



World Bank Administrative Tribunal

2015

Decision No. 525

**DC,
Applicant**

v.

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

(Preliminary Objection)

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

**DC,
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-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.
2. The Application was received on 10 April 2015. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 13 November 2015.
3. The Applicant requests 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, order the reinstatement and continuation of Peer Review Services (PRS) Request for Review No. 186. The Bank challenges the admissibility of the Applicant's claims on the grounds that he waived them in a Memorandum of Understanding (MOU) which he signed with the Bank on 3 September 2014.
4. The Applicant also challenges the Bank's failure to provide him with information about his separation benefits. The Bank contends that this claim should be deemed inadmissible as the Applicant should have "exhausted prior remedies, including PRS," in accordance with Article II of the Tribunal's Statute.
5. This judgment addresses the Bank's preliminary objections.

FACTUAL BACKGROUND

6. The Applicant is a 55 year old male who joined the World Bank in January 2002 in a country office. He received an open-ended appointment in 2005 and relocated to Washington, D.C. with his family. After several years of a fully successful performance at the Bank, in 2013 and under a new supervisor, Ms. X, the Applicant received a partially successful OPE. As a result of this, the Applicant was given a low salary increase rating of 2.2 resulting in no salary increase for that fiscal year. The Applicant was subsequently placed on an OTI.
7. The Applicant contested the OPE, SRI and his placement on an OTI. On 22 November 2013, the Applicant requested mediation which was held on 22 January 2014. The mediation was unsuccessful.
8. On 18 March 2014, following the failed attempt to mediate these issues, the Applicant filed a Request for Review with PRS - Request for Review No. 186. In his request for review, the Applicant challenged the 2013 OPE, his SRI and his placement on an OTI. He also alleged discrimination and abuse of discretionary power by his supervisor, Ms. X, “in setting [his] 2013 SRI rating and denying [him] any salary award for [his] actually successful performance.”
9. The OTI plan continued alongside the PRS process.
10. On 1 June 2014, at the conclusion of the OTI, Ms. Y, the Applicant’s Operations Manager, sent the Director of the Department, Mr. AB, a memorandum recommending that the Applicant be terminated for unsatisfactory performance.
11. On 15 June 2014, the Applicant wrote to Mr. AB disputing the charges in Ms. Y’s memorandum.
12. On 16 June 2014, the PRS Panel scheduled the hearing in Request for Review No. 186 for 7 July 2014. The Panel also issued a decision on its scope of review namely:

[W]hether the Bank acted consistently with [the Applicant's] contract of employment or terms of appointment in evaluating his performance as set forth in his Overall Performance Evaluation covering the period July 1, 2012 through June 30, 2013 ("2013 OPE"); issuing him a 2013 Salary Review Increase of 2.2 and corresponding salary increase ("2013 SRI"); and deciding to place him on an Opportunity to Improve Unsatisfactory Performance Plan ("OTI Plan"). In answering this question the Panel will examine the reasons supporting the Bank's decisions, whether the Bank followed the applicable procedures, and whether management acted in good faith.

13. On 7 July 2014, the PRS Panel held a hearing in PRS Case No. 186.

14. On the same day, Ms. W, a Human Resources Officer, sought a meeting with the Applicant. The Applicant and Ms. W met on 9 July 2014. According to the Applicant when they met she informed him that management intended to terminate his contract unless he accepted a Mutually Agreed Separation (MAS) and agreed to withdraw his PRS Request for Review No. 186.

15. On 14 July 2014, the Applicant sent Ms. W an email with an overview of their discussion noting:
 1. You informed me that senior Management has or will endorse the decision to terminate my employment with the WBG.
 2. There is a possibility for me to opt for a mutually agreed separation. This takes into consideration that I have a family and also because it would allow me to still come back in the WBG as a consultant. The question is if I would consider that offer.
 3. You reminded me about the consequences for a G4 visa holder.
 4. You explained that you are just a messenger.

16. In the same email, the Applicant noted that he responded as follows:
 1. I did not do anything wrong in the Scholarship Program that should cost me my job.
 2. If my employment should be terminated anyway because that would make [Ms. X] happy, I have no control over the decision.
 3. My salary is the only income for my family of 5 people. The best help for my family is that I keep my job.
 4. I reiterated that if my position is no longer needed in the programme, there were other ways of handling that in a respectful manner.

5. I do not see a reason to ‘mutually agree’ on an unfair situation created by [Ms. X].

17. Hours later, a Notice of Termination for Unsatisfactory Performance was issued to the Applicant. The Applicant’s contract termination was to be effective 13 September 2014. The Applicant was placed on Administrative Leave and barred from the Bank’s premises unless he received special permission from the Human Resources Vice President (HRVP).

18. On 17 July 2014, Ms. W informed the Applicant that management had “agreed to discuss the conditions of your exit from the Bank.” She asserted that the most appropriate way to reach an agreement under the circumstances was with the help of a mediator. The Applicant asserts that he was informed by Ms. W that he would lose his severance payment unless he accepted an MAS. The Bank does not contest this assertion.

19. On 21 July 2014, the Applicant contacted the Executive Secretary of the Peer Review Services informing her of his contract termination and seeking the assistance of the PRS to request “the Management in the spirit of PRS #186 to withdraw the memorandum to terminate my employment. I have not done anything that should cost me my job and I believe that the employment termination memo is an excessive solution to this conflict.”

20. On 31 July 2014, the PRS Executive Secretary responded to the Applicant stating:

With respect to management’s recent decision to terminate your employment, you may request review of this decision in PRS. If you decide to do so, you must file your Request for Review within 120 calendar days of receiving notice of the termination decision.

[...]

Alternatively, if you wish to seek review of the termination decision, you may wish to proceed directly to the World Bank Administrative Tribunal and bypass the peer review process.

21. On 4 August 2014, the Applicant was informed that the PRS Panel had submitted its report in Request for Review No. 186 to the Vice President of the Leadership, Learning & Innovation Vice Presidency for his review and final decision. The Applicant was informed that the Vice President’s decision would be issued within 30 days.

22. On 3 September 2014, an MOU was concluded between the Applicant and Mr. AB, the Director of the Applicant's unit, acting on behalf of the World Bank Group. The document provides that:

This Memorandum of Understanding (MOU) documents the agreement between [the Applicant] (“[the Applicant]”) and [Mr. AB], on behalf of the World Bank Group (“WBG”) regarding the following issues:

- [The Applicant's] ending employment with WBG
- Post-employment benefits, commitments and understandings.

23. The MOU sets out the process for ending the Applicant's contract with the Bank namely that he agrees to resign effective 1 July 2015 and would be placed on Administrative Leave from 12 September 2014 until 30 June 2015. In exchange, the Bank would pay the Applicant a single payment of US \$25,000 and place him on extended Administrative Leave for ten months.

24. Regarding the Applicant's human resources records, the MOU notes that:

5. WBG agrees not to process and record [the Applicant's] OPE/SRI ratings for 2014.

6. Pursuant to Staff Rule 3.01 (Access to Staff Records), [the Applicant's] 2013 OPE and SRI rating, and OTI-related documents in his WBG Human Resources file generated between November 19, 2013, and July 14, 2014, will be designated as Limited Access Documents [“Selecting officials shall have access to the Staff Records (except Limited Access Documents) [...]When selecting officials have identified candidates whom they are prepared to select, they may have access to Limited Access Documents of those candidates.” Staff Rule 2.01 Confidentiality of Personnel Information, paragraph 3.01(b).]

25. The MOU further states with respect to post-employment understandings:

7. [The Applicant] shall be ineligible to resume any employment relationship with the Bank for a period of 5 years from the date of his separation from the Bank.

26. Regarding post-employment benefits and commitments the MOU provides that:

8. On or about his last day of employment [the Applicant] would be paid a lump sum in respect of any accumulated annual leave days, up to a maximum of 60 days,

as of the close of business on his last day of service in accordance with Staff Rule 6.06 "Leave."

9. Upon separation [the Applicant] would be entitled to any benefits for which he is eligible to receive in accordance with Staff Rule 7.02 (Benefits on Ending Employment) and his Letter of Appointment.

27. On 3 and 4 September 2014, the Applicant received a call from a World Bank Human Resources Specialist with whom he had no previous contact. According to the Applicant, she informed him that by signing the MOU he was dropping future claims and he should inform the PRS Executive Secretary that he wanted to receive the PRS Panel report "for information only."

28. On 4 September 2014, the Applicant sent an email to the PRS Executive Secretary informing her of his conversation with the Human Resources Specialist. The Applicant stated:

Immediately after the signing of the MOU I had a phone call (yesterday and this morning) from [the Human Resources Specialist]. She seems to suggest that because of the MOU I may no longer receive the report of the PRS.

The PRS report was not discussed in the MOU. My understanding is that by signing the MOU, I am dropping all legal claims - - and the PRS report cannot be used for any future claims. I would therefore receive the report for information only.

29. On 4 September 2014, the PRS Executive Secretary asked the Applicant for further clarification on the legal implications of the MOU. She stated:

I am not privy to the content of the MOU. However, my understanding is that the MOU covered settlement for the same claims you raised in Request for Review No. 183 [sic] (i.e. 2013 OPE, 2013 SRI, and the decision to place you on an OTI). If my understanding is correct, then there is no need for the decision-maker to render a decision on the Panel's Report. Therefore, the decision-maker will not be distributing to you his decision along with a copy of the Panel's Report in accordance with SR 9.03, paragraph 11.01.

30. On 4 September 2014, the Applicant responded stating:

Yes under paragraph #6, the MOU covers the 2013 OPE, SRI and OTI-related documents and designates them as "limited access" documents. So I agree that this puts an end to the PRS process.

I discussed with [the Human Resources Specialist] the possibility to view the PRS report and recommendations. She will help me with that request.

31. On 5 September 2014, the PRS Executive Secretary sent the Applicant a Notice of Withdrawal. The Notice stated:

The Requesting Staff Member in Request for Review No. 186 notified the Peer Review Secretariat that he resolved his claims in mediation. Accordingly, the peer review process will not continue and the Request for Review has been withdrawn. The Peer Review Secretariat has terminated its process in Request for Review No. 186 effective Thursday, September 4, 2014.

32. On 10 September 2014, the Applicant contacted the PRS Executive Secretary stating:

I am confused by the notice of withdrawal as mentioned in your email. As you know I had 2 cases:

- a) PRS about the OPE 2013 up to the decision that put me on OTI – at least this is what we discussed at PRS. The implementation of the OTI was not part of the PRS because the OTI was not completed at the time of my PRS request. And the PRS does not discuss processes that were not completed.
- b) Termination Memo received on 14 July 2014 as a result of the implementation of the OTI – which was declared unsuccessful.

In fact the Mediation was about the Termination memorandum I received on July 14, 2014 (a week after the PRS). We went to Mediation to discuss my exit of the WBG under a mutually agreed separation (MAS) instead of ‘Termination.’

And the MOU just says that all OPE, SRI, and OTI documents will be classified as ‘Limited Access’. And will be made available to hiring managers and HR if I try to get another job with the WBG. These are the conditions to offer me the MAS.

But we did not discuss:

- The OPE 2013 in its substance.
- The decision to put me on OTI (the justification and fairness).

We did not discuss the withdrawal of the PRS. But we agreed that by taking the MAS, I cannot claim anything in the future about the OTI, the decision following the OTI such as the termination memo.

There is a terrible mix-up of issues. That is why I still do not understand why the recommendation of the PRS panel cannot be shared with me. Instead I am asked to come to an office and read it on a screen.

33. The Applicant followed up this message with three more emails to the PRS Executive Secretary on 12 and 15 September 2014, and on 7 October 2014. In the 12 September 2014 email the Applicant informed her that:

The reason I am very confused because the two cases were handled by 2 different mediators and there were 2 different decisions:

1/ Case #1: OPE 2013 – The Mediation was held on 12/03/2013 with Mediator [...]. The Mediation ended without an agreement. PRS was filed as a result of the failed mediation, specifically on the OPE 2013.

2/ Case#2: Termination for unsatisfactory performance – mediator [...]. Agreement we reached: MAS and resignation instead of termination. OPE and OTI related documents to be classified as ‘limited access.’ With this my understand[ing] is that the case #2 is closed. And I informed PRS about this.

No discussion was made on the OPE or decision to put me on the OTI. And this is not in the MOU. It was never clear at which point the decision was made to merge both cases.

This is my understanding of the situation and I am still confused.

34. In his 15 September 2014 email message the Applicant stated:

I will follow your advice and contact the Mediation Office. The situation is confusing for all of us. What I meant by my first email to you was that the mediation agreement resolved the claims related to Termination of employment and that I would not have to bring them to PRS. Although I do not like the fact that OPE and OTI implementation documents would be kept in my HR records as ‘limited access,’ I cannot file a case in the future with PRS because I signed the MOU. That was my understanding when I was asked to email you. I was not specifically asked to withdraw the case mediated by [...] i.e PRS#186. The OPE and OTI came into the picture – not on the substance as exposed in PRS#186 – but only when we were discussing my prospects of re-employment by the WBG after resignation.

35. On 7 October 2014, the Applicant sent an email to the PRS Executive Secretary and other members of the PRS Panel in Request for Review No. 186 stating:

I went back and read my 9/4/2014 email that you quoted. I understand that the confusion started there. I would not be still writing so many emails about this situation if I meant that my claims on PRS#186 were resolved in mediation and that the PRS#186 case has to be withdrawn. Most importantly, I am human and this confusion has to be put in perspective. The confusion cannot be isolated from the context:

- The WBG has imposed on me 20 months (February 2013 – September 2014) of continuous stress that forced me to seek help from health specialists
- I am forced out of the WBG without any logical explanation for the decision.
- I am thrown out into a job market that discriminate people of my age.
- I am leaving the WBG with the worse conditions for my professional life.
- On 9/3/2014, after long hours of mediation I reluctantly signed a MOU that ends my 13 year career with the WBG with the worse conditions possible which I could not afford to turn down. Minutes after that “deal” I am receiving urgent phone calls and urgent emails from the WBG and an injunction to reply to those emails very quickly before 9/4/2014.
- The truth is that from the time I signed off on the MOU my attention has shifted to my family, especially my 3 little children whose future is now compromised before they may not even complete middle school and high school; my family facing the risk of homelessness in a country that is not mine, etc.

36. The Applicant acknowledged that his 4 September email was “incomplete and confusing,” stating:

- It is incomplete because I just said that the MOU has a paragraph #6 that mentions “limited access documents” and that those documents are the OPE, SRI, OTI related documents, etc. I did not answer the question about my claims in PRS #186 being resolved in the MOU.
- It is confusing because, anything I was writing is about the termination case and the MOU – not about PRS#186. I have read the MOU and its binding clauses. And when I say ‘this puts an end to the PRS process’ in my mind, the paragraph #6 about “limited access documents” (which I do not like) cannot be used to start a PRS process on the termination case and the subsequent MOU.

My thinking process was simple: after Mediation, the next step in the Conflict Resolution System is PRS. I thought that I was asked – in the spirit of the MOU signed on 9/3/2014 – to assure [the PRS Executive Secretary] and the PRS Secretariat that none of the sections of the MOU would be brought to the attention of PRS any day in the future – and this includes the ‘limited access documents.’ Per the terms of the MOU I said that I agree that all claims about the provision of the MOU are dropped. By signing the MOU I closed the door to complaints about that paragraph#6. This is what I meant by ‘I agree that this puts an end to the PRS process.’

37. The Applicant further stressed the difference between the two issues stating:

I had two (2) separate cases in the CRS system and they were handled separately by 2 different Mediators. I never thought about mixing them:

-Case#1: OPE2013, SRI, decision to put me on OTI. The Mediation Office assigned Mediator [...] to handle the case. The parties at the mediation were my supervisor [Ms. X] and me. The mediation session was held on 12/03/2013 and it ended without agreement. If we had a MOU that day, I would not have to file PRS#186.

-Case #2: This was about the (a) Termination of my employment with the WBG for unsatisfactory performance by a Memorandum dated 7/14/2014 and (b) Post-employment benefits, commitments and understandings. The parties at the mediation were my Director of Operations [Mr. AB] and me. In this case Management offered a mutually agreed separation but it has to be formalized at Mediation. The mediator was [...]. I had a communication with PRS about this termination case and was informed that I could bypass PRS and take the case directly to the Tribunal, if I wished. Instead of the Tribunal, the matter was settled at Mediation and an MOU was signed on 9/3/2014.

[...] At no point a decision was made to merge both cases. I challenge anyone to prove that they sent me a communication stating that the two cases are being merged. And again, paragraph #6 of the MOU is not a solution to PRS#186. It is just an interdiction for me to get a job by retaining in my HR records documents that damage my reputation as a professional.

[...]

If I had made the decision to take case#2 directly to the Tribunal, PRS#186 (case#1) would still be pending and would have to be resolved. The fact that a MOU is signed for case #2 does not close case #1 – especially when this was not agreed upon before the 9/3/2014 mediation or before the signing of the MOU the same day.

38. In the penultimate paragraph of his email the Applicant underscored “that PRS#186 was not part of the discussion at the Mediation on 9/3/2014 or other mediation sessions,” adding:

A phone call from HR after the signing of the MOU does not change that. Discussing the issues raised in PRS #186 would have required the presence of my Supervisor [Ms. X] or my Manager [Ms. Y] at the Mediation sessions. The Director of Department [Mr. AB] does not even see my OPE. It is signed at the Manager level. Therefore he could not discuss those issues at the Mediation table. On the other hand he received from my manager a recommendation to terminate my employment and my response to the recommendation. He signed the termination memorandum on 07/14/2014. Those are what he discussed with me and it resulted in the MOU that we both signed on 9/3/2014.

39. On 17 October 2014, the PRS Panel reviewed the Applicant’s request to re-open the peer review proceeding. In considering his request the Panel reviewed the MOU dated 3 September 2014, the Applicant’s submission dated 7 October 2014, and Ms. Y’s response dated 10 October

2014. According to Ms. Y, PRS should not re-open the proceeding as the MOU addressed all of the Applicant's claims, including the claims he sought for review in Request for Review No. 186.

40. The Panel determined that PRS was not the "appropriate forum to resolve the parties' discrepancies regarding whether the MOU includes resolution of [the Applicant's] claims pertaining to Request for Review No. 186. Rather per the terms of the MOU, the Panel note[d] that either party may request the assistance of the Office of Mediation Services in an attempt to resolve these types of issues." The Panel further noted that "[i]f mediation is unsuccessful, [the Applicant] then may seek review at the World Bank Administrative Tribunal."

41. According to the Applicant, the World Bank management declined to participate in mediation. On 8 December 2014, the Office of Mediation Services informed the Applicant and the Bank's representative that the case was not deemed appropriate for mediation and was referred to other channels for resolution.

The Applicant's request for information on his separation benefits

42. On 5 December 2014, the Applicant sent an email to the World Bank Lead Human Resources Specialist, to request the breakdown of the separation benefits he should expect to receive on 30 June 2015 under the terms of the MOU. These were severance payments he expected as a result of information provided by Ms. W.

43. On 11 December 2014, the Applicant sent the Lead Human Resources Specialist a reminder email.

44. On the same day the Lead Human Resources Specialist responded informing the Applicant that he was "in and out of the office quite a bit during the last week and a half." He stated that he would look into the Applicant's request and respond "hopefully tomorrow, otherwise by Monday."

45. On 23 December 2014, the Applicant sent the Lead Human Resources Specialist a follow up email stating:

I just want to remind you of the breakdown I requested from your office on 12/05/2014. I know you are very busy but my family and I are considering our options about taking the severance payment or not. The breakdown I am asking for will help us in this time of difficult decisions.

46. The Applicant did not receive a response.

The Application

47. On 10 April 2015 the Applicant submitted this Application to the Tribunal. He seeks the following six remedies. First, rescission of his 2013 OPE and SRI, or, in the alternative, referral back to PRS ordering the reinstatement and continuation of PRS Request for Review No. 186. Second, rescission of the OTI, or, in the alternative, referral back to PRS ordering the reinstatement and continuation of PRS Request for Review No. 186. Third, removal of all records of his 2013 OPE and SRI and of the Opportunity to Improve Plan from his personnel records – or, in the alternative, referral back to PRS ordering the reinstatement and continuation of PRS Request for Review No. 186. Fourth, provision of full information as to the amount of all separation benefits which would be due to the Applicant if he were to resign from the World Bank as of 1 July 2015. Fifth, rescission of the MOU dated 3 September 2014, and the consequent reinstatement of his right to appeal the notice of his termination given to him on 14 July 2014. Sixth, appointment to a position within the World Bank equivalent to his former position of Program Officer, Level GF.

48. The Applicant further seeks in compensation: a) A retroactive salary increase equal to at least the average awarded to GF level staff who received a 3.2 SRI for fiscal year 2013; b) A salary increase of an equivalent amount for fiscal year 2014; and c) Such additional compensation as the Tribunal deems appropriate, but not less than 12 months' salary and benefits for the emotional stress and the terrible damage to his health and professional reputation caused by management's abusive treatment.

49. On 22 May 2015, the Respondent filed a Preliminary Objection contending that the Application was inadmissible as the Applicant's claims were waived under the terms of the MOU.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Bank's contention No. 1

The Application is inadmissible because the Applicant's claims are waived under the terms of the Memorandum of Understanding

50. The Bank maintains that under the 3 September 2014 MOU the parties agreed to “release all claims connected to the issues that are part of this agreement and refrain from future legal or administrative action related to such issues, except for the purposes of implementing and, if needed, enforcing the terms and conditions of this MOU.” According to the Bank, the Applicant’s termination of employment was a direct result of his partially successful OPE and the unsuccessful completion of his OTI. The Bank contends that the withdrawal of the Applicant’s Request for Review No. 186 by PRS was proper as he waived these claims under the MOU.

51. The Bank further argues that the Applicant freely entered into an MOU that (i) arose out of issues surrounding his performance and unsuccessful OTI, (ii) settled and released all claims connected with the termination of his employment, and (iii) established the termination of his employment by resignation effective 1 July 2015.

52. According to the Bank, the argument that the proceedings in PRS Request for Review No. 186 were different from the mediation and MOU on the termination of the Applicant’s employment is untenable. The Bank contends that there were no proceedings to stay in the PRS process since by the time the parties agreed to engage in mediation about the Applicant’s termination (17 July 2014), the entire PRS process was almost finalized.

53. The Bank contends that the settlement which the Applicant received was “generous” namely: (i) almost 10 months of Administrative Leave with continuation of salary and full benefits; (ii) a single payment of US \$25,000 on or about 30 June 2015; and (iii) other human resources-related arrangements. The Bank argues that “[a]llowing Applicant to challenge his OPE, SRI, OTI and termination now would be inconsistent with the Tribunal’s views [...] and would undermine the rationale behind settling disputes.” The Bank avers that in determining the amount of money

for a financial settlement it takes into account the potential cost of litigating the claim before the Tribunal. It contends that it expected the certainty that all of the Applicant's claims related to his termination of employment, including his OPE, SRI, and OTI, would be settled. The Bank asserts that "[t]he Tribunal should not undermine that expectation just because Applicant wants to have another go at Respondent."

The Applicant's Response

The MOU did not waive the claims in PRS Request for Review No. 186

54. The Applicant contends that the plain language of the MOU as well as the surrounding circumstances reveal that he did not waive his claims in PRS Request for Review No. 186. The MOU clearly states the issues the parties discussed. The Applicant avers that despite the Bank's attempt to bring the claims of PRS Request for Review No. 186 under the umbrella of the MOU, the "reality is that the PRS case related solely to earlier events – his 2013 OPE, his 2013 SRI, and his being placed on an OTI – at a time when the termination of his employment was not even contemplated."

55. The Applicant further argues that the waiver language in the MOU is clear. The claims before the PRS Panel were separate and apart from the issues covered by the MOU and did not involve "future" legal action. The Applicant contends that "this waiver language therefore cannot have been intended to require the withdrawal of the PRS case."

56. According to the Applicant, if the parties had intended the MOU to end the PRS Request for Review No. 186 "it is inconceivable – and completely contrary to the Respondent's standard practice – that the parties would not have included specific language in the MOU requiring that this specific case be withdrawn." The Applicant points to three factors – his explicit and written refusal to discuss the withdrawal of PRS Request for Review No. 186, the fact that the PRS case was not stayed pursuant to Staff Rule 9.03, paragraph 4.05, and the fact that Human Resources did not know whether PRS No. 186 was waived or not – to reinforce his point that the plain language of the MOU does not refer to a waiver of the claims reviewed by the PRS Panel.

57. The Applicant contends that should the Tribunal interpret the MOU as including a waiver of PRS No. 186, then the MOU must be voided on the grounds of deception. The Applicant argues that “[t]he Respondent lulled [him] – at a time when he was supremely vulnerable – into believing that he had reached an agreement to resign from the Bank in nine months but not that he had agreed to waive his pre-existing PRS case.” The Applicant maintains that had he known that the MOU would require him to withdraw his claims before PRS, he would never have signed it.

58. Finally the Applicant contends that the Tribunal should not be moved by the Bank’s attempt to list the terms of the MOU hoping “presumably that the Tribunal will consider these generous and will be swayed to accept the Respondent’s arguments.” The Applicant notes that “these terms could in no way compensate [him] and his family for the loss of his employment at the Bank after twelve years of exemplary service, the strong likelihood that he will never be able to find alternative employment given his age.”

The Bank’s Contention No. 2

The Applicant failed to exhaust internal remedies regarding his claims concerning separation benefits

59. The Bank contends that if the Applicant had issues relating to his separation benefits he should have “exhausted prior remedies, including PRS, in accordance with Article II of the Tribunal Statute.”

The Applicant’s Response

The Tribunal has jurisdiction over the separation benefits claims

60. The Applicant contends that this claim on the failure of Human Resources to explain his separation benefits relates to his termination and to the terms of the MOU. He argues that the Staff Rules make it clear that staff members have the right to appeal issues relating to an MOU and/or termination directly to the Tribunal. On this basis the Applicant contends that he is within his rights to challenge this treatment directly at the Tribunal.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

61. The Tribunal observes that following the withdrawal by PRS of the Applicant's Request for Review No. 186, he has received neither the recommendations of the PRS Panel, nor the decision of the Vice President which ordinarily would have been sent to the Applicant around 4 September 2014. The essence of this Application is an appeal to the Tribunal to either adjudicate the claims the Applicant raised before the PRS Panel directly by finding those claims admissible under Article II of the Tribunal's Statute, or refer the matter back to PRS for completion, reinstating his Request for Review No. 186 and the rights attached to that process, namely his right to accept or challenge the decision of the Vice President on those claims. The Bank has raised a preliminary objection on the grounds that the MOU of 3 September 2014 waives the pre-existing PRS Request for Review No. 186.

The Validity of the MOU

62. The Tribunal notes the Applicant's contentions that if the Tribunal were to agree that the MOU included a waiver of his claims in PRS Request for Review No. 186 "it would mean that [the Applicant] was deceived by the Respondent. Such deception would mean that his signature on the MOU was fraudulently obtained. [...] An MOU obtained through fraud must be considered null and void." The Tribunal further notes that the Applicant dedicates a section of his Application to his claim that he signed the MOU under "severe duress," and that he was under "such severe economic pressure, his signature on the MOU cannot be considered voluntary."

63. The Tribunal considers that prior to addressing the Bank's preliminary objection, it is important to conduct an evaluation of these allegations and review the record for any evidence of fraud or duress which may invalidate the MOU. As was held in *Mr. Y*, Decision No. 25 [1985], para. 32 "no release or settlement of claims should be given effect if concluded under duress." To succeed in his claims the Applicant must provide convincing evidence since "an allegation is not a substitute for proof." *Malekpour*, Decision No. 322 [2004], para. 29.

64. The Tribunal is well aware of the pressures upon a staff member at a critical time such as signing an MOU upon receipt of notice that his employment would be terminated. In this case the Applicant avers that he had no choice but to try mediation since he was told “his only recourse was to file another appeal with either PRS or the Tribunal – both of which he knew would take months and months.”

65. The Tribunal reiterates that

[i]n all cases of release agreements the staff member is assumed to have balanced the benefits resulting from the different options he or she has, and finally to have decided to consent to the proposed agreement. In each case the staff member must have been under certain pressures leading him to opt for what appeared to him to be the more advantageous alternative. This kind of pressure is inherent in the process and cannot be treated as by itself constituting duress.” *Kehyaian (No. 2)*, Decision No. 130 [1993], para. 26.

66. The Tribunal is not convinced by the Applicant’s argument that the pressures he faced constituted duress. The Applicant had a choice and, after weighing his options, chose mediation and signed the resulting MOU. There is nothing in the evidence to indicate that he made this choice under duress or as a result of fraud. Therefore, the MOU is held to be valid.

67. Having upheld the validity of the MOU, the Tribunal now turns to the Bank’s preliminary objection which raises two main questions. The first question is whether the waiver clause in the MOU applies to the PRS process and the claims which preceded the notice of termination of the Applicant’s employment. Central to this issue is whether the Applicant’s claims concerning his 2013 OPE, SRI and placement on an OTI constitute part of the issues included in the MOU, or are connected to those issues so as to consider them waived by the waiver clause, and fully and finally settled by the terms of the MOU.

68. The second question raised in the preliminary objection is whether the Applicant failed to exhaust internal remedies within the Bank Group prior to filing his claim challenging the failure to provide him with information on his separation benefits.

The Scope of the MOU and Waiver Clause

69. It is well established that staff members and the Bank may execute agreements whereby staff members waive or release their claims against the Bank (*see Mr. Y*, Decision No. 25 [1985], para. 26). The Tribunal has accepted the validity of, and given effect to, agreements between the Bank and staff members which include release of claims against the Bank. *See e.g. Tweddle*, Decision No. 508 [2015].

70. However, the specifics of a waiver are binding only if they are express or can be clearly implied from its terms. In interpreting waiver clauses, the Tribunal looks at the “plain, ordinary and generally accepted meaning of the words used.” *BU*, Decision No. 465 [2012], para. 33. The Tribunal is “mindful of the fact that many courts take a cautious approach to upholding waivers of employment rights, in light of presumed unequal bargaining power, and the importance of certain rights.” *CE*, Decision No. 479 [2013], para. 49. It therefore takes into account the circumstances surrounding the negotiations, and whether the staff member was represented by legal counsel. In the present case, while the Applicant was assisted by a Staff Association Counsellor, he was neither represented nor advised by legal counsel during the mediation and signing of the MOU.

71. Under the Additional Terms section of the MOU, the parties agreed to the following:

This MOU constitutes a full and final settlement of the issues described above. [...] The parties agree to release all claims connected to the issues that are part of this agreement and refrain from future legal or administrative actions related to such issues, except for purposes of implementing and, if needed, enforcing the terms and conditions of this MOU.

72. The Tribunal observes that the issues which formed the subject of the agreement and of which the MOU represented “a full and final settlement,” are specified in the preamble which provides that:

This Memorandum of Understanding (MOU) documents the agreement between [the Applicant] and [Mr. AB], on behalf of the World Bank Group (“WBG”) regarding the following issues:

- [the Applicant’s] ending employment with WBG
- Post-employment benefits, commitments and understandings.

73. Paragraphs 22 - 26 above set out the precise provisions of the MOU. There is no reference in the MOU, express or implied, to the substance of the 2013 OPE, SRI and decision to place the Applicant on an OTI, or to PRS Request for Review No. 186. Of critical importance is the fact that the Bank does not dispute the Applicant's assertions that the 2013 OPE, SRI and decision to place him on an OTI were not discussed by the parties in the mediation which resulted in the MOU. The Tribunal finds the Applicant's descriptions of the content of the mediation consistent and credible, and notes the lack of evidence from the Bank to refute these assertions.

74. With respect to paragraphs 5 and 6 of the MOU, the Tribunal finds that these paragraphs merely relate to access to the Applicant's human resources records and their impact on the Applicant's future employment at the World Bank in accordance with the Staff Rules. These references do not indicate settlement of the Applicant's pre-existing claims.

75. Therefore, the Tribunal finds that on a plain reading of the MOU, its scope is limited to what is clearly stated namely: the Applicant's ending employment with WBG and post-employment benefits, commitments and understandings. These were the issues which the parties agreed were fully and finally settled by the terms of the MOU. The practical 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 agreed to leave the Bank. The MOU details the consideration received by the Applicant in exchange for the right to contest the ending of his employment at the Bank. The MOU neither expressly nor implicitly addresses the claims which were before the PRS Panel in Request for Review No. 186.

76. The Tribunal will now address the question of whether the claims reviewed by the PRS Panel in Request for Review No. 186 are "claims connected to the issues" in the 3 September 2014 MOU and fully and finally settled by its terms.

77. The Bank argues that termination of the Applicant's employment was a direct result of his partially successful OPE and the unsuccessful completion of his OTI. According to the Bank, the PRS claims are therefore connected to the issues that are part of the agreement and fall under the waiver in which the Applicant agreed to "release all claims connected to the issues that are part of

this agreement and refrain from future legal or administrative actions related to such issues.” The Bank relies on the Tribunal’s decision in *BU* to support its contentions. The Applicant on the other hand maintains that the issues are distinct and separate since the claims in PRS Request for Review No. 186 related solely to earlier events at a time when the termination of his employment was not contemplated. Furthermore, the Applicant contends that he is not engaging in “future legal or administrative actions,” but rather is seeking the completion of PRS Request for Review No. 186 which was treated as withdrawn due to an incorrect interpretation of the waiver clause.

78. Upon a review of the record, the Tribunal finds that while the events occurred sequentially, i.e. the termination of the Applicant’s contract was a result of the unsuccessful OTI which was instituted due to the poor OPE, such sequential links are insufficient, on their own, to conclude that these pre-existing claims in Request for Review No. 186 were fully and finally settled by the MOU.

79. It is useful to recall that the claims raised by the Applicant before PRS concerned allegations of procedural irregularities and arbitrariness in the exercise of his manager’s discretionary powers. Those claims did not address the termination of his contract, the finding that his OTI was unsuccessful, or challenge the post-employment benefits and commitments he agreed to in the MOU. As the PRS Panel decided on 16 June 2014, its scope of review was limited to “whether the Bank acted consistently with [the Applicant’s] contract of employment or terms of appointment in evaluating his performance [...]; issuing him a 2013 Salary Review Increase [...]; and deciding to place him on an Opportunity to Improve Unsatisfactory Performance Plan [...].”

80. The record shows that at the time the Applicant brought his claims before the PRS Panel termination of his contract had not yet occurred. While the Bank may contend that termination of the Applicant’s contract was a possible consequence of his placement on an OTI, there is evidence in the record that he received some positive comments during the OTI. It was equally possible that his OTI may have been found successful and his employment would not have been terminated. In either event, at the moment when the Applicant filed his request for review with PRS on 18 March 2014, there was no termination decision for him to challenge. The Tribunal is of the view that the Applicant’s challenge before PRS of the process leading up to the OTI, and the fact that his contract

was eventually terminated are two separate issues. The decision that the Applicant's OTI was unsuccessful resulting in termination, the subject of the MOU, is 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.

81. Even assuming that a connection could be drawn between the claims raised by the Applicant before PRS and the issues resolved by the MOU, the Tribunal finds that the waiver does not operate in the manner the Bank maintains. The language of the waiver clause expressly refers to future administrative or legal action. The waiver does not apply retroactively to proceedings which had already concluded, a month prior, in a different forum. It is insufficient, without more, to presume that the Applicant waived his pre-existing claims in Request for Review No. 186.

82. This conclusion that the waiver clause does not apply to the Applicant's pre-existing claims in Request for Review No. 186 is confirmed by a review of the Bank's standard practices in drafting separation agreements with its staff. The Tribunal will apply the *contra proferentem* rule against the Bank on the ground that it drafted the waiver clause, and "in its at least equally legitimate sense to the effect that ambiguities are resolved, if necessary, against the party seeking to rely on the text." AA, Decision No. 384 [2008], para. 36.

83. Having reviewed some examples of MOUs concluded by the Bank and the waivers contained therein the Tribunal finds that, as a standard practice, the MOUs expressly state all the issues and leave no room for confusion as to which claims form part of, or are connected to, the issue addressed in the MOU. The waivers are also explicit regarding the waiver of claims which preceded the conclusion of the MOU. For instance, in *Lansky (No. 1 and No. 2)*, Decision No. 425 [2009], para. 50, the critical provisions of the MOU provided that:

Article 1. In consideration of the binding terms of this MOU, [the Applicant] agrees to fully and finally settle and release any and all claims or causes of action alleging negligence or breach of contract arising out of the security incident on December 9, 2005[...] and all other claims and causes of action relating thereto, excepting only those circumstances specified in Article 2 below. [The Applicant] also agrees to fully and finally settle and release any and all other claims, including employment and benefit claims against the IFC or the Bank Group arising on or before the date of her acceptance of this MOU.

84. In a subsequent article of the MOU, the parties agreed that “by signing this MOU, the parties and the IFC/WBG mutually settle and release all claims that arose prior to execution of this MOU, including withdrawing, if applicable, with prejudice, any formal or informal redress actions, subject only to the exceptions listed in Article 2 above.”

85. In *BU*, para. 11, the waiver clause provided that:

6. In accepting these terms and conditions, you fully and finally settle and release all claims you might otherwise have against the Bank Group concerning your separation, or otherwise arising out of circumstances occurring or decisions taken on or before the date of your acceptance. You understand that the settlement of these claims includes relinquishing of the right to appeal to the Appeals Committee, the Workers’ Compensation Administrative Review Panel and the World Bank Administrative Tribunal.

86. The Tribunal is unconvinced by the Bank’s attempt to draw parallels between the present case and *BU*. In *BU* the waiver applied to any claims “arising out of circumstances occurring or decisions taken on or before the date of [the applicant’s] acceptance” of the agreement. In that case, the applicant’s claims before the Tribunal arose out of the events which were the basis for the mutually agreed separation agreement he signed with the Bank. On the contrary, the waiver in the present case compels the parties to refrain from “future legal or administrative actions related to” the issues that are part of the MOU.

87. A case which bears some factual similarity with the present case is *Kirk*, Decision No. 29 [1985]. In that case the applicant and the Bank entered into a separation agreement while the applicant’s appeal before the Appeals Committee concerning his salary increase and performance evaluation was pending. The waiver which the applicant signed provided that “[i]n accepting these terms and conditions, you fully and finally release the Bank from any claims which you might otherwise have against the Bank.” The Tribunal held in para. 31 that:

A statement in a separation agreement that a staff member is releasing claims he might “otherwise” have against the Bank appears rather clearly to encompass all preexisting claims.

88. The Tribunal takes account of the clarity of the language used in the agreements in the aforementioned cases, and notes that there has been no explanation from the Bank as to why it did not include such comprehensive language in the present case if it intended the waiver to apply to the Applicant's pre-existing claims in Request for Review No. 186.

89. As the Tribunal held in *CE*, Decision No. 479 [2013], para. 47, waivers such as that in the 3 September 2014 MOU "have the effect of waiving claims that come into existence after the date of the execution of the Agreement as long as such claims relate to or are connected to the claims and issues referred to in the Agreement." Unlike the applicant in *BU* who attempted to resuscitate claims which were the subject of his mutually agreed separation agreement, the Applicant in this case is seeking the completion of a pre-existing process which was neither addressed by the MOU, nor subject to the waiver clause in the MOU.

90. The Tribunal is further convinced that the waiver clause does not apply to the Applicant's pre-existing claims in Request for Review No. 186 based on its consideration of the circumstances surrounding the mediation and resulting MOU. In the first instance, the record shows that when the Applicant was initially informed that the Bank's management would approve the decision to terminate his employment, he made clear to the Human Resources Officer that he would not agree to withdraw PRS Request for Review No. 186, as he did not see "a reason to 'mutually agree' on an unfair situation created by [Ms. X]." When management agreed to discuss the Applicant's exit, he was informed that management had "agreed to discuss the conditions of your exit from the Bank." This undisputed information is relevant to demonstrate the Applicant's state of mind and information he possessed when entering into the mediation which resulted in the MOU. The resulting MOU, an agreement that the Applicant's employment would end by resignation as opposed to termination, is consistent with the purpose for which he entered into mediation. Thus, while the Bank may have intended the MOU to apply to the PRS claims, the record does not support a finding that the Applicant shared this intent.

91. Secondly, the record shows that the Applicant contacted PRS regarding the decision to terminate his contract. He was advised to either file a new and separate request for review of the termination decision, or proceed directly to the World Bank Administrative Tribunal to challenge

the decision to terminate his employment. The Applicant opted to enter into mediation to resolve the dispute on the decision to terminate his contract. This fact demonstrates that the termination of the Applicant's contract was treated as distinct from the PRS Request for Review No. 186.

92. For these reasons, the Tribunal finds that the Applicant's claims in Request for Review No. 186 were not waived by the waiver clause. Consequently, the MOU did not resolve the Applicant's claims pertaining to Request for Review No. 186. The waiver clause does not have the effect of withdrawing PRS Request for Review No. 186 and that process should be reinstated.

93. Finally, the Tribunal wishes to address the concerns expressed by the Bank that:

When Respondent agreed to pay Applicant (i) almost ten (10) months of Administrative Leave with continuation of salary and full benefits, (ii) a single payment of US \$25,000 on or about June 30, 2015, and (iii) other human resources-related arrangements, Respondent reasonably expected in exchange the certainty that all of Applicant's claims related to the termination of his employment (including his OPE, SRI, and OTI) would be settled. The Tribunal should not undermine that expectation just because Applicant wants to avoid his obligations while keeping all of the benefits he has already received.

94. This decision of the Tribunal in no way undermines the validity of the MOU, which the Tribunal has affirmed (see paragraphs 62 - 67 above). As stated in paragraph 75, 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 MOU is not rescinded by this judgment. A finding that the claims which were the subject of PRS Request for Review No. 186 are not subject to the waiver clause in the MOU does not change the fact that the Applicant mutually agreed to separate from the Bank, nor does it allow him to, in the future, contest the termination of his contract. Such action is clearly barred by the waiver clause.

95. If the Bank desired certainty that all the matters of importance to it were addressed in the MOU, it should have ensured, consistent with its own practice, that such matters were included in the agreement. The Tribunal's jurisprudence is replete with illustrations of well-drafted MOUs and waiver clauses which leave no doubt in the mind of the reader that the claims raised by the

applicants are barred by the waivers they signed. In such instances, the Tribunal did not hesitate to dismiss those applications. In the present case, the Tribunal is concerned that, having not raised the substance of the 2013 OPE, SRI, and placement on an OTI during the mediation, the Applicant was contacted by Human Resources shortly after the MOU was signed, and around the time when the decision of the Vice President was to be issued to him, with the suggestion that the Applicant had waived those claims. Those were claims which the Applicant had previously stated that he did not wish to withdraw. It is important in the conclusion of agreements between the Bank and its staff that the Bank, the drafter of the terms of a projected MOU, acts transparently and clearly.

The Applicant's Claims Concerning his Separation Benefits

96. The Applicant argued in his Application that he was unfairly treated by the Bank due to the failure of the Lead Human Resources Specialist and Human Resources to provide him with information regarding the separation benefits to which he was entitled under the terms of the MOU. As of the date of the Applicant's final filing in this case, 12 August 2015, he had not received this information.

97. The Bank argues that this claim is inadmissible on the grounds that the Applicant failed to exhaust internal remedies including PRS.

98. The Tribunal observes that, pursuant to Staff Rule 9.03 paragraph 6.04(e), in circumstances where a staff member has a dispute concerning the terms of an MOU, the staff member is entitled to bring his claim directly before the Tribunal. Staff Rule 9.03 paragraph 6.04(e) provides:

Panels may not review Requests for Review concerning:

[...]

e. a challenge to the validity of a Memorandum of Understanding (MOU) or settlement agreement between the Bank, IFC or MIGA and a staff member (Panels may review an allegation of breach of such an MOU or settlement agreement, although a staff member seeking review of an alleged breach of an MOU or settlement agreement may elect to bypass the peer review process and file an application concerning the matter directly with the World Bank Administrative Tribunal pursuant to Staff Rule 9.05)

99. Other than raising this claim before the Tribunal, it is unclear to which other forum the Applicant could have recourse. He sent more than one email to the Lead Human Resources Specialist requesting the information. Furthermore, reference to this matter in his Application and subsequent pleadings should have served as notice to the Bank to provide the Applicant with a response to his request. However, the Bank inexplicably failed to provide a response.

100. The MOU expressly permits the parties to take legal or administrative actions for the “purposes of implementing and, if needed, enforcing the terms and conditions of this MOU.” In light of the fact that the separation benefits are noted in the MOU, the Tribunal finds that failure on the part of Human Resources to provide the Applicant with the requested information may be challenged directly before the Tribunal as it affects the implementation of the MOU.

101. Therefore, the Applicant’s claims concerning his separation benefits are admissible.

Concluding Remarks

102. This decision does not dispose of the merits of the Applicant’s claims regarding his OPE, SRI and the decision to place him on an OTI. It rather requires that PRS Request for Review No. 186 which addressed these claims should resume. As per the normal processes, the decision of the Vice President and the recommendations of the PRS Panel should be transmitted to the Applicant. Furthermore, this judgment does not put into question the validity of the MOU, which has been held to be valid and to preclude, on its terms, any future challenges by the Applicant to the termination of his employment contract. The Applicant’s claims before PRS were limited to the administrative decisions which pre-dated the MOU. He is therefore entitled to receive the results of the review of those pre-existing claims, bearing in mind that regardless of the result he is barred from future challenges to the termination of his employment contract due to the 3 September 2014 MOU.

DECISION

- (1) The Bank's preliminary objections are dismissed.
- (2) The Applicant's claims in PRS Request for Review No. 186 were not waived by the MOU signed by the parties on 3 September 2014. The Request for Review No. 186 is hereby reinstated.
- (3) The claim on the Applicant's separation benefits is admissible.
- (4) The Bank shall pay the Applicant the amount of \$9,822.30 in attorney's fees arising from the preliminary objections phase of these proceedings.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/ Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 13 November 2015