THE CARIBBEAN COMMUNITY ADMINISTRATIVE TRIBUNAL

2022

Decision No. 1

COMPLAINT 2 OF 2022

BETWEEN

NIGEL ROWE

COMPLAINANT

AND

CARICOM SECRETARIAT

RESPONDENT

Panel:
Judge Sir Patterson Cheltenham KC (President of Panel)
Judge J Emile Ferdinand KC
Judge Westmin James

Counsel for Applicant:
Ms Alifa K. Elrington
Ms Paulette V. Elrington-Cyrille

Counsel for Respondent:
Dr Corlita Babb-Schaefer

1. This judgment is rendered by the Caribbean Community Administrative Tribunal ("the Tribunal"), composed of Judge Sir Patterson Cheltenham KC, as President of the Panel; Judge J Emile Ferdinand KC; and Judge Westmin James. It determines Complaint No. 2/2022 following the procedures established in the Rules of Procedure of the Caribbean Community Administrative Tribunal, 2020 ("CCAT Rules of Procedure 2020").

JURISDICTION

2. Pursuant to Article III(1) of the CCAT Statute, the Tribunal is competent to adjudicate upon any grievance or complaint by which a member of the staff of an eligible institution (as defined in Article II of the CCAT Statute and which said institution by declaration has recognised the jurisdiction of the Tribunal and whose declaration has been approved at a plenary meeting of the eligible institutions) "alleges the breach of, or otherwise failure to observe, the contract of employment or terms of appointment of such staff member or of … provisions of the Staff Rules and Regulations…."

3. The Caricom Secretariat is an eligible institution specifically named in Article II of the Statute. The Caricom Secretariat accepted the jurisdiction of the Tribunal by declaration dated 22nd July 2021 to take effect from the 1st August 2021, which was approved by the Plenary of Eligible Institutions on 11th August 2021.

4. Pursuant to Article III(2) the Tribunal is only competent to adjudicate upon grievances where the cause of action arose after the establishment of the Tribunal and after the date on which the eligible institution became subject to the jurisdiction of the Tribunal. The cause of action having arisen on 30th December 2021, the Tribunal therefore has jurisdiction.

PROCEDURAL HISTORY:

5. On 11th May 2022, a former Caricom Secretariat (hereinafter "the Caricom Secretariat" or "the Secretariat" or "the Respondent") employee, Nigel Rowe ("the Complainant") filed a *Complaint* and a Request for Document Production together with 19 Exhibits before the Tribunal.

6. The Complainant, who was represented by Attorneys-at-Law Alifa K. Elrington and Paulette V Elrington-Cyrille of Elrington & Associates, requested that the Tribunal review the decision of the Secretariat not to renew his fixed term appointment.

7. On 31st May 2022 the Secretariat, represented by Dr Corlita Babb-Schaefer, General Counsel of CARICOM lodged its *Response* to the Complaint together with 10 Exhibits.

8. On 30th June 2022, the President pursuant to VII(8) of the Rules of Procedure granted an extension of time of 14 days to the Complainant to file his Reply.

9. On 14th July 2022, the Complainant filed his *Reply*.

10. On 31st July 2022 the then President of the Tribunal, President Lisa Shoman SC pursuant to Article VI(2) of the Statute and applying Article III(2) of the Rules of Procedure, designated a panel of three members to hear and decide the Complaint. The Panel was first constituted by Judge Lisa Shoman, Judge Sir Patterson Cheltenham and Judge Westmin James.

11. On 25th August 2022 in accordance with Article XII of the CCAT Rules of Procedure 2020 a Case Management Conference was conducted virtually pursuant to Article XXIII of the said Rules. The Panel ruled on the request for disclosure and gave directions for the disclosure of documents, witness statements and set the date and time of the hearing of the witnesses.

12. On 31st August 2022 the Respondent filed its Disclosure.

13. On 2nd September 2022 the Respondent filed the Witness Statement of Alli Hussein Alli and on 22nd September 2022 the Witness Statement of David Chan.

14. On 22nd September 2022, the Complainant filed his witness statement.

15. On 5th October 2022 pursuant to Article IV(1) of the CCAT Rules of Procedure 2020 Judge Lisa Shoman recused herself from the Panel and Judge Emile Ferdinand was appointed to the Panel. Pursuant to Article I(3) of the said Rules Judge Sir Patterson Cheltenham then became the President of the Panel.

16. On 10th October 2022, the Panel held the hearing which included the examination of the witnesses via video conferencing pursuant to Article III(4) of the said Rules.

17. On 31st October 2022 and 14th November 2022, the Complainant and Respondent respectively filed *Written Submissions*. On 21st November 2022, the Complainant filed his *Reply Written Submissions.*

18. The Tribunal deemed oral arguments unnecessary.

FACTUAL BACKGROUND

19. There are no major facts in dispute in this case. The Complainant was first employed with the Respondent from 2nd May 1991in the post of Messenger, Administrative Services and remained employed with the Respondent on various fixed term contracts until 30th December 2021, that is, for some 30 years.

20. The Complainant was subsequently employed as a Videoconferencing Assistant from 1st January 2008 and the last contract with the Respondent was from 1st January 2021 to 31st December 2021.

21. On 16th April 2021, the Complainant suffered a stroke and was hospitalized for four days. When he was discharged from the hospital, he attended physical therapy sessions three days weekly: on Mondays, Wednesdays and Fridays for 1½ hours, each session.

22. Dr Yogesh Etwaru produced a medical report dated 15th June 2021 wherein it is stated that the Complainant needed to continue rehabilitation for a period of 8-12 months and was likely not to be able to return to regular work duties for at least 8 months due to his degree of deficits. This was stated to be a tentative assessment pending improvement and continuous evaluation.

23. On 1st July 2021 the Respondent hired Mr Irfan Ali to work in the Integrated Information Systems, Corporate Services Programme in place of the Complainant to perform in the post of Video Conferencing Assistant.

24. Dr Etwaru produced another medical report dated 13th July 2021. The Report stated that the Complainant had shown progressive improvement and was able to ambulate with the aid of an assist device and had preserved mental capabilities. It went on to state that his main crisis will be the inability to use the affected upper limb, which is his previously dominant side, to do work such as typing, signing and the like. It also stated the Complainant could return to work once duties and responsibilities were modified to facilitate his disabilities.

25. By email dated 27th July 2021, the Staff Association requested that the Respondent allow the Complainant to return to work for the resumption of his duties on a gradual scale leading to full duties and full resumption of work.

26. On 23rd August 2021 the Respondent, by email referring to the medical report dated 15th June 2021, provided the Complainant with two options for sick leave.

27. On 27th August 2021 the Complainant spoke to the Director of Human Resources Management requesting to be reinstated. The Director of Human Resources of the Respondent in a letter of the same date informed the Complainant that the Respondent required a second medical report on the Complainant's condition and a medical certificate from a registered medical practitioner selected by the Respondent before they could make a decision permitting his return to work. The Respondent had the Complainant undergo a medical examination by Dr Rhonda Archer on 31st August 2021.

28. By medical report dated 27th September 2021 Dr Archer stated that the Complainant had shown significant improvement compared with previous reports and it was evident that he worked very hard at physiotherapy sessions and he was ambulate, albeit slowly. It was stated that he demonstrated a fair range of motion of his right upper and lower extremities with compensated use of his left hand to accomplish work tasks and activities. It recommended that the Complainant's on-going physiotherapy sessions continue four times weekly for at least six to eight months. It was also recommended that the Complainant be allowed to return to work on a modified schedule including being assigned an assistant,

who would be responsible for high-mobility tasks, a reduction in daily hours and a quarterly to semi-annually phased-in workload process depending on his improvements.

29. The Complainant on 30th September 2021 and again on 5th October 2021 wrote to the Respondent's Human Resources Department indicating his improved health and desire to return to work.

30. By email dated 30th September 2021 the Respondent's Human Resources Department informed the Complainant that the Respondent was still awaiting a medical report and so he was unable to resume work until the Respondent was able to review the report and make an informed decision about how it can best support him within the working environment.

31. On 13th October 2021 the Complainant again contacted the Human Resources Department of the Respondent for an update on his request to return to work and was informed by email on same date that the matter was before the Secretary General.

32. On 15th December 2021 the Complainant and the President of the Staff Association had a meeting with the Deputy Secretary General of the Respondent and requested reinstatement.

33. Dr Etwaru gave an updated medical report dated 16th December 2021. The report stated that based on his assessment, he was of the opinion as stated prior that the Complainant can return to work, however with obvious modifications in workload and responsibilities.

34. By email dated 28th December 2021 the Respondent requested a meeting that day to discuss the Complainant's contract. The meeting was rescheduled to the next day where he was apprized that his employment with the Respondent will be terminated. By letter dated 30th December 2021 the Complainant was served with a Notice of Separation from the Respondent. The letter was signed by the Deputy Secretary General of the Respondent but did not give any reason for the non-renewal of the Complainant's contract with the Respondent.

35. On 5th January 2022 the Complainant was given the Final Payment, Pay Instruction Invoice which indicated that the Complainant was separated from the Respondent, effective 31st December 2021. It also set out that the Claimant was being given one month's pay in lieu of notice of non-renewal of contract, leave grant entitlement for self and dependent and an *ex gratia* payment of one year's salary.

36. By letter dated 28th January 2022 the Complainant through his Attorney-at-Law requested that the Secretary General of the Respondent review the decision to separate the Complainant from the employ of the Respondent as well as to provide him with an explanation of the decision to separate him.

37. On 1st February 2022 the Complainant received payment of EC$38,713.77 representing his leave grant, salary in lieu of notice, and *ex-gratia* payment (less medical expenses).

38. On 10th February 2022 the General Counsel of the Respondent informed the Complainant that the Secretary General of the Respondent reviewed the matter and in exercise of her discretion, decided not to renew the Complainant's contract. The letter stated that the reason for the non-renewal was as follows:

    a. The Secretary General took into account the demands of the work environment of the Videoconferencing Assistant which is high-paced and characterised by long hours to accommodate extended hours of Conferences/meetings;
    b. The Secretary General took into account the reports of Dr Yogesh Etwaru and Dr Rhonda Archer;
    c. Being of the view that the Complainant would not be able to satisfactorily perform a renewed contract from 1st January 2022 to 31 December 2022;

    the Secretary General took the decision that the fixed term contract of the Complainant will not be renewed.

39. The Complainant thereafter brought this claim before the Tribunal.

TRIBUNAL ANALYSIS

Law Applied by the Tribunal

40. As this is the inaugural judgment of the Tribunal, it is important for the Tribunal to address the principal rules of law within the framework of which it will decide cases brought before it. This issue of the relevant law to be applied is basic and fundamental to the Tribunal.

41. The applicable law for this Tribunal is set out in the Statute establishing the CCAT. It states at Article X that *"[i]n its determination of rights and obligations under the contract of employment or in respect of claims of discrimination, the Tribunal shall apply the principles of international administrative law to the exclusion of the national laws of individual staff members or host countries."*

42. In its preamble, the CCAT Statute affirms that the Tribunal is *"bound by international principles of due process of law, and that its decisions shall be consistent with the principles of fundamental human rights and taken in accordance with international administrative law."*

43. International Administrative Law as applied by International Administrative Tribunals such as this Tribunal is sometimes referred to as 'International Civil Service Law', 'Global Administrative Law' or the 'Law Governing Employment Relations in International Organizations.' This is merely a group of *sui generis* law, rooted in public international law or 'international institutional law', applying to the specific legal regime of the international civil service.

44. There are three main sources of law for International Administrative Law: (i) substantive rules, such as employment contracts, staff regulations, staff rules, and administrative

orders; (ii) procedural and interpretative rules, such as statutes of the Tribunal, general principles of law (such as estoppel, good faith, equity, non-abuse of rights, and due process); and (iii) customary international law (including certain human rights principles, such as non-discrimination), judicial precedents (of other courts, both national as well as international, including other international administrative tribunals —as far as they are consistent with customary international law).

45. As directed by its Statute, the Tribunal does not apply the national laws of the member states in which the employee works. This Tribunal therefore will apply the three main sources of international administrative law to this case before it.

Whether the Non-Extension Decision was an Abuse of Discretion

46. The Staff Rules at Clause 9.92 define a Fixed-Term Appointment as Full-time employment for a specified period of not less than one (1) year and not more than three (3) years. Under the Respondent's Staff Rules 9.92 it is stated that a fixed-term appointment does not carry any expectancy of renewal or of conversion to permanent appointment.

47. International Administrative Law jurisprudence has indicates that there is no right, absent unusual circumstances such as an express promise or legitimate expectation, to the extension or renewal of a fixed term contract.[1] A fixed term contract is just that: a fixed term for a period of time and expires on its predetermined date. The decision to extend the Complainant's contract of employment therefore falls within the Respondent's discretion.

48. While international organisations such as the Respondent have a discretionary authority to grant the holder of a Fixed-Term contract a further contract, that discretionary authority to renew or not to renew a contract at the expiration of its predetermined date is not unfettered, absolute and unlimited. The decision not to extend a Fixed-Term contract, while discretionary, must be reached fairly and not in an arbitrary manner.[2]

49. As stated by the World Bank Administrative Tribunal:[3]

> *"Decisions that are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or which lack a reasonable and observable basis, constitute an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment."*

50. This Tribunal will likewise adopt this principle. While this Tribunal will not replace the discretion of the Respondent with that of its own, the decision of the Respondent is not immune from review by this Tribunal. This Tribunal has the jurisdiction to evaluate whether that decision was taken without authority, tainted with any procedural irregularity

[1] See CP v IBRD, Decision No. 506 [2015], para. 36 available at https://tribunal.worldbank.org/
[2] FK v IBRD, Decision No. 627 [2020], para. 60, quoting Tange v IBRD, Decision No. 607 [2019], para. 111; Barnes v IBRD, Decision No. 176 [1997], para. 10.
[3] AK v IBRD, Decision No. 408 [2009], para. 41; See also ET v IBRD, Decision No. 592 [2018], para. 91; DO, v IBRD Decision No. 546 [2016], para. 33; Desthuis Francis v IBRD, Decision No. 315 [2004], para. 19; Marshall v IBRD, Decision No. 226 [2000], para. 21; de Raet v IBRD, Decision No. 85 [1989], para. 67.

or made based on a mistake of law or of fact. The Tribunal can also evaluate whether any essential fact was ignored and whether there was abuse of authority.

51. This reasoning has been confirmed by other International Administrative Tribunals, including the Inter-American Development Bank Administrative Tribunal,[4] the United Nations Administrative Tribunal[5] and the International Labour Organization Administrative Tribunal.[6]

52. The Complainant contends that the Respondent, through its conduct, created a legitimate expectation that his contract would be renewed upon expiry on 31st December 2021. The Complainant alleges that the fact that the Complainant was given successive one-year contracts for 30 years, placed on the Respondent's pension plan and received sick leave pursuant to the Staff Rules as a permanent staff member he had a legitimate expectation that his contract would be renewed.

53. The facts before the Tribunal, however, do not support this contention. It was made clear to the Claimant in the contract which was subject to the Staff Rules and Regulations. The Staff Rules state that there was no right to a renewal for fixed term contracts. Further, past renewals of a contract are not by themselves a basis for a legitimate expectation of a renewal.[7] The fact that a person is placed on a pension plan or given sick leave like a permanent employee is not inconsistent with a fixed term contract and in and of itself does not give a legitimate expectation to a contract holder of a renewal. This is even more so since the Staff Regulations specifically state at Regulation 37(v): *"For the avoidance of doubt, participation in the Defined Contribution Pension Plan by non-permanent members of staff does not carry any expectancy of conversion of any type of appointment to a permanent appointment."*

54. This Tribunal must therefore move on to evaluate the evidence before it to determine whether the Respondent abused its discretion. The Respondent has submitted that the reason for the non-renewal was that the Complainant would not be able to satisfactorily perform a renewed contract from 1st January 2022 to 31st December 2022 due to his health. It is the Respondent's burden to show this.

55. The Respondent has not provided this Tribunal with even basic evidence of any evaluation by the Respondent at the time of the decision not to renew the contract of the Complainant. The Respondent did not bring any witness that made the decision not to renew the contract of the Complainant, neither the person who signed the termination letter, the Deputy Secretary General nor anyone from the Human Resources Department. The only two witnesses produced by the Respondent indicated that they did not make the decision not to

[4] Case No. 100, BD v. IDB (2022), para 38, and Case No. 101, TS v. IDB, para 93, Case No 104 Vélez-Grajales v. IDB para 41 available at www.iadb.org/tribunal.
[5] Ahmed v. Secretary-General of the United Nations, Judgment No. 2011-UNAT-153; Kacan v Secretary-General of the United Nations, Judgment No. 2015-UNAT-582 available at https://www.un.org/internaljustice/oaj/en
[6] S (No. 2) v WTO, Judgment No 3914; Re. AMIRA, ILOAT Judgment 1317 paras 23-24.
[7] Kacan v Secretary-General, 2015-UNAT-582, para. 19. See also, Igbinedion v Secretary-General 2014-UNAT-411, para. 26; Hepworth v Secretary-General, 2015-UNAT- 503, para. 42; Abdeljalil v Secretary-General, 2019-UNAT-960, para. 41.

renew the contract of the Complainant. They also gave evidence that they made no determination that the Complainant was not fit to work nor were they consulted as to whether the Complainant would have been able to do the work under a renewed contract.

56. The Respondent submitted that the letter dated 10th February 2022 from the Respondent's General Counsel on behalf of the Secretary General provided the reason for the non-renewal. This however cannot be the case as the Secretary General of the Respondent was exercising a review function rather than an original function. The Secretary General in that letter had to be indicating the factors she herself considered in making her decision whether to rescind the non-renewal, not what was considered at the time and by whom the decision was made that the Complainant's contract not be renewed. The Secretary General could not have made the original decision not to renew the Complainant's contract and exercise the review of her own administrative decision which the letter on first read suggests.

57. Moreover, the medical evidence before the Tribunal does not support the Respondent's contention that the Complainant would not be able to satisfactorily perform a renewed contract. The medical report of the Respondent's own doctor dated 27th September 2021 stated that the Complainant showed significant improvement compared to previous reports. The Respondent's doctor recommended that the Complainant return to work and be assigned an assistant, who would be responsible for high-mobility tasks and would aid in the reduction of the volume of tasks assigned to the Complainant. The Report also stated that the Complainant indicated that he could perform the part of his role as IT video conferencing assistant which pertained to scheduling and coordination of video/web conferencing. The Report stated that these functions can be accomplished with principal use of his left hand which had no noted [defects].

58. The doctor did strongly recommend a reduction in his daily hours and a quarterly to semiannually "phased in" workload process associated with demonstrated improvements in his physical progress and stamina. There was no evidence presented to the Tribunal as to why the medical report of the Respondent's own doctor who had recommended that the Complainant return to work with accommodations was not followed. There was no evidence presented to the Tribunal that these accommodations could not be made or were too expensive or were otherwise unreasonable. There was also no follow up medical by the Respondent.

59. The Respondent having provided no evidence on the reason why the contract of the Complainant was not renewed, and as the medical evidence does not support the Respondent's contention. The Tribunal therefore holds that the non-extension decision was an abuse of discretion of the Respondent.

60. The Tribunal notes with serious concern the use by the Respondent of continuous fixed term contracts for long periods of time and the injustice likely to arise. Using successive one-year contracts to engage contract holders in full-time employment for extended periods of time denies the contract holder the status of a permanent member of staff and the benefits pertaining to that status. The Respondent should evaluate their staff members and consider whether persons who are engaged long-term on successive fixed-term contracts should not

be formally converted to permanent employees. While a conversion of the fixed-term contract to a permanent contract with the Respondent was not requested by the Complainant in this case and so is not before us, the Respondent will do well to evaluate the jurisprudence of international administrative tribunals in this area.

Whether there was a violation of Due Process

61. The next issue to be addressed by this Tribunal is whether the requirements of due process were observed in this case. The Complainant contends that his due process rights were violated because the Respondent failed to inform the Complainant within a month of the termination notice or provide a reason for the non-renewal decision.

62. Due process broadly includes the right to access to an independent and impartial court/tribunal, an opportunity to be heard, to employ counsel, to examine witnesses and evidence. A basic requirement of due process in international administrative law will require that an employer adequately inform the staff member affected about any problems concerning his career prospects, skills, or other relevant aspects of work and that affected staff be given the corresponding opportunity to respond.[8] Due process therefore requires the Respondent to give reasonable notice of the non-renewal of a fixed-term contract and reasons for the decision.

63. The Contract of the Complainant stated that it may be terminated by one month's notice on either side. The Respondent acknowledges that it did not give one month's notice but has indicated that it paid the Complainant one month's pay in lieu of notice after the termination.

64. Notice under a contract serves the dual purpose of communicating to the affected staff member the proposed non-renewal and provide the staff member the reason(s) for the employer's decision. It is in the interest of all staff members that the employment of qualified employees are not terminated on the basis of inadequate facts or spurious justifications. Notice also provides the staff member a fair opportunity to dispute, and possibly to seek recission of the decision of the employer or seek other remedies available under the Staff Rules and dispute-resolution procedures.

65. The requirement to give notice to the Complainant of non-renewal was thus not only contractual but part of the Complainant's due process rights. The Tribunal wishes to indicate that it is not sufficient to pay one month's salary **after** the termination as this will have the result of depriving the Complainant of the opportunity to challenge the decision before being terminated and possibly obtaining a stay or a reversal of the decision to terminate.

66. Not only is the Respondent required to give reasonable (or at least the agreed) notice of the non-renewal of the fixed-term contract, but the Respondent is also entitled to reasons for the non-renewal decision. The very case cited by the Respondent [***S. (No. 2) v. WTO***

[8] See Garcia-Mujica v IBRD, Decision No. 192 [1998], para. 19

***Judgment No. 3914*]** the United Nations Administrative Tribunal makes this point very clear. The UNAT in that case, citing its own jurisprudence, stated:

> *"With regard to the duty to provide a reason and the adequacy of that reason, the Tribunal stated as follows in Judgment 1817, consideration 6:*
>
> > *"A staff member needs to know the reasons for a decision so that he can act on it, for example by challenging it or filing an appeal. A review body must also know the reasons so as to tell whether it is lawful. How ample the explanation need be will turn on circumstances. It may be just a reference, express or implied, to some other document that does give the why and wherefore. If little or no explanation has yet been forthcoming, the omission may be repaired in the course of appeal proceedings, provided that the staff member is given his full say."*

67. This case from UNAT stands for authority that a particular form of notification of reasons was not required and the reasons for non-renewal did not have to be placed in the notice of non-renewal but could be given in a meeting. It also stands for the authority that the absence of explanation could be repaired in the course of an appeal provided that the staff member is given the opportunity to respond.

68. The Respondent sought to argue that the Secretary General of the Respondent gave reasons for the non-extension in her response to the Complainant's Request for Review. The Tribunal notes that this justification came after the decision to terminate was made and communicated to the Complainant and after the Complainant's appointment had already ended. As stated previously, in International Administrative Law, there must be a valid reason for any decision not to renew a fixed-term appointment of a staff member and staff members must be provided with a reason that is "a specific and true assessment" at the time of the decision. This will no doubt provide a fair opportunity to the employee to dispute, and possibly seek successful review of the decision of their employer.[9]

69. While the lack of reasons, (not notice) may be remedied in the course of an appeal process, in the present case there was no such appeal process. The Secretary General's letter was her exercising her review function as the final internal decision-making body before the Tribunal. Further, these stated reasons would not have been able to repair the lack of reasons given to the Complainant because the Complainant would not have had any opportunity to respond to the Secretary General's Review or as stated in ***S. (No. 2) v. WTO Judgment No. 3914*** be "given his full say."

70. The Tribunal notes that, although issues with the Complainant's health were apparent to management, the Complainant was given no warning that this issue could affect his employment. The Tribunal notes that the Complainant had made several requests to the Human Resources Department of the Respondent to return to work. There was no indication that the Respondent gave any warning to the Complainant that his contract could

[9] See CS v IBRD, Decision No. 513 [2015] para. 77, citing Skandera v. The World Bank, Decision No. 2 [1981], para. 28

not be renewed because of concerns with his health and his ability to fulfil a new contract with some accommodations. Transparency and fair treatment require that staff members be alerted to such concerns before a decision of non-renewal is made.

71. This is even more apparent when the medical doctor approved by the Respondent said that the Complainant could return to work with some modifications. The Respondent has indicated that the medical reports of Dr Etwaru and Dr Archer indicated that the Complainant needed rehabilitation and physiotherapy. The Tribunal finds that it is one thing to be aware of medical challenges facing the Complainant, but that it is quite another to be aware that those challenges may negatively impact the continuity of one's employment with the Respondent. The Secretariat's lack of candour in this case was unfair to the Complainant.

72. The Tribunal therefore finds that the Respondent failed to (i) give the Complainant notice of the non-renewal, (ii) give the reasons for the non-renewal and (iii) adequately inform the Complainant of any potential problems concerning his contract and its non-renewal. In those circumstance the Tribunal holds that the Respondent has breached the Complaint's right to due process.

Discrimination

73. The Complainant also alleges that the non-renewal decision was discriminatory. He claims that he has always been re-contracted before for some 30 years. He contends that there was no problem with his work and the only factor that counted against him was his disability. The Respondent denies there was any discrimination and that the Complainant has not satisfied the burden.

74. The law of the international civil service or international administrative law has long held that equality of treatment or non-discrimination is a general principle of a fundamental nature.[10] It is not only a "substantive rule" developed by international administrative tribunals, but "the principle of non-discrimination is a source of law hierarchically higher than the [internal] norm [of an organization]."[11]

75. Freedom from discrimination is also a basic human right. International Organizations and their staff are expected to respect the dignity, worth and equality of all people without any distinction whatsoever. This also would mean that while not directly binding on the organization, international human rights instruments may be cited in support of a decision on discrimination issues.

[10] Amerasinghe C. F., Principles of the Institutional Law of International Organizations, 2nd ed. (Cambridge: Cambridge University Press, 2005) at 293 and 297; Kryvoi Y, "The Law Applied by International Administrative Tribunals: From Autonomy to Hierarchy" (2015) 47 George Washington International Law Review 267 at 271.
[11] Barbargallo G "Closing Remarks by Judge Giuseppe Barbagallo" in Petrović D, ed., 90 Years of Contribution of the Administrative Tribunal of the International Labour Organization to the Creation of International Civil Service Law (Geneva: ILO Publication, 2017), 193 at 194

76. The Respondent's Staff Rules prohibit any form of discrimination or harassment, including sexual or gender harassment as well as physical, written, or verbal abuse at the workplace or in connection with work. Where such infractions occur, a staff member shall be subject to the Secretariat's disciplinary procedure.

77. The Tribunal is therefore entitled to step in and rescind discretionary employment decisions based on invidious discrimination, either toward the individual or the class to which they belong. These decisions would be considered unlawful and can be overturned by the Tribunal consistent with its mandate to apply not only international administrative law but principles of human rights law in its decisions.

78. There exists a large body of literature on discrimination and equality in the employment context both in national and international human rights law from which the Tribunal can draw. Principles of non-discrimination and equality are articulated in a range of international and regional human rights instruments, constitutions and national systems.

79. As established in international human rights law, so too in the international civil service, the Complainant bears the initial burden of establishing a *prima facie* case of discrimination. If the Complainant satisfies this burden, then the burden shifts to the Respondent to provide either a non-discriminatory rationale for its decision or evidence supporting a legitimate purpose for the differential treatment. The Respondent must then persuade the Tribunal the different treatment was reasonably related to the purpose stated and it was proportional to the stated purpose. The Complainant may then challenge the Respondent's stated rationale and provide evidence to show that it is a pretext for a discriminatory decision.

80. In relation to the *prima facie* burden which the Complainant bears, the Tribunal recognises that, except in the most egregious of claims, it may be challenging for the Complainant to obtain evidence to support a claim for discrimination as statements indicating discrimination by the Respondent are seldom likely to be in hard evidence. A Complainant can rely on circumstantial evidence from which discrimination can be inferred. The evidence required to be produced by a Complainant would depend on each individual case but a Complainant must at least make the allegation and provide some factual support for such.

81. These principles have been canvassed in numerous cases before other International Administrative Tribunals, some of which are cited by the parties in this case.[12]

82. The Tribunal finds that the Complainant has not on the evidence shown that the reason for the decision was discriminatory, either directly or indirectly on the basis of disability. The Tribunal therefore holds that the Complainant has not made out a *prima facie* case of discrimination and dismisses this aspect of the complaint.

Remedies

[12] See: DJ v. IFC, Decision No. 548 [2016] (Merits); Case No 80 Vena and Verdejo-Sancho et al. v. IDB; see also Case No. 80 (Rev) Judgment of 8 December 2015, [2015] IDBAT and Case No. 80B Judgment of 22 March 2019.

83. Article XIII of the Statute provides:

> *"Where the Tribunal finds that the complaint is well founded it shall order the rescission of the decision contested or the specific performance of the obligation invoked. In the event that specific performance is not available or practicable, the Tribunal shall, instead, order the institution to pay compensation to the complainant for the loss, injury or damage sustained provided that such compensation shall not normally exceed the equivalent of one year's net remuneration of the complainant."*

84. The evidence is that there is currently someone contracted by the Respondent in the post previously occupied by the Complainant therefore recission of the decision not to renew and reinstatement of the Complainant are not available or practicable at this time. Therefore, in these circumstances the Tribunal awards the Complainant compensation pursuant to Article XIII of the CCAT Statute.

85. Having regard to the following:

    (i) the fact that the Complainant has worked for the Respondent for 30 years, (that is, most of his working life);
    (ii) the Complainant was deprived of another contract without due process and in breach of discretion; and
    (iii) the Complainant is 53 years old, while the retirement age with the Respondent can be as early as 55 and as late as 60;[13]

    the Tribunal finds that it fair in all the circumstances that the Respondent within 90 days do pay compensation to the Complainant in a sum equivalent to one year's net remuneration. This includes one year's salary (EC$35,868.00), his leave entitlements for himself and spouse (EC$1,722.52), the Respondent's contributions to the pension of 20% of the basic salary until June 2022 (EC3,586.80) and 13% of the basic salary thereafter[14] (EC$2331.42) and the Respondent's 75% contribution to the group insurance plan premium for the Complainant for the year.

Costs

86. The Complainant seeks legal costs in the sum of EC $8,108.00. Pursuant to Article XXI of the CCAT Rules of Procedure 2020, the Tribunal may make an order for costs as it deems fit.

87. While costs usually follow the event, a Complainant will not be required to pay a Respondent's legal costs unless the claim is vexatious, abusive, disruptive or otherwise unreasonably instituted or conducted.

[13] Staff Rules clause 13.
[14] Clause 5 of the Contract of Employment

88. This is the first case to heard and adjudicated by the Tribunal and dealt with novel issues in the context of international organisations in the Caribbean. The Complainant who has contributed 30 years to the Respondent had to retain Counsel, had to carry this matter to trial and do written submissions. We however take into consideration that the Respondent has not acted unreasonably in the conduct of the case before the Tribunal and was successful in defending part of the Claim.

89. In these circumstances, the Tribunal finds it just to make an order for the Respondent to pay a sum of EC$7,500.00 towards the Complainant's legal costs.

Decision

90. **NOW THEREFORE** the Tribunal

    a. declares that the non-renewal decision of the Complainant's contract was an abuse of discretion and in breach of due process.

    b. dismisses the Complainant's claim of discrimination.

    c. Orders the Respondent within 90 days to pay to the Complainant EC$43,508.74 and a sum equivalent to the Respondent's contribution to the group insurance plan on behalf of the Complainant for one year.

    d. Orders the Respondent within 90 days to pay to the Complainant costs in the amount of EC$7,500.00.

/s/Sir Patterson Cheltenham KC
President of the Panel

/s/J Emile Ferdinand KC
Judge

/s/Westmin R.A. James
Judge

/s/ Noel Inniss
Registrar

Port of Spain, Trinidad 11th January 2023