



**World Bank Administrative Tribunal**

**2017**

**Decision No. 560**

**DZ,  
Applicant**

**v.**

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

**(Preliminary Objection)**

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

**DZ,  
Applicant**

**v.**

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Koshi, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

2. The Application was received on 11 July 2016. The Applicant was represented by Ludovica Moro and Alex P. Haines of Bretton Woods Law. 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. The Applicant challenges the 2015 Notice from Pension Administration, "applying the amendments to the SRP and Supplemental Staff Retirement Plan ("SSRP") effective January 1, 2015 to [the Applicant], notifying her of her calculated individualized shortfall of \$278,542.57, as calculated pursuant to those amendments, and informing her of options under those amendments for contributing the identified amount."

4. The Bank has raised a preliminary objection to the admissibility of this Application. This judgment addresses that preliminary objection.

**FACTUAL BACKGROUND**

5. The Applicant joined the Bank on 18 January 1994 as a long-term consultant. She was classified as non-regular staff (NRS) and, therefore, was not eligible to participate in the Bank's Staff Retirement Plan (SRP), referred to as the Gross Plan at that time.

6. Effective 15 April 1998, the Bank introduced the Net Pension Plan (Net Plan), which was open to staff members hired on or after that date. At the same time, the Gross Plan, which was the Bank's pre-1998 SRP, was closed to all future participants.

7. On 10 December 1999, the Applicant accepted an open-ended appointment and was enrolled as a participant in the Net Plan.

8. In 2002, after the Tribunal's judgment in *Prescott*, Decision No. 253 [2001], the Applicant and several hundred staff members filed appeals to the former Appeals Committee, requesting *inter alia*, participation and credit in the SRP and other related benefits for their period of service in non-regular appointments. The Appeals Committee dismissed these claims on the bases that they were time-barred and outside the Appeals Committee's jurisdiction.

9. On 17 September 2002, the Bank decided voluntarily to grant partial pension credit for the service prior to 15 April 1998 of certain former NRS enrolled in the Net Plan. Consequently, the Applicant received 2.3 years of additional service credit in the Net Plan.

10. Prior to 2015, the Net Plan consisted of three components: a defined benefit component, a cash balance component, and a voluntary savings component (VSC). The defined benefit component is a fixed amount, fully paid by the Bank, and is based on salary and years of service. Upon retirement, a participant may choose to receive it as a lifetime annuity payment or as a single lump sum. The cash balance component reflects monthly allocations of contributions from the participant and the Bank, which are subject to a "deemed" rate of return based on the participant's investment elections. The mandatory, maximum participant contribution of 5% of net salary is collected through payroll deductions, while the Bank's contribution is 10% of net salary. Upon retirement, a participant may choose to receive the cash balance benefit as a lump sum, an annuity, or some combination of the two. With respect to the VSC, participants could contribute up to an additional 15% of net salary, which would be invested until retirement. The VSC did not have any matching employer contributions and was payable only as a lump sum.

11. On 6 February, 30 April, 1 May, and 11 December 2014, anticipated amendments to the Net Plan were discussed by Bank representatives with staff members at Town Hall meetings and a “Peoples’ Forum.”

12. On 16 December 2014, the Office of the Vice President, Human Resources sent an email to all participants in the Net Plan, including the Applicant, stating:

[...] [Y]ou are **automatically enrolled to have 11% deducted from your payroll starting on January 15, 2015**. This is a significant increase from the **current 5% deduction**. If you want to lower this amount, **you must opt out of the automatic enrollment before December 31, 2014** as this is the last day for Net Plan participants to opt out of the 6% optional contribution increase in addition to the already mandatory 5% contribution (for a total of 11%). (Emphasis in original.)

13. On 23 December 2014, the Bank’s Executive Directors approved amendments to the Net Plan, with effect from 1 January 2015. The amendments consisted of:

- a. Elimination of the VSC and transfer of any existing credited balance to the participant’s cash balance account;
- b. Voluntary, prospective contributions of up to an additional 6% of net salary to the cash balance account, for a maximum possible employee contribution of 11% (Optional Contributions); and
- c. Voluntary, retrospective contributions of up to 6% of net salary for prior years of service to the cash balance account (Additional Contributions), which would approximate the amount that a participant would have contributed had he or she contributed 11% of net salary from the date of enrollment in the Net Plan. The Additional Contributions could be paid as a lump sum up front, as a series of single payments per year for up to five years, and/or as an additional payroll deduction going forward.

14. By email dated 5 January 2015, in response to the Applicant’s email of the same date requesting information about amendments to the Net Plan, the Bank’s Program Manager, Human Resources Development, Compensation and Benefits Center of Expertise (Program Manager)

provided the Applicant with a copy of the SRP and SSRP, as amended and restated effective 1 January 2015.

15. By email dated 20 January 2015 (2015 Notice), Pension Administration reminded the Applicant about the option of making Optional Contributions and Additional Contributions to her cash balance account. Her Additional Contributions eligible balance was calculated as \$278,542.57.

16. By email dated 11 March 2015, Pension Administration reminded the Applicant about the option of making Additional Contributions to her cash balance account.

17. By email dated 21 May 2015, the Applicant filed an appeal regarding her pension to the Secretary of the Pension Benefits Administration Committee (PBAC) and the Program Manager. She requested “an appeal of my pension, an[d] consideration that I revert back to the Gross Plan.” She stated:

My appeal is to address the serious shortcomings that have been made more clear over the past two+ years of management review of the net pension plan, as well as by the recent changes and reforms to the pension plan at the Bank. I would like to appeal decisions which fall short of correcting these shortcomings in the net plan as they relate to my situation in particular (see context below), as well as relating to many other staff, especially those subject to US taxes.

The Applicant also noted that for all other purposes, other than pension, her start date at the Bank was recognized as being January 1994.

18. In her appeal, the Applicant claimed that the amendments “do not adhere to a key principle conveyed to all staff regarding the Net Plan – that is a partnership involving 1/3 [staff] and 2/3 [World Bank] funding of the Cash Balance Component.”

19. By email dated 27 May 2015, the Program Manager responded to the Applicant by clarifying the reasons for the changes to the Net Plan, namely, “to improve the level of annuity available to Net Plan participants and to allow staff to earn a 70% replacement income over a

shorter career.” He noted that “the Optional Contributions and Additional Contributions introduced with the Net Plan changes are strictly voluntary and you are by no means required to make use of those options if you do not feel it is appropriate to do so in your individual circumstances.” The Applicant was informed that, if she wished to file a formal appeal, she should submit a written request for a decision to the PBAC.

20. On 28 May 2015, the Applicant emailed the Secretary of the PBAC and the Program Manager, stating: “I think you may have misread my earlier correspondence and exchange, which request an appeal.”

21. By email dated 29 May 2015, the Program Manager informed the Applicant that any formal appeal regarding the SRP should be directed to the PBAC, through its Secretary. The Applicant responded on the same day to the Program Manager and the Secretary of the PBAC that “I have already requested appeal directly in my correspondence to you.”

22. On 1 June 2015, the Applicant and Program Manager, with the Secretary of the PBAC as an addressee, exchanged emails to confirm the Applicant’s submission of an appeal to the PBAC on 21 May 2015.

23. On 25 September 2015, the PBAC met “to consider [the Applicant’s] eligibility as a Gross Plan participant.” In setting out the chronology of the Applicant’s pension history, the PBAC noted that the 2015 Notice regarding the opportunity to make Additional Contributions prompted the Applicant “to investigate the differences between the Net Plan and the Gross Plan and led her to believe that she is at a financial disadvantage as a Net Plan participant.” The PBAC further “noted that the decisions challenged by [the Applicant] were made more than a decade ago, well beyond the statute of limitations.” In conclusion, the PBAC

[...] acknowledged that there are no provisions in the Plan that would allow Net Plan participants to retroactively participate in the Gross Plan and determined that [the Applicant] had not demonstrated any exceptional circumstances to distinguish her case from any other former NRS staff member. Therefore, the Committee agreed with the Benefits Administrator’s recommendation and denied the request from [the Applicant] to consider her eligibility as a Gross Plan participant.

24. By email dated 10 November 2015, the Secretary of the PBAC informed the Applicant:

The PBAC was empathetic to your circumstances but upon careful review of the facts and the Plan document, the PBAC found no provision in the Plan that would allow any former NRS staff member who is now a Net Plan participant to retroactively participate in the Gross Plan. Therefore, the PBAC was unable to grant your request.

25. On 23 February 2016, the Applicant requested an extension of time to file her Application. The Tribunal granted her request and gave her until 9 May 2016 to file her Application. On 27 April 2016, the Applicant requested a second extension of time, which the Tribunal granted until 9 June 2016. On 2 June 2016, the Tribunal granted the Applicant a third extension to file her Application by 11 July 2016.

26. The Applicant filed an Application with the Tribunal on 11 July 2016. She challenges the 2015 Notice, “applying the amendments to the SRP and Supplemental Staff Retirement Plan (“SSRP”) effective January 1, 2015 to [the Applicant], notifying her of her calculated individualized shortfall of \$278,542.57, as calculated pursuant to those amendments, and informing her of options under those amendments for contributing the identified amount.”

27. The Applicant seeks the following relief: (i) retirement benefits under the Gross Plan; (ii) damages based on a comparison of actuarial variations between the value of the Applicant’s retirement package under the pre-2015 Net Plan, if that plan had performed as promised, the actual value of her current retirement package, and the value of the retirement package that she would have received if she were a member of the Gross Plan; (iii) credit in her cash balance account, reflecting the deemed employer contribution in the full amount of her shortfall as of the date of the payment and a refund of any “additional” contributions the Applicant has made towards that shortfall; (iv) an amendment to adjust the cash balance account contributions so that the Bank is responsible for funding at least two-thirds of the cash balance account while the staff member funds one-third; and (v) legal fees and costs in the amount of \$103,768.11.

28. On 17 August 2016, the Bank filed a preliminary objection to the admissibility of this Application.

## SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

*The Bank's Contentions*

29. The Bank contends that the Tribunal lacks jurisdiction because (i) the Applicant's claims are out of time; (ii) the Applicant has not established non-observance of her terms of employment; and (iii) the Applicant's disagreement with Bank policy is not cognizable before the Tribunal. Finally, the Bank argues that it has not agreed to the submission of the complaint directly to the Tribunal and there are no exceptional circumstances that would warrant a waiver.

30. First, the Bank argues that the Applicant's claims are out of time because she is thirteen years late. The Bank concedes that the Applicant filed a request in time for an extension of the 120-day deadline to file an application to the Tribunal appealing the PBAC's decision. However, it submits that her underlying claims date back to 10 December 1999, "when she was informed she would be enrolled in the Net Plan and the Appeals Committee's denial in 2002 of her request to be enrolled in the Gross Plan." The Bank characterizes the Applicant's claim as one for enrollment in the Gross Plan. As such, this claim began to run when the Applicant was enrolled in the Net Plan on 10 December 1999, and she should have challenged that decision within ninety days of enrollment or at the latest, within three years. The Bank argues that the Applicant's appeal in 2002 was for past pension credit and to be enrolled in the Gross Plan, the latter being the decision that she now seeks to revisit.

31. The Bank states that the Applicant's request to the PBAC determines the scope of the Applicant's claims properly before the Tribunal. According to the Bank, her request was for the PBAC to reconsider her 2002 request to join the Gross Plan, rather than a challenge of the 2015 Notice. Moreover, the Applicant's perceived deficiencies of the Net Plan were policy arguments that were not within the scope of the PBAC's jurisdiction.

32. The Bank argues that since the Applicant's claim to be enrolled retroactively in the Gross Plan was not timely before the PBAC, the same claim cannot now be timely before the Tribunal.



33. The Bank submits that the Applicant has long been on notice of the terms and design of the Net Plan, including how it differs from the Gross Plan. According to the Bank, the Applicant should have been aware that the Net Plan, unlike the Gross Plan, is not a purely defined benefit plan so the pension benefits are not guaranteed. The Bank also argues that the Applicant has always had the necessary information to estimate her projected pension using the online pension calculator. If she took issue with the Net Plan, she should have challenged it in 1999 when she received her letter of appointment and was enrolled in the Net Plan.

34. The Bank also argues that the Applicant became aware of the “deficiencies” in the Net Plan well before January 2015. According to the Bank, as early as May 2014, the Applicant would have been able to access an online tool that would estimate how much retroactive contributions she would have to make to increase her pension benefit.

35. The Bank also points to the Applicant’s awareness about the VSC, which came into effect on 1 May 2007. The Bank states that the introduction of the VSC was a reminder to staff members of the options to save for retirement within and outside the SRP, which the Applicant could have utilized to respond to any alleged “shortcomings” in her pension benefit. However, the Applicant did not maximize the use of this option, nor did she contest the introduction of this option to make contributions.

36. The Bank denies that the Applicant’s claim arose on 1 January 2015. According to the Bank, the 2015 Notice does not restart the time since “an amendment to the Plan cannot reasonably renew the statute of limitations and invite otherwise time-barred claims.”

37. Second, the Bank submits that the Applicant has not demonstrated an incident of non-observance of her terms of employment. The Bank states that the Applicant’s terms of employment provide only for her participation in an SRP, “however, Net Plan participants are not guaranteed a specific percentage of their final salary on retirement.” The Bank denies that there is any evidence to support the Applicant’s contention that the Net Plan was designed to provide staff with a pension comparable to a pension under the Gross Plan. The Bank states that “it was abundantly clear from

the outset that although the Net Plan targeted 70% replacement salary, ‘benefits are not guaranteed.’”

38. The Bank argues that the 2015 amendments “did not unilaterally change, limit or deprive Applicant of the pension benefits to which she is entitled under the terms of employment” because these amendments are not obligatory, rather they provide additional voluntary options for staff members to save for retirement. The Bank contends that the 2015 amendments do not adversely alter the Applicant’s pension benefits or otherwise have major financial impacts. It claims that the amendments benefit the Applicant by giving her more options to save for her retirement. Should the Applicant choose not to make Additional Contributions, her projected pension benefits will remain the same as they were prior to the amendments.

39. The Bank further argues that any expectations or factors which might have induced the Applicant to accept employment or to remain in employment with the Bank are irrelevant to the determination of whether unilateral amendments to the terms of employment are permissible.

40. Third, the Bank submits that the Applicant’s claim is a disagreement with the Bank’s policy and therefore is outside the scope of the Tribunal’s jurisdiction. The Bank claims that “changes to the Net Plan and the SSRP are policy decisions taken within the constraints imposed by U.S. law” and are “policy decisions of the institution, taken by the Bank’s Board of Executive Directors after careful and extensive consultation of all stakeholders [...]”

41. The Bank states that the Applicant’s claim of discrimination is actually a challenge to the Bank’s policy, is not related to any adverse decision affecting the Applicant, and is untimely. The Bank claims that the 2015 amendments do not change the Bank’s policy of providing a tax supplement to staff members, including U.S. tax residents, to cover their tax liability. The Bank argues that the features of the SSRP and the limits on contributions pursuant to U.S. law are longstanding, and that the Bank has paid and continues to pay a tax supplement to participants to compensate them for taxes due on SRP and SSRP benefits.

*The Applicant's Response*

42. First, the Applicant argues that the Application was filed in time because she is challenging notices of 20 January and 11 March 2015, which applied the 2015 amendments to the SRP and SSRP. She emphasizes that her Application is about the shortfalls in the Net Plan. According to the Applicant, as a result of the Bank's mismanagement of the Net Plan over time, amendments were introduced in 2015, which adversely affected the Applicant and other participants in the Net Plan.

43. The Applicant also contends that the three-year bar to claims "does not apply in the present circumstances where the Applicant received notice of the changes *unilaterally* applied by the Bank to the Net Plan *only* in 2015." (Emphasis in original.)

44. The Applicant claims that the Bank did not raise the issue of timeliness before the PBAC. She alleges that neither the Pension Benefits Administrator nor the PBAC raised timeliness as a bar to the PBAC's jurisdiction. According to the Applicant, the PBAC did not reach any decision on jurisdiction. The Bank having failed to raise the issue of timeliness before the PBAC, the Applicant claims that the Bank cannot now avail of that argument before the Tribunal.

45. The Applicant disagrees with the Bank's contention that the Applicant raises different issues before the PBAC and before the Tribunal. She maintains that the substance of her claim to the PBAC and to the Tribunal are the same, namely, she disputes the changes to her pension benefits, as set out in the notices of 20 January and 11 March 2015.

46. The Applicant denies that she was long aware that her pension benefit was projected to be deficient. According to her, this information was treated by the Bank as confidential. The Applicant distinguishes between being aware of the major design elements of the Net Plan and being able to access information about the crucial underlying assumptions of the Plan, including growth assumptions. The Applicant claims that she only became aware of "how deficient and detrimental her individualized situation was" when she received the 2015 Notice, and this was the date on which she was first able to grieve the decision. The Applicant claims that, prior to 20

January 2015, the shortcomings of the Net Plan were not evident, and staff members did not know how much they would need or be allowed to contribute to the revised Net Plan.

47. Second, the Applicant submits that she has established non-observance of her terms of employment. She argues that the unilateral amendments of the SRP affect her employment contract, and that these amendments were so dramatic “to the point that the whole contribution system and balance have been completely diverted from their original formula.” Had the Applicant known about the shortfall and the need to increase significantly her pension contributions, she claims that she would have most likely looked elsewhere for employment, sought different terms of employment, or vigorously pursued a claim before the Tribunal in 2002.

48. The Applicant alleges that the Bank breached its duty to act in good faith when it failed to inform staff members in a timely manner that the Net Plan was not meeting its initial objectives and when it unilaterally amended the Net Plan’s terms. The Applicant claims that the Bank’s actions demonstrate “an unfair and discriminatory attitude towards the Applicant (and many other staff members facing the same situation).” She claims that the Bank assured Net Plan participants several times “that the retirement salary expected at the end of their career would be on par with 70% of their final net salary and on par with the retirement level of the SRP Gross Plan,” but this will not happen. Moreover, even if the specific level of retirement benefits had not been guaranteed, the Applicant argues that the Bank was irresponsible in shifting the burden to staff members to contribute “substantial catch-up payments and higher contributions from salary” to make up for the shortfall for which the Bank is responsible. The Applicant claims that although these contributions are characterized as “voluntary,” they are obligatory in order for staff members to achieve adequate pension in retirement.

49. The Applicant claims that the Bank’s actions directly affected her employment rights in an adverse manner, resulting in financial detriment. Specifically, the amendments to the Net Plan placed the full burden of the Net Plan’s failures on staff members and caused unjustified bias towards the Applicant.

50. The Applicant further claims that the Bank has disregarded the Applicant's legitimate expectations to obtain from the Net Plan pension benefits comparable to those of the Gross Plan. According to the Applicant, this was a breach of the principle of fairness.

51. Third, the Applicant states that she is not asking the Tribunal to adjudicate policy. Rather, the Bank's actions demonstrate discriminatory and unfair treatment of staff members. The Applicant claims that the 2015 amendments negatively impacted U.S. citizens and tax residents, subjecting them to a retirement benefit that is not comparable to that of non-U.S. citizens. The amended Net Plan also places the highest cost burden on long-serving staff and has a disproportionate impact on such staff since their total "catch-up" burdens are significantly greater than those of younger staff. For those staff with larger shortfall amounts, in order to comply with U.S. tax laws capping the annual contribution to the SRP, they will have to delay paying their shortfalls or be forced to place funds into the SSRP, which has inferior terms as compared to the SRP. The Applicant argues that the amendments constitute "an unjustifiable discrimination against long-serving staff, U.S. citizens and those who retire in the U.S."

52. Fourth, the Applicant submits that she has exhausted internal processes by appealing to the PBAC on 21 May 2015, within 120 days of receiving her individualized shortfall notice. The PBAC denied her request and stated that her recourse to appeal would be to the Tribunal.

#### THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

53. The first question the Tribunal must examine is whether the Application is timely. The parties submit different characterizations of the contested decision. The Applicant submits that she is challenging the 2015 amendments to the Net Plan, which she alleges resulted from the Bank's mismanagement of the Net Plan. The Bank submits that the Applicant is requesting to be enrolled in the Gross Plan.

54. The decision of the PBAC is the decision that is reviewable by the Tribunal. In this case, the PBAC clearly denied the Applicant's request for "an appeal of my pension, an[d] consideration that I revert back to the Gross Plan." In other words, the Applicant framed her claim to the PBAC

as “my request for Appeal, and staff claim to be more appropriately placed in the pre-1998 Gross Plan, in order to meet the retirement commitment of the SRP.” The Bank’s alleged responsibility for the shortfall relates to the merits of the case.

55. Article II of the Statute of the Tribunal provides the following regarding the Tribunal’s jurisdiction:

1. The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words “contract of employment” and “terms of appointment” include all pertinent regulations and rules in force at the time of the alleged non-observance including the provisions of the Staff Retirement Plan.

2. No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

- (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and
- (ii) the application is filed within one hundred and twenty days after the latest of the following:
  - (a) the occurrence of the event giving rise to the application;
  - (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted [...].

56. It is not disputed that, as the Applicant’s grievance concerned her pension, the PBAC was the appropriate dispute resolution forum within the Bank to consider the Applicant’s claim. The Tribunal has recognized that the PBAC’s “sole function is to interpret the terms of the Staff Retirement Plan and to rule on entitlements to pensions.” *Biswas*, Decision No. 262 [2002], para. 16. Having appealed to the PBAC, the Applicant has exhausted all remedies available within the Bank Group.

57. Rule 24 of the Rules of the Tribunal states:

Where an application is brought against a decision of the Pension Benefits Administration Committee of the Bank, the time limits prescribed in Article II of the Statute are reckoned from the date of the communication of the contested decision to the party concerned.

58. The record shows that on 10 November 2015, the PBAC informed the Applicant that it “was unable to grant [her] request” and that she had 120 days to appeal to the Tribunal. The Applicant submitted a request for an extension of time to file her Application on 23 February 2016, within 120 days of receiving notice of the PBAC’s decision. This request for an extension was granted by the Tribunal, as were her subsequent requests for extension. The parties agree that the Applicant filed a request in time for an extension to file an application appealing the PBAC’s decision.

59. In *Agerschou*, Decision No. 114 [1992], the applicant’s request to the PBAC was submitted past the deadline, but the Bank did not object to the PBAC’s review. Ultimately, the PBAC dismissed the applicant’s request. In determining that the application to the Tribunal was timely, counting the time from the date the applicant received the PBAC’s decision, the Tribunal noted at para. 39:

Prior to the review of the case by the PBAC the Applicant had requested an administrative review, which resulted in the affirmation of the previous decision. “The date of the communication of the contested decision” of the PBAC under Rule 22 is no less clearly the date of receipt of the January 4, 1989 letter. Thus, both under Article II of the Statute and Rule 22 of the Rules, it is from the date of receipt by the Applicant of the January 4, 1989 letter that the 90-day time limit has to be reckoned.

60. The facts in the present case are also similar to those in *Baartz (No. 2)*, Decision No. 258 [2001], where the applicant appealed the PBAC’s denial of his request for restoration of his prior service under the SRP. In discussing timeliness, at para. 30, the Tribunal noted that “once the PBAC decision was communicated to the Applicant on May 8, 2001, he timely filed his application with the Tribunal contesting the PBAC’s decision denying restoration of his prior service under

the SRP.” The Tribunal also observed that during the proceedings before the PBAC, the Bank did not raise any jurisdictional objections.

61. Other examples of the Tribunal exercising its jurisdiction where the PBAC rendered decisions on the merits include *Caryk*, Decision No. 214 [1999] and *Madhusudan*, Decision No. 215 [1999]. In *Caryk*, para. 17, the Tribunal “considers it to be of overriding importance that the Bank did not raise [its jurisdictional objections] before the PBAC.” In *Madhusudan*, para. 24, the Tribunal found “it to be of overriding importance that the Bank did not raise [its jurisdictional objections] before the PBAC” and the Bank “had indeed referred the Applicant to the PBAC in the first place.”

62. In the present case, the PBAC clearly pronounced on the merits of the Applicant’s claim in its decision of 10 November 2015. The PBAC denied the Applicant’s request, stating that “the PBAC found no provision in the Plan that would allow any former NRS staff member who is now a Net Plan participant to retroactively participate in the Gross Plan.” In the same communication, the Applicant was also advised that the PBAC’s decision was “subject to the appeal [...] to the World Bank Administrative Tribunal within 120 days of receiving this letter.”

63. The Tribunal further notes that the reference of timeliness only appears in the minutes of the PBAC’s meeting. According to the minutes, the PBAC “noted that the decisions challenged by [the Applicant] were made more than a decade ago, well beyond the statute of limitations.” The PBAC then went on to discuss the merits of the Applicant’s appeal. The minutes were only produced to the Applicant during the Tribunal proceedings, as part of the exchange of pleadings.

64. In examining the PBAC’s decision as conveyed to the Applicant, the Tribunal finds that the decision makes no reference to the Applicant’s appeal being out of time. Rather, the Applicant reasonably understood the PBAC to have considered and rejected her appeal. The Applicant’s receipt of the PBAC’s decision put her on notice of the disputed employment matter and she had 120 days from receiving the PBAC’s decision to file her Application with the Tribunal.



65. The Tribunal finds that the Bank's objection to jurisdiction based on failure to exhaust internal remedies in a timely manner must fail. The Applicant exhausted all other remedies available within the Bank Group and filed the Application within 120 days of receiving notice of the PBAC's decision, taking into account the extensions of time granted by the Tribunal.

66. The Bank's alternative grounds for the Tribunal's lack of jurisdiction are that the Applicant has not established non-observance of her terms of employment that adversely affected her and that she is challenging Bank policy.

67. Section 10.2(f) of the SRP states that the PBAC

[...] shall decide all questions of interpretation of the Plan provisions relating to participation, retirement, elections, and benefits, and any claim of any person for benefits or other payments under the Plan. [...] A decision of the [PBAC] shall be conclusive and binding on all persons concerned, subject to the appeal of the decision to the World Bank Administrative Tribunal.

68. In the present case, the PBAC assumed jurisdiction and rendered a decision on the merits. The Tribunal therefore has authority to review the PBAC's decision.

69. The Applicant claims that the changes to the Net Plan changed essential terms of her employment and thus, she is entitled to be enrolled retroactively in the Gross Plan. In *Naab*, Decision No. 160 [1997], paras. 26 and 27, the Tribunal stated:

All that Article II requires is that the Applicant be a staff member of the Bank Group and that he present "any application" alleging non-observance of "his contract of employment or terms of appointment." The Applicant in this case is a staff member of the Bank and does in fact allege non-observance of his contract of employment. He alleges that the amended Staff Rule applied to him "establishes an arbitrary and unreasonable restriction on his employment at the Bank" and that it "alters an essential condition of his employment agreement." The relief he is asking for, besides compensation, is that he should be grandfathered from the restriction introduced by the amended Staff Rule 4.01.

The Tribunal concludes that the contentions of the parties can only be disposed of once they have exhausted their right to substantiate their opposing views on the different aspects of the substantive elements of the dispute.

70. In *N*, Decision No. 356 [2006], para. 20, the Tribunal stated:

The discussion whether there has been a breach of fairness and impartiality in this case pertains to the merits. For jurisdictional purposes, as the Tribunal held in *McKinney*, Decision No. 183 [1997], paras. 13, 16–17, it is enough that the Applicant has “alleged” a plausible claim of contract violation and that it is tenable that “there are circumstances that warrant an examination of the merits of his allegations.” It was there held by the Tribunal that “[i]t would be premature and improper for the Tribunal, by declaring this application inadmissible on the ground of jurisdiction *ratione materiae*, to deprive the Applicant of an opportunity to make his case.

71. In the present case, the Applicant raised before the PBAC the claims of discrimination, and that the Bank breached the duty to act in good faith and the principle of fairness. These are issues that are within the Tribunal’s jurisdiction to consider.

72. The Bank’s preliminary objection is predicated on resolving issues on the merits. However, the merits of the Applicant’s case are not before the Tribunal at this stage of the proceedings.

73. In response to the Bank’s argument that Bank policy is not cognizable before the Tribunal, the Tribunal notes that there is scope for it to review Bank policies, albeit limited. In *Oinas*, Decision No. 391 [2009], para. 27, the Tribunal acknowledged:

The Tribunal is mindful of the limits of its powers. It is not a policy-making or a policy-reviewing institution. These functions fall within the discretionary ambit of the powers of the Bank and its governing institutions. [...] It is also well-established that in respect of policy-making “it is not for the Tribunal to override the Bank’s considered judgment and to replace it with its own” [...] nor to “consider which alternative would have been best or more effective to attain the desired objectives of reform [...]”

74. The Tribunal will also bear in mind its holding in *Eindhoven*, Decision No. 23 [1985], para. 43, where it stated:

So long as the Bank’s resolution and policy formulation is not arbitrary, discriminatory, improperly motivated or reached without fair procedure, there is no violation of the contract of employment or of the terms of appointment of the staff member.

75. The Tribunal finds that it has jurisdiction *ratione temporis* and *ratione materiae* in the present case.

DECISION

- (1) The Bank's preliminary objection is dismissed; and
- (2) The Bank shall pay the Applicant the amount of \$12,156.66 in legal fees and costs for this preliminary phase of the proceedings.

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

/S/Zakir Hafez  
Zakir Hafez  
Acting Executive Secretary

At Washington, D.C., 21 April 2017