

IN THE INDUSTRIAL TRIBUNAL

Case No. Ind Tri 22/2014

BETWEEN:

EMMANUEL CHARLES LINARES

Complainant

-and-

EMPLOYMENT TRAINING COMPANY LIMITED

Respondent

DECISION

1. I am asked to determine a claim for unfair dismissal.
2. In my decision I refer to and repeat some of the facts set out in my previous decision dated 31 October 2016 which related to an application by the Complainant to order the attendance of a witness at the hearing of this Complaint, namely the Chief Minister The Hon Mr Fabian Picardo QC MP (“**the Chief Minister**”) in his official ministerial capacity, pursuant to Rule 10(1)(c) of the Industrial Tribunal Rules 1974.
3. At the hearing of this matter the Complainant appeared in person and the Respondent was represented by Mr Craig Pilcher.
4. The hearing was limited to the question of liability only, with quantum to be determined at a later date if liability was established.

The Complainant’s grounds

5. These are set out in the Complainant’s IT1 Form dated 28 November 2014 and expanded upon in his Statement of Occurrences.
6. In the IT1 Form, the Complainant lists his grounds as follows:

“The ground cited in the Notice of Termination is “unsuitability”. At no time during my period of employment have I been advised of [sic] I was unsuitable. On the contrary the limited monthly appraisals record my overall performance as excellent for the most part but never less average. It follows that I cannot be fairly dismissed for unsuitability”.
7. The Complainant is arguing that the Respondent therefore cannot show that the reason or principal reason for the dismissal was the Complainant’s unsuitability for the post as per the requirements of s.65(2)(a) of the Employment Act 1932.
8. The Complainant expands upon his grounds in the Statement of Occurrences which is cross-referenced to a number of documents.
9. In the summer of 2012, the Complainant closed his property maintenance business.

10. Sometime in, presumably, early 2012, following a number of unsuccessful job applications, the Complainant met with the then Minister for Employment The Hon Mr Joe Bossano MP (“**Minister Bossano**”) to discuss his employment situation. Minister Bossano suggested that he set up a building company which would receive support from Government by way of work and labour but he did not feel able to manage another company.
11. On 5 March 2012 the Complainant wrote a letter to the Chief Minister asking if he or any of his ministers could help him find “*employment in any capacity*”.
12. The Chief Minister met the Complainant on 27 September 2012 at his office and explained that he had something for the Complainant but he first needed to speak with Minister Bossano.
13. Approximately two weeks later, sometime in, presumably, early October 2012, the Complainant received a call from Mr Gomila (“**Mr Gomila**”) at the Employment Service informing him that a position had been identified for him. When he saw the proposed contract, it was a position as a trainee undertaking messenger duties at the Gibraltar Tourist Board. The Respondent complained that the Chief Minister had not said that the position would be as a trainee and even less a messenger, but he appears to have signed the contract on the suggestion by Mr Gomila that at least he would have “a foot in”.
14. Somewhat confusingly, and whilst nothing appears to turn on this issue, the Notice of Terms of Engagement dated 8 October 2012 (“**Notice of Engagement**”) state the period of employment as commencing on 11 October 2012 and terminating on 10 January 2013 – i.e. three months – but also records the said period as being “for an indefinite period (Max 11 Months)”. The position is recorded as Messenger at the Gibraltar Tourist Board.
15. A short while later, the Complainant received a call from the Chief Minister’s office explaining that there had been a misunderstanding and asking him to return to the Employment Service.
16. Following that call, he received a further call from Mr Gomila also asking him to return to the Employment Service the next day.
17. On 11 October 2012 the Complainant was offered a three-month trainee contract with the Respondent to work with the Gibraltar General Construction Company Limited (“**GGCCL**”) as a project manager assisting Manager Mr Paul Baglietto (“**Mr Baglietto**”). The Complainant accepted the offer.
18. On or around 11 January 2013, after completion of the said three-month training period with GGCCL, when the Complainant asked what would be happening to him, he was informed by Mr Baglietto that the Chief Minister had extended his appointment at GGCCL for a further 3 months. During this extended period, the Respondent continued to be on a trainee contract.
19. On or around 11 April 2013, after completion of the second three-month period, he asked a director of the Respondent, Ms Joanna Hernandez (“**Ms Hernandez**”), to ask

- the Chief Minister what would be happening to him, but received no response. His appointment with GGCCCL continued as normal in the meantime.
20. In or around 11 June 2013, after 8 months in the position with GGCCCL, the Complainant met the Chief Minister outside No 6 Convent Place and asked him what was going to happen to him, to which the Chief Minister replied that he should make arrangements to meet him and informed the Complainant that his secretary would contact him later that day. That day the Chief Minister's secretary called the Complainant and invited him to a meeting on 5 July 2013.
21. On 5 July 2013 the Complainant arrived for the meeting to find that it was not with the Chief Minister himself but with his secretary. The Complainant explained that he had expected to meet the Chief Minister, which his secretary attributed to a misunderstanding and explained that the earliest available date for a meeting with the Chief Minister was in September 2013. The Chief Minister's secretary explained that an extension of his contract with GGCCCL was not possible and suggested that the Complainant apply for any government department vacancies that arose. The Complainant requested that a vacancy be opened for the project manager role but she explained that this was not possible.
22. On 6 July 2013 the Complainant met with Minister Bossano at his office where he was informed that "*he* (Minister Bossano) *was not going to employ anybody at GGCCCL and that he was told to employ me* (the Complainant) *for six months and that to that day he had not been told anything else.*" Minister Bossano explained that GGCCCL would not employ anyone because it had lost over two million pounds when it had employees. He went to on to explain that the Respondent was set up to train people to work in the private sector which the Complainant appeared not to understand because he did not consider that he required training and had come from the private sector.
23. That same day, following the meeting with Minister Bossano, the Complainant informed Mr Baglietto that he was handing over his workload to him and that he would no longer carry out project management. His reasons were that he did not feel valued in the work that he was carrying out and that he was therefore not prepared to shoulder such responsibilities for the wages that he was receiving. He started to undertake lighter duties checking work requisitions sent by the Housing Department.
24. On Friday 26 July 2013 the Complainant was asked by his manager Mr Martinez to report to Mr Jason Davis ("**Mr Davis**") at the Ministry of Financial Services on Monday 29 July.
25. On 29 July 2013 Mr Davis instructed the Complainant to carry out indexing of a large number of files, catalogues and boxes and messengering duties. The Complainant refused the instruction and, having explained to Mr Davis that he "*had not been in the construction business for forty years to end up as store man*", he left.
26. On 30 July 2013 the Complainant saw the Chief Minister – it appears by chance and not at his office – who, having heard the Complainant explain why he had left the position at the Ministry of Financial Services the previous day, asked if his secretary Mrs Ghio ("**Mrs Ghio**") had got in touch with the Complainant. The Complainant replied that she had not and the Chief Minister responded that he would look into this.

27. On 30 July 2013, based on a tip from Mr Baglietto before he had left GGCCCL that the Department of Education were looking for a clerk of works, he attended a meeting with Mr Flavio Madeira and Mr Chris Riddell (“**Mr Riddell**”) at the Department of Education, with the approval of the then Minister for Education and Justice the Hon Mr Gilbert Licudi QC MP (“**Minister Licudi**”). The Complainant was happy to engage as a trainee due to the overtime possibilities which the position offered. It appears that he met with Mr Alan Navarro of WSRM architects on that day and that his engagement was being organised by Mr Charles Savignon on the recommendation of Mr Riddell. It appears that this proposed appointment had not however been approved by the Respondent.
28. Much to the Complainant’s dismay, on Friday 2 August 2013 the Employment Service informed him that unless the Complainant returned to the position at the Ministry of Financial Services on 5 August 2013, he would “*face dismissal*”. At one point he asked – it is not clear to me who he asked – who had provided this ultimatum and he was unofficially told that it had been Ms Hernandez.
29. The Complainant fell ill with depression for two weeks and was off on sick leave as a result.
30. On 5 August 2013 the Complainant wrote a letter to the Chief Minister outlining events since the commencement of his employment with the Respondent and culminating with the events of 2 August. In that letter, he thanked the Chief Minister – “*I would like to start this letter thanking you for employing me.*” – and asking him to identify a suitable job for him – “*I implore you that all I request is for a job in my capacity for a fair wage. Thanking you hoping to hear from you.*”
31. Following his period of sick leave, the Complainant returned to the position at the Ministry of Financial Services where he worked for approximately 5 months. Performance reports appear (some are undated) to reveal a performance which improved over time with most performance criteria graded as ‘excellent’ and ‘good’ although a number of comments recommend him as being more suitable for the construction industry.
32. On 2 September 2013 the Complainant’s hourly rate was increased from £5.70 to £6.00 and his hours were decreased from 39 to 37 hours per week.
33. On 10 September 2013 the Complainant’s contract was extended for up to 11 months. At section 9 of the Notice of Variation of Terms of Engagement dated 25 September 2013 (“**the Notice of Variation**”) his “*employment is conditioned by initial employment within a Government Department or Agency pending a placement in the Private Sector with a job on completion of an agreed period of training and a business partnership agreement with the employer*”.
34. In a letter to the Chief Minister dated 4 October 2013, the Complainant provided an account of his attempts to meet with him since 5 July and complained of the unsuitability of his position at the Ministry of Financial Services, the fact that he had not received any formal training since the start of his employment and the irony of having been provided with a trainee to supervise himself. He also complained of

- providing cheap labour to the Respondent and of being victimised and punished by being obliged to carry out the menial duties allocated to him at the Ministry of Financial Services. He requested a return to undertaking maintenance work with the Care Agency (presumably under GGCCCL) and to continue doing overtime work. He signed off with the following words: *“With this I can only plead to you again, for you to look into this matter as the only thing I want is for a working post with a fair wage. Thanking you.”*
35. By a letter dated 25 January 2014, the Complainant was invited to a meeting with the Chief Minister at his office on 30 January. At this meeting, the Chief Minister asked the Complainant what he would like and he responded that he would like his job with GGCCCL back and to manage the maintenance for the whole of the Care Agency. He describes the Chief Minister’s response as follows: *“He [sic told] me that he as [sic was] going to give me the job and looked to his secretary and said “phone Samantha – I assume the reference was to the then Minister for Social Services and Equality the Hon Samantha Sacramento MP – and tell her about it, the Care Agency has a large estate and she has the money in the vote [sic ?] for this” he again looked at me and said “like this I’ll give you a job and a salary”.* The Complainant heard nothing more about this position and felt deceived.
36. In early March the Complainant was offered a position as a driver/handyman with the Care Agency on his trainee contract with the Respondent. The Complainant could not be offered a position by the Care Agency directly because it required a Category D1 driving licence which the Complainant was required to fund himself. He also complained that this was not the position offered to him by the Chief Minister on 30 January.
37. On 6 May 2013 the Complainant met the Chief Minister outside his office and was asked to attend a meeting the following Monday 12 May 2013. At that meeting the Chief Minister explained that the Complainant was not a favourite amongst his ministers referring to two “occurrences” one with the then Minister for Sport, Culture and Youth the Hon Steven Linares MP (“**Minister Linares**”) and another with Minister Licudi and the fact that he had rejected job offers from both of them. At this meeting the Chief Minister agreed for Government to pay for cost of obtaining the D1 licence.
38. Following this meeting the Complainant confronted both Ministers.
39. On 12 May 2013 the Complainant met Minister Linares at his offices complaining that the job which he had offered him was as a night porter at the John Mackintosh Hall on a 30 hour contract, making up the extra 7 hours in project management with GGCCCL whenever required, and that the first three months were as a trainee anyway. He considered this not to be a serious job offer and simply an attempt to engage cheap labour.
40. On 13 May 2014 the Complainant confronted Minister Licudi in the garage of the Europort building, where they both worked at the time, asking him what job he had offered the Complainant. Minister Licudi explained, in what appears to have been a short but rather heated exchange, that he had offered him a job at the old St Bernard’s Hospital as a clerk of works but the Complainant had rejected it. When the Complainant denied this, Minister Licudi became angry and said that he did not like the fact that the Complainant had waited for him in the garage and warned him not to

- accompany him in the lift or he would be sent home. About an hour later Minister Licudi's personal secretary called the Complainant in and informed him that from that moment he was no longer working at the Ministry of Financial Services.
41. The Complainant felt that he had been bullied by Minister Licudi.
42. In a letter to the Chief Minister dated 16 May 2014, the Complainant described his meeting with Minister Licudi and made the allegation of bullying, signing off with the following line: *"I hope that this will not affect my effort to get a new job. Thanking You."*
43. Sometime following his letter to the Chief Minister, around late June to early July 2014, the Complainant was moved to a position within the Care Agency at the St Bernadette's Resource Centre ("**the Resource Centre**").
44. The Complainant accepted the position on the understanding that he would be employed directly by the Care Agency once he passed his D1 driving licence. The Complainant avers that he passed his licence two weeks after he started working at the Resource Centre. An email dated 30 June 2014 from Mr Kenneth Trinidad ("**Mr Trinidad**") of Construction Training Company Limited confirms the date that arrangements for the Complainant to start training for his licence were put in motion. A copy of the Complainant's learner's licence is dated 14 July 2014 so I assume that he must have obtained the full licence after that date.
45. Upon passing his driving licence – I assume in the second half of July 2014 – the Complainant asked his seniors when his direct employment with the Care Agency would commence and pointed out that he was working 40 hours per week instead of the contracted 37 hours. The Manager, Deputy Manager and Human Resources Manager at the Care Agency all explained that they were waiting for his contract to be drawn up but this never materialised.
46. During his time at the Care Agency the Caretaker's post, who the Complainant was expecting to take over, was covered by an agency worker from Grand Home Care. This annoyed the Complainant who reports verbal abuse, bullying and threats of physical violence from this worker. He reported this abuse to several superiors at the Care Agency and was reassured that they would take it up with the worker in question.
47. Seven weeks after passing his driving licence, in very late August or very early September – certainly before his meeting with Minister Bossano on 3 September described below - at a meeting with the Caretaker, the Manager and the Human Resources Manager, the Complainant was informed that he was not suitable for the position.
48. On 3 September 2014, the Complainant met with Minister Bossano at his office who explained that he had been covering a vacant post previously covered temporarily by an agency worker from Grand Home Care. Minister Bossano also explained that he could not interfere with decisions of other departments and asked him to report to the Employment Service.

49. When the Complainant arrived at the Employment Service he was met by Mr Charles Robba (“Mr Robba”) a Manager of the Respondent. Mr Robba explained that it was nothing to do with him but he either took up a position with Koala Construction or his contract would terminate at the end of the month. He was provided with details of the salary and a job description.
50. The Complainant started working a receptionist at the main entrance of the Employment Service.
51. On 8 September 2014 the Complainant’s hourly rate was increased to £6.15 with effect from 1 September 2014.
52. On 9 September 2014 the Complainant was asked to sign his termination papers with a termination date of 12 September 2014. The reason for termination cited by the Respondent on the Termination of Employment form was “Unsuitability”.
53. On 12 October 2014 the Complainant’s employment with the Respondent ended.
54. On 22 September 2014 the Complainant wrote to the Chief Minister providing details of the events leading to his dismissal. He complained that he was still owed unpaid wages and that £40 of costs relating to his driving licence had not been reimbursed by Government. He signed off with the following statements: *“I feel to have been cheated, lied and conned throughout the months I have been working for you. I was given a job that never materialised, told to work, always for a minimum pay again saying that I have been bullied and treated like an idiot when all I wanted was a job for a fair pay. I sometimes wonder that I have been a victim of a political war between ministers.”*
55. By a letter dated 3 November 2014 the Chief Minister responded to the Complainant as follows:
- “It is with regret that after careful consideration of your case and in particular in light of the effort my Government have already made to accommodate you. I must inform you that there is nothing further to offer. Let me remind you that you have been accommodated the following jobs:*
1. *Education Dept under Minister Licudi.*
 2. *ETCL offices – New Harbours.*
 3. *CTCL – Town Range offices.*
 4. *Care Agency – Bus driver/ handy man.*
 5. *CTCL – Town Range offices.*
 6. *Employment offices – New Harbours.*
- I wish you all the best in the future.”*
56. The Complainant makes a number of concluding statements in his Statement of Occurrences which I summarise as follows:
- 56.1 He feels that he was deceived in the two years of his employment by the Respondent;

- 56.2 That, following his first meeting with the Chief Minister, what he had expected was a job and not a trainee's job at his age;
- 56.3 He does not accept the Respondent's position that he knew from the start that he had no prospect of a job in the public sector. He points to the offers of three jobs during his time with the Respondent as evidence against this assertion;
- 56.4 That the Driver and Vehicle Licensing Department had still not issued his D1 Licence as they were awaiting relevant paperwork from the Employment Service;
- 56.5 The Complainant refutes the assertion by Mr Trinidad in his email to me dated 4 June 2015 that he was invited to apply for a number of jobs in the public sector and refused them;
- 56.6 The Complainant refutes the Respondent's position that he was placed on the training programme in order to improve his prospects of finding employment in the private sector;
- 56.7 The Complainant refutes the Respondent's position that he found it difficult to accept that he was not going to get a job in the public sector on the basis that the Chief Minister offered him two jobs in the public sector;
57. The Complainant also makes the following point: *"What I know from the beginning is that the Chief Minister said that he had something for me when I asked him for a job ..."*
58. On 29 April 2015 the Complainant was offered re-engagement under a training contract with the Respondent by Mr Trinidad. This was not accepted.
59. On 8 October 2015 by a letter from Mr Craig Pilcher for the Respondent, the Complainant was reminded that the said offer of re-engagement – with the Respondent – was still open on the same terms and conditions previously enjoyed: *"This may assist you to find employment in the private sector more to your liking in the future and will help your current economic situation."*
60. The Complainant responded by way of a letter dated 14 October 2015 the text of which I quote in full:
"I am referring to your letter of the 8th October and can safely say that I have rarely had the misfortune of reading a more self serving document.
As you well know my background is in the Construction Industry and has been for several decades. Teaching me how to use a sweeping brush or deliver letters is hardly likely to equip me to find a post in the private sector.
I was at one stage promised by the Chief Minister a job maintaining the whole Care Agency estate which would have been much more in keeping with my skills.

On a more positive note if I can be offered work where my skills are recognised and can be utilized then it may make sense. This is not a question of it being 'more to my liking'."

The Respondent's grounds of resistance

61. The Respondent sets out its grounds of resistance in its IT3 Form. They are signed by Mr Robba on behalf of the Respondent.
62. The Complainant was accepted as a trainee for an initial period of three months on 11 October 2012, at the request of the Chief Minister.
63. The Complainant was accepted even though the Respondent did not have a suitable employer with a vacancy for a trainee. For this reason, he was placed in the public sector in order to allow him to gain some experience even though there was no prospect of employment at the end of this initial period.
64. When his contract was extended by way of the Notice of Variation it was "... with the clause that he was only in the public service in order to provide him with improved prospects of employment in the private sector".
65. The Respondent's position is that "*All trainees that are placed in the Public sector are being given the opportunity to acquire skills that will increase their prospects of employment in the private sector, and none are given employment in the public sector.*"
66. The Respondent maintains that the Complainant "*found it very difficult to accept this and it proved difficult to find a placement with [sic ?] given that he considered the wages in the private sector too low.*"
67. The Complainant was offered the opportunity to start up his own construction company given his experience in that industry and to be placed on the approved contractors list, but he did not take up this offer as he felt he was not able to manage a business on his own.
68. The Respondent avers that all training contracts are for a maximum of 11 months in keeping with its fundamental objective of only training individuals to improve their employment prospects in the private sector. Indefinite training for a candidate who is very difficult to place, such as the Complainant, would deprive other individuals of training opportunities.
69. The Respondent submits that the Complainant had "*known from the beginning that there was no prospect of employment in the public sector or of being retained indefinitely in the scheme if it was proved impossible to find him a suitable placement.*"
70. The Respondent does not consider that the favourable performance reports relied upon by the Complainant are relevant to the Complaint as they were not his employers.
71. In essence the Respondent's argument is that the Complainant's unsuitability was not, necessarily, in relation to the placements or responsibilities assigned to him but rather to the actual vocational training programme offered by the Respondent.

The Complainant's evidence at the hearing

72. Whilst I have considered and taken account of all of the evidence provided by the witnesses at the hearing, I do not refer to all of the evidence in my decision.
73. At the hearing of this claim, the Complainant explained that he had signed the Notice of Engagement very reluctantly because he understood that it was a trainee position and not the offer of a permanent position within the public sector as he had expected.
74. He repeated that the positions which he had held at the Respondent and GGCCCL were not suitable for a man of his experience and age, but would be ok for "*an 18 year old*".
75. The Complainant confirmed that he was aware of the low hourly rate on which he was engaged, adding that it may have been suitable for a messenger but not for a supervisory position in the construction industry.
76. He also confirmed that the clerk of works position with the Department of Education was on a trainee basis and subject to his existing hourly rate, albeit with greater overtime possibilities.
77. He understood that the purpose of the Respondent was to train people for eventual employment in the public sector but repeated that he did not require training himself.
78. He also understood that he had been on two successive 11-month fixed term contracts.
79. When asked if he agreed with the condition at Section 9 of the Notice of Variation quoted at paragraph 33 above, he replied that the Chief Minister had told him that he would have a contract after 6 months but conceded that the contractual position was different to what the Chief Minister had offered him and that he knew what it meant.
80. The Complainant explained that the Night Porter position was not financially or logistically viable for him because he lives in Algeciras.
81. When asked why he did not apply for the Koala Construction ("**Koala**") position, the Complainant explained that he had applied, taking the Tribunal to an unsigned application letter to Koala for a Vacancy for Site Manager dated 3 September 2014, which refers to a meeting with Mr Martein Plantenkamp, Project Manager that same date. He explained that he did not receive a response and in fact applied twice, although the date of the second application was not established. When asked by both Mr Pitcher and myself why he had not mentioned this in his Statement of Occurrences, his response was that he did not know. The Complainant added that Mr Robba had known because he had gone during working hours. When asked whether he had discussed this any further with Mr Robba, the Complainant could not remember.
82. When asked by Mr Pitcher why he had not taken the 3 separate offers of re-engagement as a trainee, the Complainant responded by referring to the explanation provided in his letter of 14 October 2015 to the Respondent the text of which is quoted at paragraph 60 above.

83. When asked whether he applied for the vacancies with Interserve and HSE, the Complainant explained that he had spoken to them but that the Respondent should have known that he did not meet the qualification requirements for these posts. In fact, he denied having been provided the HSE Vacancy Notifications by the Respondent but finding it himself as he sorted through the pile of Vacancy Notifications on Mr Trinidad's desk.
84. The Complainant insisted that training positions were not suitable for him and that it was not that he did not want to be trained but rather that he did not need to be trained.
85. He disagreed with the suggestion that there was an incompatibility between what he wanted and what the Respondent was able or willing to offer him. He explained that trainees were normally taken on by the host employers after one or two months and paid by the host employer but he had been with the Respondent the whole time.
86. In relation to the manner of his termination, the Complainant did not agree that he was not renewed rather than dismissed. His rationale was that his contract should have terminated on 10 August 2014 and he was working without a contract in September 2014 when he was terminated.
87. The Complainant agreed that the Section 9 requirement in the Notice of Variation quoted at paragraph 33 above required him to apply for any available vacancies.
88. He conceded that there was nothing in writing to confirm that he had been offered the post at the Care Agency because he had only been told verbally.
89. The Complainant confirmed that he was paid his Notice to 11 October 2014.

The evidence of Mr Brian Bear ("Mr Bear") for the Respondent

90. In his witness statement Mr Bear recalls the Complainant being posted to his office from around May/June 2014.
91. He refers to the forwarding of Vacancy Notifications in the private sector to the Complainant and describes the Complainant's response as follows:
- "On occasion he shrugged these off saying that they were not for him, the reasons often given were amongst others, his age, experience and that things had changed in the construction industry and he was not up to date".*
92. Mr Bear explains the decision to terminate the Complainant's employment as follows:
- "7. After having placed him in various departments and having sent him various private sector vacancies in which he was unsuccessful or to which he refused to attend the decision was taken by my CEO to terminate the Claimant's [sic Complainant's] employment on the grounds of unsuitability."*

8. *The standard procedure adopted by the Respondent on these occasions is to contact the employee and inform him of the termination and reason(s) for it at least one month before the contract is terminated. In the event that an employee is unwilling or unable to sign the termination of contract we have a form which states the reason for the employee's unavailability or unwillingness to sign thereby validating the termination. However, this was not the case here as the Claimant willingly signed the Termination Notice ... "*

93. The following points were established in the course of his live evidence:

93.1 Mr Bear had spoken to Mr Robba who categorically denied asking the Complainant to apply to Koala or knowing about the application.

93.2 Mr Bear was not aware of the application to Koala.

93.3 When I asked Mr Bear why Mr Robba had not been called to give evidence, his response was that the Respondent did not feel that Mr Robba's evidence was relevant.

93.4 In response to questions from the Complainant, Mr Bear maintained his position that the Complainant was immediately provided with suitable Vacancy Notifications whenever they came in, but the Complainant would find an excuse not to apply as he was not interested in the jobs offered. He was only interested in a job that was promised to him by someone else.

93.5 Mr Bear confirmed that some trainees were taken on by private sector employers after an initial 3-month probationary period during which their salary was subsidised by the Respondent. Others, like the Complainant, continued to be paid until they were "*taken by the labour market*".

93.6 Mr Bear also explained that he did not always follow up on whether the Complainant had applied for the vacancies which they passed onto him.

93.7 He used to provide the Vacancy Notifications to the Complainant by hand and not be email as they sat across each other and Mr Trinidad would pass them by email.

93.8 The Night Porter position at the John Mackintosh Hall was initially understood to have been a Handyman position - as per the exchange of emails between Mr Bear and Mr Ferrar - but this mistake was never brought to Mr Bear's attention.

93.9 Mr Bear was responsible for about 200 individuals in total supported by Mr Robba, Mr Trinidad and Mr John Viales.

93.10 When I asked Mr Bear why the Complainant's contract was terminated a month (when notice was provided) after its expiry, he answered that he did not know but assumed that he was given an extra month to think about it. The Complainant responded that in August he was still working at the Resource Centre.

93.11 Mr Bear strongly refuted my suggestion that the Complainant's contract has been allowed to run beyond 11 months into 13 months because he was going to be taken on permanently. This was not policy and no one was taken on permanently by the Respondent.

93.12 He did concede that the Complainant could have been offered a further 11-month contract if he had been more cooperative in relation to the vacancies that were offered to him. He did not find the Complainant's attitude to vacancies to be reasonable and described his attitude as "*laissez faire*". His intention was simply to 'mark time' until he got a job that he had in mind. In his view the Complainant was waiting for a job with Government.

93.13 Mr Bear explained that the contract has not been terminated but simply not renewed based on his unsuitability for the trainee position. He therefore wished to qualify his use of the word "*terminate*" at paragraph 7 of his Witness Statement (see paragraph 92 above). He explained that the use of the word termination had been used in line with the terminology required by the Employment Service Termination of Employment form.

93.14 Mr Bear agreed that if the Complainant had found a job in the private sector, they would have subsidised his salary for the first 3 months, and that this was consistent with the condition at Section 9 of the Notice of Variation.

93.15 I asked Mr Bear why he had been considered suitable for the Respondent's training programme initially and he responded that the Respondent could not discriminate on any ground, including age, and was obliged to take on everyone with an interest in finding employment. His exposure to filing and office administration processes were aimed at skill diversification and keeping him busy whilst the Respondent tried to find him a suitable post.

93.16 Mr Bear was not aware of the promise to make him permanent at the Care Agency or of any other job offers whilst he was posted elsewhere i.e. outside of the period May-July 2014. He explained that his name was put forward for any suitable posts that arose during his time with the Respondent as he was on their database. The John Mackintosh Hall position is an example of this.

93.17 Mr Bear confirmed that the re-engagement offered to the Complainant after his termination was on the same terms as before.

The evidence of Mr Trinidad for the Respondent

94. In his witness statement Mr Trinidad describes the communication of vacancies to the Complainant and his reaction to them as follows:

"3. ... During his time in our offices every time a vacancy in his field of work appeared we would communicate these to him, sometimes verbally or sometimes by simply passing the vacancy notice to him by hand as a result of our close proximity. Unfortunately he would mostly shrug them off saying that they were not for him, the

reasons often given were amongst others, his age, experience and that things had changed in the construction industry and he was not up to date.”

95. Mr Trinidad explains that the Complainant succeeded in securing a post with the Care Agency on a trial basis, but for reasons that he does not know he was found to be unsuitable for the job.

96. Referring to a conversation at his office following his telephone call to the Complainant on 29 April 2015:

“5. ... Mr Linares laughed the offer off and said that he was not willing to earn a trainee wage to work with staff that he thought were less qualified than him but on a much better wage.”

97. The following points were established in the course of his live evidence:

97.1 Mr Trinidad explained that the Respondent and CTCL both provided the same service namely training and placements and offered each other trainees depending on their skill set/needs.

97.2 The offer of further employment was on the same terms.

97.3 Mr Trinidad explained that Mr Bear did not share an office with him and the Complainant, but sat in an adjacent office.

97.4 Vacancy Notifications were usually provided to the Complainant manually as they shared the same office.

97.5 He could only recall the Complainant having followed up a vacancy at Interserve and having applied for the job at the Care Agency, but nothing else. He conceded that the Complainant may have applied for other jobs but none that he was aware of.

97.6 They did not know what position he was looking for so they just offered him everything in that field.

97.7 Mr Trinidad had no involvement or authority in the decision to terminate/not renew the Complainant's contract.

The Respondent's closing submissions

98. Mr Pilcher made the following submissions:

98.1 The Respondent's sole purpose was to train individuals, not to offer them permanent employment. Both witnesses confirmed this in their live and written evidence. This was made very clear to the Complainant from the outset and in the Notice of Variation. The Complainant accepted this albeit reluctantly when he signed the Notice of Engagement. This was an informed decision.

- 98.2 The Complainant has accepted that he never asked to be employed by the Respondent and yet he accepted the position.
- 98.3 The Complainant accepts that he was unsuitable as he did not need training. He was either unable or unwilling to comply with the Respondent's training policy.
- 98.4 Nothing in the evidence received by the Tribunal contradicts the Respondent's contention regarding the Complainant's unsuitability.
- 98.5 His performance records are not relevant to the claim as they do not go to the fundamental question of his unsuitability for the training scheme offered by the Respondent.
- 98.6 The Complainant has not adduced any evidence to show that he was unfairly dismissed by the Respondent. He has only sought to persuade the Tribunal that he was not made permanent in relation to other positions which are not themselves the subject matter of this claim.
- 98.7 The Complainant was difficult in relation to the jobs offered to him by the Respondent.
- 98.8 He was acutely aware that direct and permanent employment in a public sector position could not be offered by the Respondent, unless a vacancy arose. But he simply did not accept this.
- 98.9 The Respondent complied with its duty to train the Complainant by placing him in various departments, Government owned companies and the Care Agency. It also notified him of a number of vacancies in the private sector. The Respondent cannot be blamed for the fact that suitable jobs within the private sector did not materialise for him. The fact that the Complainant did not provide any feedback in relation to the private sector vacancies cannot be the Respondent's fault.
- 98.10 The Complainant was also offered D Class driving licence training.
- 98.11 Whilst it is accepted that the second renewal was allowed to over-run, there is no evidence to suggest that the termination was anything other than a non-renewal. The Respondent's decision not to renew was justified on the Complainant's own evidence of unsuitability.
- 98.12 The three offers of re-engagement were not conditional on the Complainant withdrawing his claim.
- 98.13 If the Tribunal finds against the Respondent, the three offers of re-engagement should be taken into account when considering the Complainant's mitigation of loss.

The Complainant's closing submissions

99. The Complainant made the following submissions:

99.1 The Chief Minister offered him a job, not a training contract with the Respondent. He only signed the Notice of Engagement because it was suggested that at least he would have a foot in the door.

99.2 He only took it on because he wanted a job.

99.3 He was subsequently told that the Chief Minister only wanted him at the Respondent for six months, following which he would be given a permanent contract in the public sector. He was therefore deceived by the Ministers, the CEOs and the HEOs.

99.4 No-one has questioned the truth of his allegations or the evidence presented. The written evidence of the Respondent does not contradict his evidence. All they say is that they encouraged him to apply for certain vacancies in the private sector, which they cannot prove in any event as there are no emails to prove this, although he accepts that he had direct access to the Vacancy Notifications for the time that he was there.

99.5 He only dealt with Mr Bear and Mr Trinidad for two months out of the two years that he was with the Respondent.

99.6 Everything went wrong for him after he met with the Chief Minister's secretary on 5 July 2013 and she said that there were no permanent posts in the public sector for him.

99.7 The Complainant stated that he could not be accused of not calling any witnesses because they were all still employed by the Respondent or Government.

Was the Complainant unfairly dismissed?

100. The Complainant arrived at the meeting with Mr Gomila in early October 2012 expecting a position within a Government department or agency and not a trainee position. I accept the Complainant's evidence on this issue.

101. However, what Mr Gomila offered him was a trainee position with the Respondent for a fixed term of 11 months. I am satisfied that the Complainant understood the nature of the position and the nature of the Respondent's activity – namely training of individuals for re-employment in the private sector - at that point and that he signed the Notice of Engagement reluctantly but knowing fully that this was not what he had expected.

102. On 11 October 2012, Mr Gomila confirmed that the position would not be as a messenger with the Tourist Board but as a Project Manager with GGCL for a 3-month training period. He accepted this change which was in keeping with the trainee capacity of his contract.

103. He continued in that trainee position until late July 2013. Whilst he is not disputing the point, his suggestion to the Chief Minister's Secretary on 5 July 2013 that a vacancy be opened for the position that he was covering as a trainee confirms that he was well aware of the nature of his employment 10 months into his first contract.
104. The nature of his employment with the Respondent was, on the Complainant's own evidence, very clearly explained to him by Minister Bossano at their meeting on 6 July 2013. The fact that the Complainant felt that he did not require training is immaterial to the reality of the employment relationship.
105. Following Minister Bossano's explanation, the Complainant refused to continue undertaking the project management role with GGCCCL because the salary was not commensurate with the position and started undertaking less onerous work with GGCCCL.
106. In my view, at this point the Complainant openly accepted that (1) he did not require training by the Respondent (2) that the artificially low salary paid was due to the trainee nature of the position and (3) that the trainee position would not become a permanent position with either the Respondent or GGCCCL because their only purpose was to train individuals. Despite this acceptance, the Complainant continued to work for the Respondent in a trainee position for a commensurate salary.
107. When training was offered in a different area – archiving – at the Ministry of Financial Services in late July 2013, he refused it on the basis that it was a demeaning request given his forty-year background in the construction industry.
108. The position with the Department of Education which, much to the Complainant's dismay, never materialised, had also been as a trainee. On this occasion the Complainant had been more than happy to take the position because it was in his area of competence and offered significant overtime opportunities.
109. The Complainant returned to the Ministry of Financial Services in August 2013 and continued in the position for approximately 5 months, clearly in a trainee position.
110. It was during this time that his contract was extended by a further 11 months on the proviso contained in the Notice of Variation. If the Complainant harboured any doubts whatsoever of the nature of his relationship with the Respondent, these cannot have endured beyond 10 September 2013 when he signed this document.
111. Following his meeting with the Chief Minister on 25 January 2014, where he requested a position managing the whole of the Care Agency's maintenance, he was offered a position as handyman/driver at the Agency in early March 2014. This continued to be in his trainee position. He did not take it up because it was not the position that he had allegedly been offered by the Chief Minister.
112. In May 2014, he also turned down a position as night porter at the John Mackintosh Hall, also as a trainee for the first three months.

113. His time at the Ministry of Financial Services ended abruptly on 13 May 2014 after a confrontation with Minister Licudi, and following a period in May/June during which he was placed in the Respondent's offices with Mr Bear and Mr Trinidad, in late June/early July 2014 he moved to a position, on his existing trainee contract with the Respondent, to the Care Agency at the Resource Centre.
114. During this time, he obtained his D1 licence expecting to be permanently employed by the Care Agency. This post did not materialise.
115. He was then moved to the Employment Service's reception where he continued to work until the end of his contractual notice period.
116. The Complainant, by his own admission, was not a suitable candidate for the training and employment opportunities on offer by the Respondent. He was not interested in the training offered or in the majority of the opportunities in the private sector which he came across, whether by referral to him by the Respondent or through his own efforts.
117. He very reluctantly agreed to take the Respondent's offer of a trainee position in order to get his foot in the door in the hope that a permanent job within the public sector would at some point materialise, which was not an unreasonable aspiration and one that was not necessarily discouraged by the Respondent, but in the full knowledge that this was not a commitment/responsibility of the Respondent. This is supported by his numerous approaches to the Chief Minister and Minister Bossano rather than the Respondent's management when trying to secure permanent employment within the public sector.
118. From July 2013, the Complainant continued in the Respondent's employment reluctantly and clearly only in the hope that he would be moved to a public sector job which never happened.
119. Mr Bear explained the rationale for the decision not to renew the Complainant's employment on the basis on unsuitability.
120. In my view, the Complainant's rationale for refusing the offers of re-engagement confirm his unsuitability.
121. In light of the evidence presented to the Tribunal, which in large part is accepted by the Complainant himself, the Respondent's decision to dismiss was a reasonable decision in all of the circumstances.
122. However, the Respondent allowed the Complainant's second contract to extend beyond 12 months. This brought the Complainant within the protection against unfair dismissal afforded by section 59 of the Act.
123. The Respondent was not therefore entitled to simply 'not renew' the Complainant's contract. It was required to undertake a formal capability assessment procedure with the Complainant which would have allowed for formal submissions from both sides,

representation (if required), consideration of evidence, provision of full written reasons and the availability of an appeal procedure. This was not carried out.

124. The dismissal was therefore procedurally unfair.

125. The procedural unfairness entitles the Complainant to the basic award which is a minimum of £2,200.

126. I appreciate that the parties have not addressed me in relation to compensation. I will however provide my view on the level of the basic award in an attempt to help the parties avoid the need for a further hearing on this net issue.

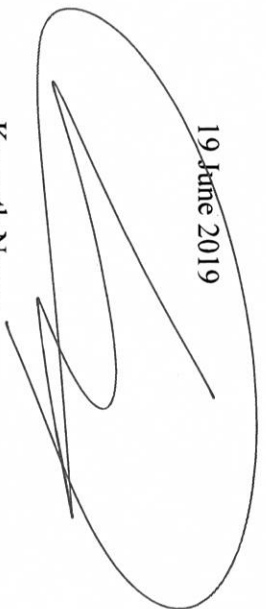
127. In determining the amount of the basic award, I balance the fact that the absence of a suitable procedure has been the result of an oversight and has been motivated by neither malice or reckless disregard, against the fact that absolutely no procedure has been engaged by an employer whose nature, size, activity and resources make such absence wholly inexcusable.

128. I therefore consider that a basic award in the sum of £3,200 would be fair. If either party is not happy to adopt my indication, they may request that the matter be listed for submissions.

129. I now turn to the compensatory award.

130. In my view the Complainant would still have been dismissed had fair procedures been followed. It is therefore just and equitable for no compensatory award to be made and considerations in relation to calculation of loss and mitigation of the same do not therefore arise.

19 June 2019

A large, stylized handwritten signature in black ink, enclosed within a hand-drawn oval border. The signature is cursive and appears to read 'Kenneth Navas'.

Kenneth Navas
Chairman