



World Bank Administrative Tribunal

2017

Decision No. 565

**DC (No. 3),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**DC (No. 3),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Judges Stephen M. Schwebel (President), Abdul G. Koroma, and Marielle Cohen-Branche.
2. The Application was received on 30 July 2016. The Applicant represented himself. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 10 April 2017.
3. Invoking Article XIII of the Tribunal's Statute, the Applicant seeks revision of *DC* (Preliminary Objection), Decision No. 525 [2015] with respect to the Tribunal's judgment to uphold the validity of the Memorandum of Understanding (MOU) which the Applicant signed with the Bank on 3 September 2014.
4. On 12 October 2016, the Bank submitted a preliminary objection contesting the admissibility of the Application.

FACTUAL BACKGROUND

5. On 10 April 2015, the Applicant filed an application requesting the Tribunal to either adjudicate his claims concerning his 2013 Overall Performance Evaluation (OPE) and Salary Review Increase (SRI), and placement on an Opportunity to Improve Unsatisfactory Performance Plan (OTI) or, in the alternative, to order the reinstatement and continuation of Peer Review Services (PRS) Request for Review No. 186.

6. On 22 May 2015, the Bank filed a preliminary objection challenging the admissibility of the Applicant's claims on the grounds that he waived them in the MOU which he signed with the Bank on 3 September 2014.

7. On 13 November 2015, the Tribunal rendered its judgment dismissing the preliminary objection. In *DC (Preliminary Objection)*, Decision No. 525 [2015], the Tribunal upheld the validity of the MOU and found that the scope of the MOU was limited to the Applicant's ending employment with the World Bank Group, post-employment benefits, commitments, and understandings. In assessing whether the claims reviewed in PRS Request for Review No. 186 were claims connected to the issues in the MOU, the Tribunal held that the decision that the Applicant's OTI was unsuccessful and resulted in termination, the subject of the MOU, was separate and distinct from the decision to give him a poor OPE, a low SRI and even the decision to place him on an OTI. The Tribunal further held that the waiver clause in the MOU did not apply to the PRS Request for Review No. 186 and claims which preceded the notice of termination of the Applicant's employment. The Tribunal reviewed the Bank's practice in drafting MOUs and, applying the *contra proferentem* rule, found that the MOU waiver clause did not operate in the manner asserted by the Bank.

8. In submitting the present Application, the Applicant alleges that:

In light of the new and critical information that has now emerged, I appeal to the Tribunal again. I respectfully request that the Tribunal recognizes that those new pieces of evidence qualify to invoke ARTICLE XIII of the Tribunal and request a [revision] of the Tribunal's decision No. 525, para 62- 66, related to the validity of the MAS/MOU.

9. The Applicant claims that he possesses three new pieces of evidence which justify an Article XIII application, and which would "shake the very foundation of the Tribunal's persuasion" that the MOU was valid. According to the Applicant, the first piece of evidence is that upon receipt of the PRS Panel Report No. 186, five months after *DC*, he discovered that the PRS Panel did not "debunk" his discrimination claim. To the Applicant, gender/racial bias led to an "ill-motivated" MOU. The Applicant maintains that this new evidence proves that the MOU was simply the culmination of a drawn out discriminatory termination process. According to the

Applicant, the Bank knew that “discrimination of any kind [...] leading to the Termination Memorandum dated 7/14/2014 will [...] invalidate” the termination of his employment. The Applicant claims that when the Bank found out that PRS Report No. 186 did not address the discrimination claim, they tried to keep him from seeing it, and instead “used [the HR Officer] to blackmail [him] into signing the MAS on 9/3/2014 [i.e.,] one day before the Report was due to be sent to [him].”

10. The Applicant’s second piece of evidence of discrimination is that he was able to confirm the differential treatment of a “white female colleague,” Ms. BB, who was in the same position as him. The Applicant maintains that, on 20 May 2016, he confirmed that Ms. BB who was also a Program Manager, had, like him, been given a “Partially Successful” rating in her 2013 OPE. Yet, according to the Applicant, she fared much better than him, as she was never put on an OTI but instead placed on a Developmental Assignment. Furthermore, her employment was not terminated.

11. Finally, the Applicant submits his third piece of new evidence, namely that the motives behind the Strategic Plan prepared by his supervisor, Ms. X, was recently revealed. According to the Applicant, his supervisor implemented a “phony” plan. The Applicant maintains that the Bank fraudulently provided him with false information to make him believe that his position would be made redundant in any event, and that he relied on this information when he was signing the MOU. The Applicant asserts that a month after the MOU was signed, his supervisor hired “her white female friend” as Program Officer.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Bank’s Contention No. 1

The Application does not satisfy the criteria in Article XIII of the Tribunal’s Statute

12. The Bank contends that the Applicant has not met the conditions set in Article XIII(1). The Bank asserts that none of the Applicant’s pieces of alleged new evidence provide a basis to revisit matters already adjudicated by the Tribunal in Decision Nos. 525 and 530, or that are currently under review in connection with the Applicant’s second application. According to the Bank,

Article XI of the Tribunal's Statute, which concerns the finality of judgments, should prevail over Article XIII because an Article XIII review is "only available in exceptional circumstances." The Bank maintains that the Applicant has not produced any new evidence that would justify a revision.

13. The Bank further contends that none of the three pieces of evidence substantiate the Applicant's allegations. First, the Bank is not persuaded by the Applicant's argument that discovery that the PRS Panel did not address his discrimination claim justifies a revision of any of the Tribunal's previous judgments under Article XIII. Instead of substantiating his claim of discrimination, the Bank argues that the "new discovery" indicates that the Applicant's manager was equally strict with other staff members, regardless of their race. Second, the Bank asserts that the Applicant knew about his colleague's "Partially Successful" rating as early as 6 December 2013 when all the staff members in the Applicant's unit met with the Ombuds Services Office. Third, the power-point presentation on the Strategic Plan, which the Applicant believes was deceptive information, was shared with the entire office in 2013 and was not new information.

The Applicant's Response

This is a proper Article XIII claim to review Decision No. 525

14. The Applicant asserts that he is invoking Article XIII of the Tribunal's Statute to request a review of only paragraphs 62-66 of the Tribunal's Decision No. 525 related to the MOU. The Applicant reiterates that "everything that happened in this case – in particular the Termination Decision dated 7/14/2014 and the MAS/MOU w[as] motivated by discrimination; that the multiple violations of due process were motivated by racial or gender discrimination."

15. The Applicant maintains that he has indeed presented three new pieces of evidence of racial/gender discrimination that were neither available to him nor to the Tribunal before Decision No. 525 was rendered, and that these facts of racial/gender discrimination were never used as arguments in his previous applications. He argues that they now offer a new and legitimate ground to challenge the "ill-motivated" Termination Memorandum and the MOU which was upheld in Decision No. 525. The Applicant also claims that the evidence he presents will "shake the very foundations of the Tribunal's persuasion." He avers that it will show the Tribunal that the Bank's

MOU which was used to separate him from his employment “was stained by racial/gender discrimination.” According to the Applicant, the Bank has a “panoply of instruments [...] to make decisions against its staff,” but may not use racial and/or gender discrimination. Without a response from the Bank on the discrimination claim, the Applicant argues that the MOU is unlawful.

16. The Applicant notes that he submitted this Application within five months of receiving the first piece of evidence, the PRS Report No. 186. Regarding the second piece of evidence, Ms. BB’s “Partially Successful” rating, the Applicant says that he received that information on his personal email account at a time that he was on the OTI and overloaded with twice his usual amount of work. As a result, he did not read the email or send comments to the team. Finally, although the third piece of evidence was shared with the entire team in 2013, the Applicant claims that it was “deceiving” to him as it was designed to close down his work program. Only after the hiring of a “white female as [his] replacement,” learning of his colleague’s replacement, and receiving the PRS Report did “all pieces of the puzzle [come] together: they wanted to get rid of the Black male.” According to the Applicant, “he had [...] false information that swayed [him] into signing the MOU.”

The Bank’s Contention No. 2

The Application is inadmissible because the claims are waived under the terms of the MOU

17. According to the Bank, the Applicant’s claims related to the termination of his employment were settled in the MOU signed on 3 September 2014, which was upheld in the Tribunal’s Decision No. 525. The Bank reiterates that the Applicant voluntarily signed to release the claims contained therein, and that the Tribunal held that MOU to be valid.

The Applicant’s Response

The MOU does not cover these claims

18. The Applicant responds that the racial/gender discrimination claims in this Application are not covered by the release of claims in the 3 September 2014 MOU. According to him, these claims were part of a “pre-existing process which was neither addressed by the MOU, nor subject to [its]

waiver clause.” The Applicant argues that the facts and evidence in the instant Application – that is, the discrimination he suffered for the months after his new supervisor joined his unit – took place prior to the MOU, and constituted steps leading to the termination of his employment and the MOU itself.

19. According to the Applicant, the waiver clause in the MOU “does not say or imply that even a serious issue such as racial and/or gender discrimination claims discovered later should be dismissed.” The Applicant asserts that “if the Bank had made it clear to me that they were ending my employment just because my managers had a racial and/or gender bias against me, there is no doubt that the 9/3/2014 MAS would have never been signed [...] certainly not with the terms included in the 9/3/2014 MAS.”

The Bank’s Contention No. 3

The Application is inadmissible because the claims are currently under review in the Applicant’s second application

20. The Bank argues that the Applicant’s claims are *sub judice* and currently pending before the Tribunal in his second application. The Bank argues that the Applicant’s claims related to his termination of employment with the Bank are “a repeat of Applicant’s claims presented in case 16/7 [...] presented approximately a month before the instant case [and] challenging his 2013 OPE, SRI and OTI placement.” Thus, the Bank contends that the present Application is a repeat of the Applicant’s first and second applications and should be dismissed.

The Applicant’s Response

This Application is not sub judice to his second application

21. In response to the Bank’s contention, the Applicant asserts that a claim of racial/gender discrimination is difficult to file, extremely serious and the Tribunal is “rightfully very strict when the claims are not backed with strong evidence.” For this reason, the Applicant filed this Application when it was ready instead of rushing to “piggyback” it on the second application.

22. Furthermore, the Applicant argues that the “central evidence,” Ms. BB’s 2013 OPE rating, was discovered only after the second application had been filed. Either way, the Applicant believes that there is no obligation to consolidate an Article XIII claim with any other claims. If there is an issue, the Applicant concedes that the Tribunal has the authority to consolidate the two cases if it so desires, pursuant to Rule 27 of the Tribunal’s Rules.

The Bank’s Contention No. 4

The Applicant’s claims are barred by res judicata

23. The Bank contends that the Tribunal’s own jurisprudence has repeatedly blocked attempts to submit previously adjudicated claims as “irreceivable under the principle of *res judicata*.” The Bank contends that the Applicant’s claims “relate to and are based on facts that were known and have been addressed by the Tribunal in its previous judgments in the Applicant’s case, including the validity of the MOU and the termination of the Applicant’s employment in the Bank.”

The Applicant’s Response

The claims are not barred by res judicata

24. The Applicant argues against a *res judicata* bar stating that the claims of racial/gender discrimination are not a “repetition of matters already litigated or settled already by the MAS or any previous Applications.” According to the Applicant, “[n]one of the previous Applications include anything about racial/gender discrimination.” He further states that “the claim of racial/gender discrimination is a new fact that (i) emerged from the PRS#186 Report, (ii) from new evidence found in a text written by [Ms. BB], and (iii) from the discovery of a deceptive [...] strategic plan; those claims have never been judged by the Tribunal.”

The Bank’s Contention No. 5

There is no prima facie case of discrimination

25. The Bank argues that the Applicant has not met his burden of proof for racial/gender discrimination. The Bank is not convinced that the Applicant only discovered this fact in the thirty

days between his second and third applications. The Bank argues that, if the Applicant knew about discrimination, he would have brought those claims in his second application. The Bank argues that the Applicant's instant case represents a misuse of the internal justice system and a misuse of the Tribunal's judicial resources.

The Applicant's Response

The Applicant has met his burden to establish a prima facie case of discrimination

26. The Applicant contends that he has established a *prima facie* case of discrimination by showing that "staff who are in basically similar situations are treated differently" (citing *Crevier*, Decision No. 205 [1999], para. 25), and that the Bank has to provide a "non-discriminatory business rationale for its decision" (citing *AI*, Decision No. 402 [2010], para. 41). The Applicant notes that the Bank has not yet responded to his allegations of discrimination and as such has failed to "debunk" his allegations of gender/racial bias that led to an ill-motivated MOU.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

27. Article XI of the Tribunal's Statute provides that: "Judgments shall be final and without appeal." In *van Gent (No. 2)*, Decision No. 13 [1983], para. 21, the Tribunal held that:

Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be "final and without appeal." No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff.

28. The Tribunal has also stated that: "This rule of finality of the Tribunal's judgments is essential to the operation of the Bank's internal justice system. Once the Tribunal has spoken, that must end the matter; no one must be allowed to look back to search for grounds for further litigation." *Mpoy-Kamulayi (No. 7)*, Decision No. 477 [2013], para. 27.

29. The sole exception to the principle of finality is found in Article XIII of the Statute which provides that:

A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

30. However, the Tribunal has stated in a number of its judgments that “the powers of revision of a judgment are strictly limited and may be exercised only upon compliance with the conditions set forth in Article XIII.” *Skandera*, Decision No. 9 [1982], para. 7. In *Kwakwa (No. 2)*, Decision No. 350 [2006], paras. 18-19, the Tribunal further held that:

In this light, the character of Article XIII as a very limited exception should be obvious. Its requirements are not fulfilled unless the Tribunal is satisfied that newly discovered facts are potentially decisive. It is difficult to define in a phrase the nature of factual revelations which might justify the disruption of a *res judicata*; it is a matter to be determined in the particular circumstances of each case. If it were left to any disappointed litigant to assess the relevance and decisiveness of subsequently discovered facts, the ingenuity of pleaders would ensure that few, if any, judgments would ever be final. Unless some restrictive principle fulfills a rigorous screening function, the availability of revision would subvert a fundamental rule of tribunals such as this one: namely that its judgments are definitive. To ensure that Article XIII does not wreak havoc with the rule of finality, enshrined in Article XI, the former must be recognized as available only in exceptional circumstances. The “new fact” must shake the very foundations of the Tribunal’s persuasion; “if we had known that,” the judges must say, “we might have reached the opposite result.”

31. The present Application must be viewed in light of these fundamental statutory rules and related jurisprudence.

WHETHER THE APPLICANT HAS MET THE CRITERIA SET IN ARTICLE XII

32. The Tribunal will now assess whether the Applicant has satisfied the criteria for revision set in Article XIII(1) of the Tribunal’s Statute. Article XIII(2) provides that a request for revision

must “contain the information necessary to show that the conditions laid down in paragraph 1 of this Article have been complied with.” The requisite conditions are:

- a. Discovery of a fact which was unknown to both the Tribunal and the party seeking revision at the time the judgment was delivered;
- b. The fact must be such that it “might have had a decisive influence on the judgment of the Tribunal”; and
- c. The request for revision must be submitted within a period of six months after discovery of said fact.

33. In support of his contentions, the Applicant submits three pieces of evidence which he claims were facts unknown to him at the time the judgment in *DC* was rendered. These are: (i) the fact that PRS Panel did not “debunk” his discrimination claim; (ii) the fact that a colleague who had the same “Partially Successful” OPE rating as he did was treated differently; and (iii) a realization that a strategic plan instituted in his unit was designed to make him believe that his employment will be made redundant and pressure him into accepting the MOU.

34. The Tribunal will review each fact based on the conditions enumerated in para. 32 above.

Fact No. 1

35. The first fact presented by the Applicant is that the PRS Panel did not “debunk” his claim of discrimination. The Applicant states that he learned on 24 February 2016, the day he received the PRS Panel Report, that the PRS Panel did not “debunk” the discrimination claim he made in his request for review.

36. Having reviewed the record, the Tribunal finds that while the fact that the PRS Panel did not discredit the Applicant’s discrimination claim may have been new to him, the fact that he believed he was being discriminated against, and that discrimination was the foundation for the negative employment decisions, was not new. The Applicant submitted his request for review to PRS on 18 March 2014. In it he claimed “discrimination against me in setting my 2013 SRI rating and denying me any salary award for my actually successful performance.” This statement

demonstrates that he perceived discriminatory motives for the employment decisions prior to the present Application. That the Applicant recently discovered that the PRS Panel did not address or “debunk” this claim is inconsequential. It is therefore the Tribunal’s view that Fact No. 1 does not satisfy the first condition for an Article XIII revision. Even if the Applicant were successful in claiming that this fact is new, his claim would nevertheless fail as there is no evidence that the finding that his allegation of discrimination was not “debunked” by the PRS Panel might have had a decisive influence on the Tribunal’s judgment that the MOU was valid. The Tribunal’s assessment of the validity of the MOU was based on a review of the Applicant’s capacity to enter into the agreement with the Bank.

Fact No. 2

37. The Applicant’s second fact is that a colleague, Ms. BB, who had the same “Partially Successful” OPE rating as he did, was treated differently. Instead of being placed on an OTI with her employment terminated through an MOU, the Applicant’s colleague was permitted to go on a Developmental Assignment. The Applicant argues that had he known this, he would not have signed the MOU. On the other hand, the Bank contends that this fact is not new and the Applicant knew about the treatment of Ms. BB as early as 6 December 2013.

38. The record contains a document titled “Meeting Notes for meeting with Staff Relations Officer and Ombudsman on December 6, 2013.” The Tribunal observes that this document, which contains information about Ms. BB’s OPE rating, was shared with the Applicant on 6 December 2013. Thus, the fact was in the Applicant’s possession and was not “new,” thereby failing to meet the first condition of Article XIII. However, the Applicant asserts that he “never had a chance to read the email” because he was on an OTI at the time and was “overloaded with [Ms. BB’s] work program and parts of [Ms. X’s] tasks.” He maintains that he “read the text only on May 20, 2016 when [his] Attorney needed information on [Ms. X’s] management style” for his second application.

39. The Tribunal will not consider this fact to be new on the sole ground that the Applicant did not have enough time to read an email he received in which this fact was mentioned. Nevertheless,

even assuming the novelty of such information, it fails to have a bearing on the matter at hand which is the validity of the MOU the Applicant signed. This is due to the fact that there is no evidence that information on Ms. BB's "Partially Successful" rating might have had a decisive influence on the Tribunal's judgment. The validity of the MOU does not rest on circumstances which are external to the fact that the Applicant, exercising his full capacity, signed an MOU which on its face is a valid document.

Fact No. 3

40. The final fact which the Applicant proffers is that the Strategic Plan prepared by his supervisor, Ms. X, was deceptive. The Applicant claims that, when signing the MOU, he relied on the Strategic Plan which noted that his position was likely to become redundant in the future. He avers that three weeks after he signed the MOU, Ms. X hired a new Program Officer to do his job, and asserts that this new Program Officer is Ms. X's friend. The Applicant further claims that three years later the fellowship program which was earmarked in the Strategic Plan to undergo changes was still ongoing and there are now two additional Program Officers to do the tasks he and Ms. BB were performing.

41. According to the Applicant, this is evidence that the Strategic Plan was a "fallacy." To him it was "an invention to achieve [Ms. X's] confessed goal which was that 'staff who have been in the Scholarship Program for a long time should leave so she could refresh the team.'" The Applicant further argues that management knew that this Strategic Plan would not be put into effect but they "intentionally chose to remain silent until [he] signed the MAS." He maintains that he "relied heavily on the official but false information available to [him] at the time to go to Mediation and sign the MAS." The Applicant further argues that "[i]t is a fact that the bogus 'Efficiency PLAN' and the MAS signed on 9/3/2014 were just pretextual and designed to snatch away [his] Open-ended Bank employment in order to hire a person they like." Finally, the Applicant maintains that "[a]n Agreement signed in such circumstances is a fraudulently obtained agreement; it is contrary to the Bank's internal laws of due process and fairness."

42. In response, the Bank contends that the Strategic Plan was not new to the Applicant as it was circulated to the entire team in 2013.

43. Upon review of the record, the Tribunal considers that the fact that the Strategic Plan was never implemented is new information which the Applicant did not have at the time the judgment in *DC* was issued. Indeed, evidence that this Strategic Plan was a false plan designed to persuade the Applicant to sign the MOU, could add merit to the argument that his consent to the MOU was obtained fraudulently. That said, the Tribunal finds that there is no evidence on the record that the Applicant was informed that his position was to be made redundant and that he should sign the MOU in advance of this inevitable occurrence. While evidence of fraudulently obtained consent to the MOU would indeed be decisive and critical to an Article XIII claim, the Applicant has not discharged the burden of providing such evidence.

ADDITIONAL CLAIMS

44. Having found that the Applicant's submissions do not meet the legal basis to warrant a revision under Article XIII, the Tribunal finds that there is no need to address the Bank's remaining preliminary objections in detail. With respect to the assertion that the Applicant's claims are waived under the terms of the MOU which was signed on 3 September 2014, the Tribunal reiterates its observation that the purpose of the MOU "was to govern the conditions of the Applicant's exit from the Bank and bar him from challenging the termination of his employment or the terms under which he is to leave the Bank." The Tribunal upheld the validity of the MOU after finding that there was no evidence on the record that the Applicant was misled or subjected to duress. In light of the above, the Tribunal finds merit to the Bank's contention that the present Application is barred by the MOU which the Applicant signed. The Applicant's request for revision is, effectively, an attempt to litigate the termination of his employment, a cause of action which is clearly barred by the MOU. Unlike the PRS claims which the Tribunal found were not connected to the termination decision and thus outside the scope of the MOU, the Applicant's claims here are clearly connected to the subject matter of the MOU – namely the termination of his employment.

45. The Applicant asserts that the decision to terminate his employment was motivated by discrimination. He further claims that the MOU was tainted by the discriminatory motives of his managers. The Tribunal finds that the Applicant has not discharged the burden to present a *prima facie* case of discrimination. *See AI*, para. 41. While there is no singular test and the proof of a *prima facie* case will vary from case to case, as was held in *Bertrand*, Decision No. 81 [1989], para. 20, the Applicant must at least present “detailed allegations and factual support” regarding his claim of racial and/or gender discrimination. The record shows that the Applicant has submitted speculations not actual facts in support of his contentions. Though the Applicant claims that the different treatment of Ms. BB is evidence that he was discriminated against, there were alternative and plausible reasons for the difference in treatment between them, namely the fact that Ms. BB was awarded only one “Partially Successful” rating, while the Applicant was given two “Partially Successful” ratings. Furthermore, the Applicant assumes foul play because Ms. BB was eligible for the annual salary increase. To the Applicant this must mean that the “Partially Successful” rating was improperly removed from her OPE. However, the staff rule which the Applicant quotes in his pleadings expressly provided that “at the discretion of the staff member’s manager, the staff member may be granted an increase under the salary increase matrix.”

DECISION

The Application is dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/Zakir Hafez
Zakir Hafez
Acting Executive Secretary

At Washington, D.C., 21 April 2017