IN THE COMMONWEALTH SECRETARIAT ARBITRAL TRIBUNAL

IN THE MATTER OF

DR JOSEPHINE OJIAMBO
APPLICANT

and

THE COMMONWEALTH SECRETARIAT
RESPONDENT

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

JUDGMENT No 2

24 May 2019
**Introduction: the application before the Tribunal**

1 The Applicant, Dr Josephine Ojiambo, was employed by the Commonwealth Secretariat as a Deputy Secretary-General (DSG) from 12 January 2015 until 11 January 2018. At the time of her appointment as Deputy Secretary-General (Political) she was one of three Deputy Secretaries-General employed by the Secretariat.

2 Dr Ojiambo’s contract of employment provided for a term of three years, which as the letter offering her the position explained “may be renewed subject to satisfactory performance and the organisation’s requirements at that time.”

3 By 2016 the Secretariat was facing significant financial constraints. Its expenditure substantially exceeded its revenue, and it was required to draw on its reserves to fund continuing operations. The newly appointed Secretary-General, Baroness Scotland QC, commissioned a comprehensive review of the organisation with a view to effecting major structural reforms. A number of cost-saving measures were adopted to reduce expenditure in the short term, pending the outcome of that review. In that context the Secretary-General decided in 2016 that the three serving Deputy Secretaries-General would not have their contracts renewed. The roles would be retained but would be kept vacant until the review was completed and the Secretariat’s financial position was resolved. The Secretary-General kept the Board of Governors of the Commonwealth Secretariat, and the Board’s Executive Committee, informed about the review and about her decision not to renew the terms of the three Deputy Secretaries-General.

4 Dr Ojiambo was aware of these measures and of the decision not to renew the terms of the current DSGs. One DSG left in December 2016, and another in June 2017 after an extension of his term for several months to accommodate his family circumstances. From July 2017 onwards Dr Ojiambo was the only serving DSG.

5 On 31 July 2017 Dr Ojiambo was advised by email that her contract would not be renewed. The email referred to the financial constraints affecting the Secretariat. Dr Ojiambo considered that her appointment should be renewed: her understanding was that the organisation required a DSG to carry out the functions she was performing, and that the Secretariat’s finances had improved sufficiently that it could afford to renew her contract. She raised these issues with the Secretary-General in person, and by email.

6 Discussions and correspondence followed over the next five months. Dr Ojiambo expressed concern about the failure to renew her contract and about certain other aspects of her treatment by the Secretariat, and raised the possibility of grievance proceedings. In the course of those discussions, the Secretary-General offered Dr Ojiambo a 3.5 month extension of her contract to the end of April 2018. Dr Ojiambo agreed to this extension, while continuing to press for concerns that she had raised about her work plan and certain other matters to be addressed. However the Secretary-General then advised Dr Ojiambo that the renewal was subject to certain conditions, including that Dr Ojiambo accept the extension “in full and final settlement of ALL outstanding issues in relation to your position as DSG without any reservation”. ¹ This conditional offer was not accepted by Dr Ojiambo.

¹ Email dated 4 December 2017, capitalisation of “ALL” in the original.
Dr Ojiambo’s contract expired without being renewed. Her employment came to an end on 11 January 2018.

Dr Ojiambo made an application to the Tribunal challenging the decision not to renew her contract. She sought relief including the grant of a further contract for three years, and/or compensation.

The Liability Judgment

In its first judgment in this matter issued on 14 December 2018 (“the Liability Judgment”) the Tribunal found that the Secretariat breached its contractual obligations to Dr Ojiambo by:

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

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

The Tribunal dismissed Dr Ojiambo’s claim for compensation arising out of other aspects of her treatment in the period from 31 July 2017 onwards.

The Tribunal concluded that if the Secretariat had not breached its obligations in the manner described above, it would have made an unconditional offer of renewal of Dr Ojiambo’s contract for a period of at least 3.5 months, and possibly longer. Dr Ojiambo would have accepted such an offer.

The Tribunal held that the appropriate remedy is an award of compensation to Dr Ojiambo in respect of the loss she has suffered as a result of the Secretariat’s breaches. That loss includes both financial loss and the stress and inconvenience caused by those breaches.

The Tribunal did not have sufficient evidence before it to quantify that loss. As the Tribunal noted in the Liability Judgment, it generally expects the parties to address all issues, including the amount of any compensation claimed, in their pleadings. But in this case neither party engaged with the issue of quantum in any detail in their pleadings. In those circumstances, the Tribunal considered that the appropriate course was to issue directions that provided for the parties to make submissions on the amount of compensation to be awarded.

The Tribunal encouraged the parties to seek to resolve the question of quantum by agreement, to avoid the time and expense involved in a further determination by the Tribunal.

The Tribunal made the following formal orders:

15.1 the Tribunal declared that the Secretariat breached its obligations to Dr Ojiambo by declining to renew her contract of employment for a further term without considering whether there was, at the time of that decision, a good reason not to renew her contract;
15.2 the Tribunal declared that the Secretariat breached its obligations to Dr Ojiambo by making an offer of renewal on a short term basis that was conditional on Dr Ojiambo settling all outstanding issues in relation to her position as DSG;

15.3 the Tribunal reserved leave to the parties to make submissions on the amount of compensation to be awarded to Dr Ojiambo in respect of the breaches by the Secretariat of its obligations. The Tribunal set a timetable for filing submissions and any evidence on compensation. That timetable was subsequently varied by consent to provide the parties with more time to seek to reach agreement on compensation;

15.4 Dr Ojiambo was awarded costs in respect of her application to the Tribunal. The parties reached agreement on costs up to and including the Liability Judgment.

16 The parties were not able to agree on the amount of compensation to be paid by the Secretariat to Dr Ojiambo. They filed submissions on this issue, and Dr Ojiambo provided evidence to support her compensation claim. No further evidence was provided by the Secretariat.

17 This judgment addresses the question of compensation. It should be read together with the Liability Judgment. We will not set out all the facts again – the background to Dr Ojiambo’s application to the Tribunal, which was not in dispute in any material respect, is set out in detail in the Liability Judgment.

Approach to determining compensation

18 Article X(1) of the Tribunal’s Statute provides:

If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked, or in addition to, or alternatively to any such remedy, appropriate compensation for any loss or damage occasioned. Where an application is made by a staff member, where relevant, the Tribunal shall, at the same time, fix the amount of compensation to be paid to the applicant for the loss, injury or damage sustained, provided that such compensation shall not normally exceed the equivalent of three years’ net remuneration of the applicant. The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher amount of compensation. A statement of the specific reason for such an order shall be made.

19 The purpose of an award of compensation is to put Dr Ojiambo in the position in which she would have been if the breaches identified in the Liability Judgment had not occurred.2

20 In assessing the appropriate level of compensation the Tribunal has a broad discretion to award what is equitable for the injuries sustained.3

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2 See Venuprasad CSAT APL/40 (No 2) at [48].
3 See Venuprasad CSAT APL/40 (No 2) at [49], citing Addo CSAT/21 at [118].
Loss of remuneration

21 Dr Ojiambo’s claim for compensation for loss of remuneration is put on the basis that if the Secretariat had not breached its obligations to her, she would have obtained either

21.1 an immediate three year contract extension (taking her employment to 11 January 2021), or

21.2 a short-term extension (taking her at least to 30 April 2018) followed by a further substantive three year extension (taking her to 30 April 2021).

22 Dr Ojiambo says that if the Secretariat had acted lawfully and had not committed the breaches found by the Tribunal, it is likely that she would have been offered a further three year term. There were no concerns about her performance. The only barrier to a second three year term identified by the Secretariat was its financial circumstances. The Tribunal found that there was evidence to support the inference that there had been material improvements in the Respondent’s financial position by mid-2017.4 By late 2017 the Respondent’s finances had improved to the point where the Respondent was able to make an offer of a 3.5-month contractual extension. The Respondent gave no consideration at that point to the affordability of a longer extension for a full three-year term.5 Thus, Dr Ojiambo says, the question is whether things had improved sufficiently by the end of 2017 that had the Secretariat given proper consideration to the relevant circumstances it would have offered her a substantive contract renewal.

23 Dr Ojiambo emphasises that the Secretariat chose not to provide any evidence about its financial circumstances in late 2017, either at the liability stage of the proceedings or in connection with the determination of compensation. Dr Ojiambo emphasises that this information is solely within the knowledge of the Secretariat. She invites the Tribunal to draw the inference that the Secretariat was in a position to afford a three year term as at the end of 2017: if there was evidence to the contrary, the Secretariat could, and should, have provided it to the Tribunal.

24 Alternatively, Dr Ojiambo says she would have been offered an unconditional short term appointment, and it is likely that she would subsequently have been offered an extension of that appointment for a full three year term once the Secretariat’s financial ability to do so was confirmed. By mid-2018 at the latest the Secretariat knew it could afford a three year contract for a DSG, as it proceeded to advertise for a new DSG in July 2018.

25 Dr Ojiambo says she has made extensive efforts to obtain alternative employment, but has not been able to find a suitable full time position. She has provided detailed evidence about those efforts, and about the remuneration she has received since leaving the Secretariat.

26 Dr Ojiambo asks the Tribunal to order that she be compensated for her losses to date, plus future losses up to 11 July 2020, i.e. for 30 months from the end of her employment on 11 January 2018. She submits that calculating compensation on the basis of this period of loss is appropriate for the following reasons:

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4 Liability Judgment at [81].
5 Liability Judgment at [82], [102] – [103].
a. The number of suitable roles which become available at the Applicant’s level of seniority is inherently limited.

b. The Applicant finds herself on the labour market at a time other than that of her choosing.

c. She has now not been in full time work for well over a year since her employment ended on 11 January 2018.

d. Her extensive attempts to mitigate her loss during that period have not borne fruit, and there is no indication that they are likely to do so in the near future.

e. Further, this period of unemployment represents an unwelcome gap in her CV.

f. The Applicant is a high-profile individual, and it is a matter of public record that she has brought proceedings against her former employer. This may adversely affect the perception held of her by some potential employers.

g. It is possible that the Applicant might secure an appropriate role sooner, but equally it might take longer. Further, once an appropriate role is identified it may not be possible for her to start it, and to recommence her earnings, straight away.

h. It is quite likely that an appropriate role would be paid less than the DSG role which she lost, which carried a high (£148,602) basic salary plus significant financial and other benefits.

Dr Ojiambo’s submissions anticipated that the Secretariat would argue that compensation in respect of lost remuneration should be awarded for a shorter period because the Secretariat might not have renewed her contract even if it had acted lawfully, or might have offered a renewal for less than a full three year term. Her submissions in response to that argument read as follows:

30. It is anticipated that the Respondent may seek to invite the Tribunal to discount the compensation payable to the Applicant to reflect the possibility that her contract would not have been renewed had it acted lawfully. The Applicant submits that no such discount should be made, for two reasons.

a. The Tribunal rejected this argument, and declined to undertake such an exercise and to apply any discount, in Ayeni (No. 2), where the Applicant had not been considered for a renewal of his contract for a second term:

“48. It is not contested by the Respondents that in those circumstances the Applicant is entitled to compensation for the loss of that expectancy. However, the Respondents contend that the [Applicant] had only a 50% chance of having his contract renewed even though that fact was unique in the Secretariat since under the Respondent’s’ rotation
policy, some twelve persons in similar positions to that held by the Applicant had had their contracts renewed for a second three-year contract. It is not the province of the Tribunal in deciding what remedy to give or the quantum of compensation, to consider what the Respondents may or may not have done had they followed their own rules in this matter.

49. We must consider what loss the unlawful action of the Respondents has caused to the Applicant. The loss to the Applicant is the value of a new contract for which he was not even considered, although he was entitled to be fairly considered.”

b. Further, even if the Tribunal considered it appropriate to depart from the approach taken in Ayeni, it is submitted that no discount should be made on this basis, since for the reasons already given there was little or no real prospect that, had the Respondent acted lawfully, the Applicant would not have been granted a substantive 3-year extension of her contract.

The Secretariat’s response

28 The Secretariat says that compensation should be awarded on the basis that but for the breaches Dr Ojiambo would have been offered, and would have accepted, an extension of her contract for 3.5 months ie to the end of April 2018. The Secretariat says it is entitled to rely upon the minimum period which would have been accepted by Dr Ojiambo, as found by the Tribunal. An appropriate amount of compensation would therefore be based on 3.5 months of earnings, plus an appropriate amount for stress and inconvenience.

29 The Secretariat distinguishes Ayeni (No 2) as follows:

16. The case of CSAT/12 (No.2) Ayeni may be distinguished because, in the present circumstances, it was not envisaged that there would be another 3-year contract, as the restructuring at senior levels was the reason for keeping the positions vacant. The Board and ExCo asked that the role of the DSG be reconfigured in June 2018.

30 The Secretariat says that Dr Ojiambo was given significant notice of non-renewal of her contract on 27 September 2017, and was paid for six months from the date of her formal notice of non-renewal. She was therefore paid in full until 26 March 2018, 10.5 weeks after her term of employment finished on 11 January. The Secretariat says that this notice period is intended fairly to give employees the time to make arrangements for their departure, and that this must be taken into account in addressing the issue of what further compensation Dr Ojiambo is entitled to.

31 The Secretariat says that even if there had been a renewal for more than 3.5 months, there was no prospect of an extension beyond 30 June 2018:

20. In addition, even if the short renewal extended beyond 3.5 months, there would be no possibility of any employment continuing beyond the end of the budgetary year on 30 June 2018.
By that time, even if any short term renewal had extended beyond 30 April, it was clear that the Board envisaged a DSG role embracing a wider range of functions than that of the former DSG (Political) role.

In particular, the Secretariat says there was no prospect of a further three year term because the needs of the Secretariat had changed as a result of moving from three DSG roles to a single DSG role:

12. The Respondent does not accept that it was ever considered that a further contract up to 11 January 2021 was available to the Applicant. There was an exchange of views about an extension to the end of April 2018, beyond the Commonwealth Heads of Government Meeting, and a request by the Applicant to extend to August 2018. However, it was always clear from July 2017 onwards that as the sole remaining DSG, the Applicant would be responsible for CFTC matters, and that the role of DSG (Political) would not be renewed at the end of her contract because there was a need for a broader range of skills, if and when the DSG role was filled.

Addressing the claim based on the prospect of a renewal for a further three year term, the Secretariat says:

21. If, to the contrary, in the further alternative the Applicant were entitled to a further contract until 11 January 2021, there is no basis on which the award should be 30 months, because the Respondent had a duty to mitigate her loss: see Ayeni (No.2) at paragraphs 50 and 86. We therefore invite the Tribunal to award compensation in respect of no more than 50% of that period, in this scenario.

22. The Respondent's efforts to find new employment are relatively extensive. However, some positions applied for have been at a more senior level than that held by the Applicant at the Secretariat and in much larger organisations. A lack of success in a highly competitive field may suggest a need to strategically re-evaluate key strengths of the Applicant compared to the requirements of the vacant positions in order to demonstrate "serious and determined efforts to find alternative employment".

Dr Ojiambo's reply

34 Dr Ojiambo’s reply emphasises the Tribunal’s finding that if the Secretariat had acted lawfully, it would have offered a 3.5 month contract and possibly longer. She says:

3. First, the Secretariat seeks to downplay the significance of the Tribunal’s finding at paragraph [117] that had the Secretariat not breached its obligations it would have offered a 3.5 month contract “and possibly longer”. Indeed the Secretariat goes so far as to submit that it is “entitled to rely upon the minimum period which would have been accepted by the Applicant”, an approach which entails re-writing the Tribunal’s decision.
4. These important words – “and possibly longer” – reflect the fact that the Applicant won on her primary case, namely that the Secretariat acted unlawfully in reaching its decision not to offer a substantive 3 year renewal (Judgment paragraphs [73]-[83] and [115.1] and [124.1]). While it is possible that if the Secretariat had acted lawfully it would not have offered a 3 year renewal at that stage, there was also a real chance that a 3 year extension would have been offered. The Tribunal has not yet assessed that chance, but it has certainly made no finding that this breach made no difference to the outcome and, on the contrary, it held that the Applicant is entitled to compensation “for the loss she has suffered as a result of the Secretariat’s breaches” (Judgment at [119]) – the plural is used, without qualification.

5. It follows that the Applicant is entitled to compensation for the loss of that chance, and that to delete from the Judgment the words “and possibly longer”, as the Secretariat seeks to do, would leave the Applicant without any remedy on this core part of her case.

35 Dr Ojiambo’s reply notes that the Secretariat chose not to provide any further evidence on the circumstances relevant to renewal as at the end of 2017, and says that this reinforces her submission that if proper consideration had been given to renewal at that time, a three year renewal would have been offered.

36 In response to the submission that the DSG role had changed, so there was no prospect of a three year renewal in the DSG – Political role, Dr Ojiambo says:

7. The Secretariat refers at paragraphs 12, 16 and 20 of its Submissions to the DSG role which was advertised in 2018 being intended to embrace a broader range of skills than were required in the role which the Applicant had carried out. No evidence in support of that submission is identified, nor is any explanation offered as to the precise differences; and even if the role was in some way subtly different there is no reason to think (and it is not suggested by the Secretariat) that the Applicant would not have been able to carry it out. During the last 6 to 8 months of her role at the Secretariat, she had oversight for all programs, entailing both a technical and administrative stewardship for all programs in the areas of politics and governance, human rights, rule of law, youth, women, education, health, small states, macroeconomic policy, climate change, trade, oceans and natural resources.

37 Dr Ojiambo also takes issue with the argument that the Tribunal should disregard the possibility that a short term renewal would have left her well placed to take advantage of the Secretariat’s improving financial circumstances, and obtain a full three year renewal at a later date. She says that a proper award of compensation “must reflect the reality that she would have been highly likely to have been retained on a long-term basis.”

38 Dr Ojiambo says that she has taken reasonable steps to mitigate her loss, and that the period of future loss she claims is reasonable, having regard to the difficulties which she has encountered in finding appropriate alternative work.
The Tribunal held that if the Secretariat had not breached its obligations to Dr Ojiambo, it would have offered her an unconditional extension of her contract for a period of at least 3.5 months, and possibly longer. She is entitled to be placed in the position in which she would have been if the Secretariat had not breached its obligations. We accept Dr Ojiambo’s submission that the prospect of a renewal for more than 3.5 months cannot simply be disregarded: that would not be consistent with our findings.

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

There are two broad ways in which the appropriate amount of compensation for loss of remuneration could be approached. One approach would be for us to make a finding about the likely length of extension that would have been offered by the Secretariat, if it had acted lawfully and had taken into account all relevant considerations. The second approach would be to award compensation for loss of a renewal of at least 3.5 months, together with an award for the loss of a chance of a longer renewal.

On the first approach, the evidence establishes that the Secretariat’s financial circumstances in late 2017 did not preclude renewal of Dr Ojiambo’s contract for 3.5 months. There is evidence before the Tribunal to support the inference that there had been material improvements in the financial position of the Secretariat by mid-2017. By mid-2018 the Secretariat was in a position to recruit a new DSG for a three year term: so by mid-2018 financial constraints were no longer a barrier to employment of a DSG for a full three year term. It is possible that there was a material improvement in the Secretariat’s financial circumstances in the first half of 2018 which made a three year term feasible even though it was not feasible as recently as December 2017, but we have not seen any evidence to that effect. There is force in Dr Ojiambo’s submission that against this backdrop it was incumbent on the Secretariat to provide evidence that financial circumstances in late 2017 would have precluded renewal for a longer period, and that the Secretariat has failed to do so. In those circumstances we do not consider that we

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6 At [75].
7 Liability Judgment at [81].
should take the Secretariat’s financial circumstances into account in determining the likely length of a renewed term, if a lawful decision had been made in late 2017.

We see more force in the Secretariat’s argument that the reduction in the number of DSGs from three to one was likely to result in a change in the nature of the role, and the experience and skills required to perform it. We consider that it was open to the Secretary-General to decide in late 2017 that she would renew Dr Ojiambo’s contract for a period that would enable Dr Ojiambo to complete her existing responsibilities, and perform the important role of DSG, while the needs of the Secretariat were reviewed and consideration was given to how many DSGs were required in the future, and what the future role and responsibilities of those DSGs should be. It is likely that a renewal period determined on that basis would take into account the real prospect of a reduction in the number of DSGs to one, the time that would be needed to advertise that position and make an appointment to it, and the desirability of having a DSG in place throughout that period.

On this approach, we consider that an extension to a date somewhere between the end of August 2018 (the date suggested by Dr Ojiambo in her email of 21 November 2017) and the end of 2018 was likely. We do not consider that it is likely that the Secretary-General, acting lawfully and taking into account all relevant factors, would have offered a term of only 3.5 months. Nor however do we consider it likely that she would have offered a full three year term in the context of a significant restructuring of the Secretariat’s senior management positions. It is not possible to be more precise. The mid-point of this period is 31 October 2018.

It is possible that if Dr Ojiambo had been offered an unconditional extension through to a later date, she might have been offered a longer extension after the Secretary-General and the Board had decided to appoint a single DSG for a three year period. But we think it is more likely that a new DSG role would have been advertised. It would not be appropriate for us to base an award of compensation on speculation about the possibility that Dr Ojiambo might have successfully applied for the new role. We therefore decline to take into account the possibility of a further term of employment, following the likely short term extension.

We consider that an award of compensation for loss of remuneration assessed on the basis of a likely renewal until 31 October 2018 would be equitable to both parties. Dr Ojiambo was paid until 26 March 2018. So the award would reflect her loss of remuneration from 27 March to 31 October 2018: just over seven months.

On the second “loss of a chance” approach, the compensation awarded would have two components: the loss from 27 March to 31 April 2017, plus an allowance for the lost chance of a longer extension of up to 3 years. The chance of an extension for a full three years was in our view small. The chance of a shorter extension was high. Again, it is not possible to be precise – any mathematical assessment of these probabilities would be artificial. Using this approach as a cross-check on the first approach, we see an award of a further six months’ remuneration as a reasonable reflection of the value of this lost chance.

We therefore consider that a fair award, in the exercise of the broad discretion referred to at [20] above, would proceed on the basis that Dr Ojiambo should be compensated for loss of remuneration for the period 27 March 2018 to 31 October 2018.

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8 Liability Judgment at [93].
The parties are in agreement on how compensation for loss of remuneration should be calculated, subject to a small adjustment to the after tax salary figure suggested by the Secretariat which is favourable to Dr Ojiambo. On the basis of the approach to calculation of lost remuneration adopted by the parties, the appropriate figure appears to be £82,634.26.9

During the period by reference to which this award has been calculated (i.e. 27 March to 31 October 2018), Dr Ojiambo earned the sum of £3,650 from consulting work. This should be deducted from the award by way of mitigation. The other earnings referred to in Dr Ojiambo’s witness statement and schedule of loss relate to the period after 31 October 2018: we do not consider that there should be any deduction in respect of those earnings.

Thus the net award in respect of loss of remuneration is £78,984.26.

**Compensation for stress and inconvenience and injury to feelings**

It is well established that compensation for stress and inconvenience and injury to feelings (moral injury) can be awarded by the Tribunal in an appropriate case, having regard to the seriousness of the harm suffered.10

The Secretariat breached its obligations to Dr Ojiambo in connection with the renewal of her contract. The process followed by the Secretariat was unsatisfactory in a number of respects. Dr Ojiambo was presented with an unlawful ultimatum requiring her to waive any rights she might have in order to obtain a short term extension, and was forced to make difficult choices about the offer made to her and about her future at short notice. This inevitably caused stress and inconvenience. Dr Ojiambo’s evidence confirms that the abrupt termination of her role following the period of negotiations about renewal in the second half of 2017 caused her, and her family, considerable continuing stress and inconvenience throughout 2018. If the Secretariat had acted lawfully, and had treated Dr Ojiambo with the respect and concern to which she was entitled, these harms would not have occurred.

Dr Ojiambo claims the sum of £30,000 for injury to her feelings and for stress and inconvenience. The Secretariat submits that the appropriate figure for these moral injuries is no more than £10,000.

The harm caused to Dr Ojiambo by the Secretariat’s breaches was real and significant. However we do not consider that the harm caused by the Secretariat’s breaches in this case was as serious as the harm suffered by Mr Venuprasad, in respect of which the Tribunal recently awarded £30,000 for serious harm to reputation and harm to feelings.11 Taking into account the evidence before us, and the parties’ submissions on this issue, we consider that a fair award in respect of this head of loss is £20,000.

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9 Based on annual remuneration of £138,612.30 which equates to £2,665.62 per week, for a period of 31 weeks.


11 Venuprasad (No 2) at [81].
**Aggravated damages**

Dr Ojiambo claims aggravated damages, on the basis that the stress to which she has been put has been exacerbated by the Secretariat’s conduct of these proceedings. In particular, she emphasises that in its Rejoinder the Secretariat argued, for the first time, that she had failed to exhaust internal remedies and that the claim should be dismissed for lack of jurisdiction. She says (footnotes omitted):

41. This point was without merit and, as explained in the Applicant’s further submissions dated 5 November 2018, it was an abuse of process for the Respondent to raise it at that late stage. There was a particular irony in the Respondent’s position in that when the Applicant had sought to raise concerns internally, she had suffered retaliation for doing so.

42. The Respondent sought to argue that the Applicant should not even be afforded a right of reply on the newly-taken jurisdictional point and then, when invited by the Tribunal to respond to the Applicant’s arguments, the Respondent abandoned the point altogether.

43. The Applicant accepts that this Tribunal process is one where parties may be expected to defend their positions robustly. But this particular line of attack should never have been used and, as already submitted, amounted to an abuse of process. It crosses the threshold of conduct for which an award of aggravated damages is appropriate.

The Secretariat submits that there are no grounds whatsoever on which to make an award of aggravated damages. It withdrew this argument and has already agreed legal costs for this aspect of the proceedings, which would address any costs incurred by Dr Ojiambo in relation to this point. The Secretariat submits that there is no relevant loss that Dr Ojiambo has suffered and that no award for aggravated damages should be made.

The Tribunal agrees with Dr Ojiambo’s submission that the jurisdiction argument lacked any merit, and should not have been made. But we do not consider that the Secretariat’s conduct of these proceedings crosses the threshold that would justify an award of aggravated damages. Any direct loss caused by the way in which the proceedings were conducted, including any additional legal costs incurred in responding to the jurisdiction argument, has already been compensated through the award of costs made by the Tribunal. An award of aggravated damages, in addition to the compensation awarded under other heads and the award of costs, is not appropriate.

**Other losses claimed by Dr Ojiambo**

Dr Ojiambo provided a detailed schedule of loss setting out the calculation of her loss of remuneration, and a number of other losses. The Secretariat filed a detailed schedule in response. We have already dealt with the claim for loss of remuneration. We now consider the other losses claimed.

Dr Ojiambo claims for 75% of the university fees payable by her dependent daughter Veronica for one semester. She says that if her employment had continued, these fees would have been
reimbursed. The Secretariat says it made a payment in February 2018 reimbursing fees for the semester ending in May 2018, and it does not accept that any further reimbursement is due.

Dr Ojiambo’s witness statement refers to fees for her daughter’s final semester, noting that she was a student at the university until June 2018. If Veronica completed her studies in June 2018, and fees to May 2018 had been reimbursed by the Secretariat, it is not clear what semester any additional payments might relate to. Veronica does not appear to have been a student at the university for a further full semester in respect of which fees would have been payable by Dr Ojiambo. The supporting documents provided by Dr Ojiambo do not shed any light on this issue. No further clarification was provided in Dr Ojiambo’s reply submissions. The evidence before us is not sufficient to support a claim for compensation for loss of reimbursement of further university fees beyond May 2018.

Dr Ojiambo also claims for the expenditure she incurred in connection with addressing the visa position of Veronica, whose visa status and university student status were affected by the loss of Dr Ojiambo’s diplomatic visa. The Secretariat opposes this claim on the basis that it has no responsibility for visa costs, or in respect of any associated fees. The Secretariat is right to say that it is not normally responsible for costs of this kind. But the Tribunal considers that these costs would not have been incurred by Dr Ojiambo but for the Secretariat’s breaches. Dr Ojiambo is entitled to the claimed compensation of £3,188.

Dr Ojiambo also claims compensation for costs incurred in connection with obtaining a visitor’s visa to enable her to visit the UK to resolve her daughter’s visa and university status issues. These are also costs that would not have been incurred by her but for the Secretariat’s breaches. However some of the costs claimed relate to the fact that Dr Ojiambo’s passport was lost in the course of its return to her by the British High Commission in Kenya, and had to be replaced. We consider that these losses are not sufficiently closely connected to the Secretariat’s breaches for it to be equitable to require the Secretariat to pay compensation for them. We award £171 under this head.

Dr Ojiambo claims for medical costs which she incurred because when her employment came to an end, she lost access to free medical care through the NHS and through the private medical insurance paid for by the Secretariat. She does not claim that the medical conditions for which she required treatment were caused by the Secretariat’s breaches. But she says that the cost to her of paying for the treatment was a direct consequence of those breaches. The Secretariat does not accept this claim, on the basis that it was not responsible for the medical condition and there is no claim for personal injury. This response appears to be based on a misunderstanding of the basis of the claim. We consider that these sums are in principle recoverable: if the Secretariat had not breached its obligations, Dr Ojiambo would not have incurred these costs. Dr Ojiambo claims the sum of £2,108.97 in respect of these costs. However it appears that some of the amount claimed relates to medication costs for periods after 31 October 2018, the date which we have treated as the likely end date for her continued employment, and thus for continued access to free medical care. On the basis of the limited information available, and adopting a pragmatic approach to avoid further delay in resolving this matter, we award a round sum of £2,000 in respect of these costs.
Dr Ojiambo claims for additional costs such as paying duty on alcoholic drinks as a result of the loss of her diplomatic immunity. We do not consider that this loss is sufficiently closely connected to the Secretariat’s breaches for an award of compensation to be appropriate.

The total of the other costs and losses in respect of which we have awarded compensation is £5,359.

Finally, Dr Ojiambo claims for certain future losses after the date of this judgment. However these claims are predicated on the Tribunal accepting her argument that it is likely that she would have been offered a further term of employment extending beyond the date of this judgment. We have not accepted that argument, so these losses are not recoverable.

**Interest**

The parties agree that interest should be awarded on compensation relating to loss of remuneration from the midpoint of the period of loss at the rate of 2.5% per annum. We consider that this is an appropriate approach. We award interest at the rate of 2.5% per annum on the compensation for loss of remuneration from 15 July 2018 to the date of this judgment.

Dr Ojiambo also claims interest on other financial losses from the same midpoint date until the date of judgment at the rate of 2.5% per annum. The Secretariat’s submissions do not address the question of interest on other forms of financial loss. The rationale for an award of interest applies to all financial losses. The use of the same midpoint date as the starting date for interest on these losses is a sensible and pragmatic approach. We award interest at the rate of 2.5% per annum on the total compensation of £5,359 in respect of those other financial losses from 15 July 2018 until the date of this judgment.

Dr Ojiambo has not claimed interest on compensation for moral injury. The Secretariat opposes an award of interest on compensation for moral injury. We agree that interest should not be awarded on this component of the compensation.

**Costs**

The Secretariat submits that the question of costs should be reserved until after the award of quantum is made, because further submissions will have to be made on matters which cannot be drawn to the attention of the Tribunal at this stage. Dr Ojiambo’s reply submissions agree with this approach. We proceed on that basis.

**Formal orders**

The Tribunal makes the following orders:

72.1 the Secretariat must pay Dr Ojiambo compensation of £104,343.26 comprising:

(a) £78,984.26 for loss of earnings;
(b) £20,000 for moral injury;
(c) £5,359 for other costs incurred as a result of the Secretariat’s breaches;

72.2 the Secretariat must pay interest on the sums of £78,984.26 and £5,359 referred to above (ie on a total sum of £84,343.26) from 15 July 2018 to the date of this judgment at a rate of 2.5% per annum;
72.3 costs are reserved. If costs cannot be agreed by the parties they will be fixed by the Tribunal on the basis of the parties’ written submissions. Leave is reserved to either party to apply for costs to be fixed.

Delivered on 24 May 2019

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Mr David Goddard QC, Acting President

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Mr George Erotocritou (Former Justice, Supreme Court of Cyprus), Member

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Ms Justice Aruna Narain, Member

and

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Mr Richard Nzerem, Secretary to the Tribunal