry of your present contract with the Secretariat on 31 August 2023, you be offered a new contract for a further period of three years" (emphasis added). The Respondent's letter of 7 September 2023 stated that the decision not to renew the Applicant's contract was taken by "the Senior Management", which would naturally include the Secretary-General. Therefore, the Tribunal has no reason to doubt that the Secretary-General was responsible for the relevant decisions to offer the Applicant a new contract in a new position, and when he failed to accept that offer, not to renew his contract. This was communicated to the Applicant by the HR Director, who had authority to communicate those decisions.

123. There is no evidence before the Tribunal that the ASG was involved in the decision not to renew the Applicant's contract. The only evidence of the ASG's involvement in the decision-making process is the transcript of the Teams meeting on 15 August 2023, in

which the HR Director is recorded as saying that he would talk to the ASG about how much of the Applicant's role as Adviser and Head of Rule of Law could be brought over to the new role. The proposed Job Description for the new role included the cyber security functions which the Applicant had in his role as Adviser and Head of Rule of Law, from which the Tribunal infers that the ASG agreed to relinquish those functions from the Rule of Law Section so that they could transfer with the Applicant to the new role. This is wholly inconsistent with the Applicant's contention that the ASG had recommended non-renewal of the Applicant's contract.

124. The Tribunal does not accept the Applicant's interpretation of the Respondent's letter of 20 November 2023. The Tribunal considers that it is clear from paragraphs 16-19 of that letter that the decision to offer the Applicant a new contract in a new position was made on or around 9 August 2023, and then communicated to the Applicant by the HR Director verbally on 15 August 2023 and in writing on 16 August 2023. There was no decision taken at that time not to renew the Applicant's contract, because at that time, the Applicant had not failed or refused to accept the offer of a new contract.

125. Further, the Tribunal does not accept the Applicant's contention that paragraph 17 of the letter should be interpreted as meaning that the ASG had made a formal recommendation not to renew the Applicant's contract. The words "No renewal recommendation having been made by your line manager" clearly mean that the Applicant's line manager (the ASG) had not made any recommendation regarding renewal. (The Tribunal considers that it was appropriate for the ASG not to make any recommendation renewal in the circumstances of this case.) Therefore, the Tribunal rejects the Applicant's contention that the Respondent breached its duty of candour or engaged in any conspiracy not to disclose the ASG's recommendation to the Applicant. The Applicant's "due process rights" were not violated.

*Non-renewal decision ultra vires Regulation 13?*

126. There was no breach of Regulation 13 or of the Rotation Policy. For the reasons set out above, the Respondent's actions complied with both Regulation 13 and the Rotation Policy.

*Non-renewal decision ultra vires Regulations 16-18?*

127. The Applicant contends that his employment was summarily terminated by letter dated 30 August 2023, without notice, and that this was contrary to the requirements of Staff Regulations 16, 17 and 18, which contain the Secretary-General's only powers to terminate contracts of employment.

128. Regulation 16 provides:

“The Secretary-General may terminate the employment of an employee, giving reasons therefore, if:

- (a) The needs of the service require abolition of the post or reduction in the staff;
- (b) Such action would be in the interest of the efficient functioning of the Secretariat;
- (c) The services of the staff member prove unsatisfactory; or
- (d) The staff member is, for reasons of health, incapacitated for further service”.

129. Regulation 17 provides:

“The Secretary-General may also, giving reasons therefore, immediately and without notice terminate the appointment of an employee if:

- (a) The conduct of the staff member does not meet the standards of integrity required under Regulations 1 to 7; or
- (b) Facts anterior to the appointment of the staff member and relevant to the employee's suitability come to light, which, had they been known at the time of the appointment, should under the standards provided in these Regulations, have precluded the staff member's appointment.”

130. Regulation 18 provides:

“The Secretary-General may without notice terminate the employment of an employee where, in reliance on the Disciplinary Rules and Procedure, a Disciplinary Board recommends termination of appointment without notice and that recommendation is endorsed by a Deputy Secretary-General and upheld by the Secretary-General.”

131. Part 3, Section 3 of the Staff Handbook sets out general provisions concerning notice. Paragraph 1.5 provides that: “Upon termination of employment, the Secretariat may at its discretion, make payment in lieu of notice for the whole or any part of an employee’s notice period.”
132. The Rotation Policy provides at paragraph 2.5.1 that: “Employees can expect to be formally notified of their departure date between six months and one year before the end of their contract.” The Respondent accepted that, in this case, it was required to give the Applicant at least six months’ notice of non-renewal of his employment.
133. The Tribunal does not accept that the Applicant’s contract of employment was summarily terminated without notice. In the ordinary course, pursuant to paragraph 2.5.1 of the Rotation Policy, an employee whose contract of employment is not going to be renewed would expect to be notified of this fact at least six months before the end of his contract (although in such circumstances the Respondent would be obliged to reconsider this issue when the contract falls due for renewal – see *Ojiambo* at [79]-[83]). . In this case, the Respondent considered it was unable to reach a decision about renewal six months before the end of the contract because the Applicant had made complaints about his line manager which had not been resolved at that stage. The Applicant was formally notified on 16 August 2023 that the continuation of his tenure depended on his accepting the offer of a new contract with a new role. When the Applicant did not accept that offer by the deadline of 31 August 2023 (extended to 1 September 2023), the Respondent paid the Applicant the balance of six months’ notice from 16 August 2023, in lieu of working out his notice period, which the Tribunal considers it was entitled to do under paragraph 1.5 of Part 3, Section 3 of the Staff Handbook. This meant that the Applicant received an advantage in comparison with employees given six months’ notice of non-renewal because he was able to serve out the entirety of his contract and receive five and a half months’ payment in lieu of notice thereafter.
134. However, the Tribunal does not accept either that the contract of employment expired by effluxion of time, as contended by the Respondent. Ordinarily, for an employee in the position of the Applicant (at Pay-point E), a contract of employment will only expire by effluxion of time at the end of his second three-year term. In this case, the contract of

employment came to an end (and in that sense, ‘terminated’) on 1 September 2023 as a result of the Respondent’s administrative decision, motivated by its needs or requirements, not to renew the Applicant’s contract for a second three-year term because he did not accept the offer of a new contract on different terms by that date. The Respondent’s power to do so derived from the express terms of the contract of employment, and Staff Regulation 13 read together with the Rotation Policy. In other words, the corollary of the employee’s limited right to renewal of the contract of employment subject to satisfactory performance and the organisation’s needs or requirements at that time, is that the Respondent has the power *not* to renew the employee’s contract for a further three-year term where such non-renewal is consistent with its requirements or needs or where the employee’s performance is unsatisfactory.

135. As the Respondent had power not to renew the Applicant’s contract of employment by virtue of the express provisions of the contract and Staff Regulation 13 read together with the Rotation Policy, it was unnecessary for the Respondent to rely on Regulations 16-18 in order for the Applicant’s contract to terminate lawfully (and the Respondent did not purport to rely on those provisions when deciding not to renew the Applicant’s contract). Regulations 17 and 18 empower the Secretary-General to terminate the appointment of a staff member immediately and without notice, for reasons concerning the employee’s conduct or suitability for appointment, and are obviously inapplicable in this case. Regulation 16 empowers the Secretary-General to terminate the employment of an employee in certain circumstances, on notice. We consider that Regulations 16-18 would ordinarily be relied on where the Secretary-General seeks to terminate employment prematurely, before the end of an employee’s contractual term, or where the contract is open-ended and has no fixed term. Regulations 16-18 are not concerned with the grounds for non-renewal of a contract.

***(3) Whether the Respondent’s conduct in August 2023 constituted victimisation or retaliation for the Applicant’s complaints, including his whistleblowing complaints.***

136. The Applicant contends that he was victimised (by the Respondent not renewing his contract of employment) in response to his reports alleging data breach by the ASG made in March 2023, his Whistleblowing Complaint lodged on 17 April 2023, and his request for “protection from retaliation” contained in his email of 3 August 2023.

137. It is a principle of international administrative law that the decision maker must make the decision for a proper purpose and not for an improper purpose: see *Ojiambo* at [51] cited at paragraph 90 above. It follows that an international organisation must not act in a manner which is arbitrary or abusive in relation to an employee who makes complaints about his employer, and therefore that it must not retaliate against an employee in those circumstances:

138. The Tribunal does not accept that the Respondent's conduct in August 2023 constituted retaliation (or 'victimisation' as the Applicant says) for the Applicant's complaints. On the basis of the evidence before the Tribunal, we consider that the Respondent had two main objectives: first, to retain the Applicant within the organisation, and to give him a role which would utilise his skills and knowledge in an appropriate way; and second, to ensure the efficient and effective functioning of the organisation and in particular, the efficient and effective functioning of the Rule of Law Section. The Respondent offered the Applicant a new contract in a new position not in retaliation for the Applicant having made complaints, but to accommodate the Applicant's own request for a move and change of line manager, and to resolve the problems that the Applicant had himself identified with his working relationship with the ASG. If the Applicant had accepted the offer, it would have resolved both the Applicant's perceived difficulties in his working relationship as well as the Respondent's organizational requirements.

139. The Respondent offered the Applicant a position with the same status or grade, on the same pay point and with the same benefits as his existing role. The Tribunal rejects the Applicant's allegation that the new role represented a demotion because cyber security responsibilities represented only 25% of his role in the Rule of Law Section. This merely demonstrated that the new role overlapped with the previous role by 25%; it does not signify that his new role was intended be a less important role than his previous role. The Respondent gave the Applicant the opportunity to help craft his own job description, which the Applicant never took up. In the Tribunal's view, the Applicant could not have reasonably expected to retain all of the responsibilities of his role in the Rule of Law Section if he was to be moved out of GPD and into a different directorate.

140. The fact the proposed Cyber Resilience Section and the proposed new role of Adviser and Head Cyber Resilience were never established does not demonstrate that the Respondent's conduct was tainted by bad faith or improper motives. It simply reflected the fact that the new section and role were being proposed in order to retain the Applicant within the organisation, for the benefit of the Applicant and the organisation, and that once the Applicant failed to accept the offer of the new role, there was little point in continuing with the process. The Tribunal has arrived at the same conclusion regarding compliance with the Respondent's Lateral Transfer Policy.

141. The Applicant had a choice whether or not to accept the offer of a new contract in a new position, but he could not reasonably expect to stay in his role as Adviser and Head of the Rule of Law Section if he rejected the offer. It was his rejection of the offer which led to the non-renewal of his contract of employment.

142. The Tribunal considers it unnecessary to have regard to the Whistleblowing Report dated 13 October 2023, which post-dated the relevant decisions to offer the Applicant a new contract in a new position, and not to renew his contract of employment once he failed to accept that offer.

***(4) What, if any, remedy or relief the Applicant is entitled to.***

143. The Applicant has not established that the Respondent violated his contract of employment in any respect. Therefore, the Applicant is not entitled to any relief. As the Application has not been upheld in any respect, the Applicant's claim for relief is refused.

**SUMMARY OF FINDINGS**

***Findings on Liability***

144. We have found that the Respondent did not breach its contractual obligations to the Applicant. The Tribunal finds that the Respondent's decision was taken by a competent authority; in accordance with the applicable procedure established by the Respondent; and that it was not arbitrary or abusive.

***Findings on Remedy***

145. We have found that, as the Respondent did not breach its contractual obligations to the Applicant in any respect, the Applicant has no entitlement to any relief.

**Costs**

146. The Applicant sought his costs but did not succeed in his Application. The Respondent successfully defended the Application but has not sought its costs. Having considered its discretion in accordance with Article IX.3 of the Statute, the Tribunal determines that each party shall bear its own costs.

**FORMAL ORDERS**

147. The Tribunal makes the following orders:

- a. The Application is dismissed.
- b. Each party shall bear its own costs.

Delivered on 25 June 2024

/S/ Aruna Narain  
President Aruna Narain

/S/ Catherine Callaghan  
Judge Catherine Callaghan

/S/ Carol Roberts  
Judge Carol Roberts

And

/S/ Peter Quayle  
Peter Quayle, Executive Secretary