



World Bank Administrative Tribunal

2009

No. 425

**Tamara Lansky (No. 1 and No. 2),
Applicant**

v.

**International Finance Corporation and
International Bank for Reconstruction
and Development,
Respondents**

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

**Tamara Lansky (No. 1 and No. 2),
Applicant**

v.

**International Finance Corporation and
International Bank for Reconstruction
and Development,
Respondents**

1. This judgment is rendered by a Panel of the Tribunal established in accordance with Article V(2) of the Tribunal's Statute, composed of Stephen M. Schwebel, acting President, and Judges Florentino P. Feliciano, Francis M. Ssekandi, and Ahmed El-Kosheri.

2. The Applicant submitted her first Application to the Tribunal on 1 April 2009, without having exhausted internal remedies. In that Application she alleges harassment by the Worker's Compensation Administrator and requests that the Bank and the Worker's Compensation Administrator be ordered to cease and desist from such harassment which interferes with her treatment. She claims payment of compensation in an amount to be determined by the Tribunal. On 18 April 2009 the Bank filed a Preliminary Objection to the admissibility of her Application, noting that the Applicant had failed to appeal her case to the Worker's Compensation Administrative Review Panel ("WC Review Panel") or Disability Review Panel as required by the Tribunal's Statute and asking the Tribunal to dismiss the Application. The Bank attached to its Preliminary Objection a copy of a Memorandum of Understanding signed between the Applicant and the Bank on 19 February and 2 March 2009, respectively ("MOU").

3. In response, on 21 May 2009, the Applicant filed a second Application claiming that the Bank had breached the terms of the confidential MOU by attaching it to its Preliminary Objection, and asks the Tribunal to order the Bank to withdraw its jurisdictional objection and to apologize to the Applicant or, alternatively, to join her claims with respect to admissibility to her claims on the merits in her two Applications. The Applicant also filed on 21 May 2009 a Response to the Bank's Preliminary Objection to her first Application, stating that due to "exceptional circumstances," she should not be required to exhaust internal remedies before submitting her Applications to the Tribunal.

4. After reviewing the Parties' submissions, the Tribunal decided, in an Order dated 28 July 2009, to address the merits of both Applications as well as the jurisdictional objection simultaneously. On 23 October 2009 the World Bank Group Staff Association filed an *amicus curiae* brief supporting the submissions of the Applicant, which the Tribunal decided to accept as part of the record.

FACTUAL BACKGROUND

5. The Applicant joined the International Finance Corporation ("IFC") in 1995 as an Investment Officer. There she served until her employment was ended on 7 April 2009 pursuant to the MOU following a diagnosis of Post Traumatic Stress Disorder ("PTSD"). At the time of termination of her employment she was a Senior Investment Officer, Level GG.

6. She was diagnosed as suffering from PTSD after she returned from an IFC mission in the Democratic Republic of Congo ("DRC") in December 2005. While *en route* from Kinshasa, DRC, to the Kinshasa Airport, the Bank vehicle in which the Applicant was riding was stopped and surrounded by a group of about 15 Congolese men, apparently

members of the political opposition in the DRC. They tried to open the doors of the vehicle, without success. Persons riding in another vehicle preceding the one in which the Applicant was riding were forced out of their vehicle. Although shaken, both the driver and the Applicant were able to escape in their vehicle and reach the airport. It appears that neither the driver nor the Applicant was physically injured. Several weeks after the incident, however, back in the United States, the Applicant exhibited symptoms of, and was diagnosed with, severe PTSD. Her condition was found to be compensable under the Bank's WC Program. The Bank outsources the administration of its Program to an entity which in turn contracts out some of its responsibilities to a subcontractor. (Both entities will be hereafter referred to as "WC Administrator.")

7. The Applicant experienced sleeplessness, depression, anxiety and other ailments. She nevertheless reported back to work and was initially expected to recover quickly with aggressive treatment including both medication and therapy, along with certain adjustments to her work schedule. At the end of about three months, however, her physician became convinced that the Applicant's recovery would take significantly longer, possibly a year and reported stressful working conditions and slow processing of her worker's compensation claims as factors impeding her recovery. Many of her 2006 expenses (approximately \$8,000) were reimbursed the following year after much communication with the claims adjuster of the WC Administrator, communication which the Applicant described as "relentless, time consuming follow ups." According to the Applicant, her physician believed she would recover faster if she left her employment at IFC.

8. The Applicant continued to work throughout 2006. During this time, she struggled with the requirements imposed by the claims adjuster. Administrative difficulties seemed to follow her: she had to submit some of her claims more than once; the adjuster's fax machine would sometimes malfunction; the adjuster would be frequently absent from her office and fail to answer her e-mail messages. The Applicant's contact person at the Bank's Human Resources ("HR") Department tried to move the process forward but had limited success. Thus, according to the Applicant, she continued to experience stress and anxiety and was unable to return to work as she had originally expected. As evident in the records her condition deteriorated as her PTSD continued. After the Applicant had used all of her accumulated sick leave, she began using her accumulated annual leave to secure 100% of her regular salary. Eventually, she became eligible to receive short term disability benefits.

9. In January 2007 the Applicant was assigned to a new claims adjuster who, like her predecessor, the Applicant maintains, was poorly organized. The processing of the Applicant's claims continued to take what she saw as an inordinately long time. In April 2007 approximately \$20,000 of her claims remained unreimbursed, including \$16,000 to the Applicant and \$4,000 to her treatment provider. In June 2007 she informed the Bank that as her primary physician's bills had not been paid, she would have to pay them out of her own pocket and discontinue her treatment until the WC Administrator approved reimbursement of her claims.

10. In June 2007, after the Bank intervened, the Applicant was paid her 2006 expenses as well as five months of her attending physician's costs. The processing of her claims changed hands again. The WC Administrator requested from the Applicant additional

information and required compliance with new procedures for the processing of her claims, including claims submitted between January and July 2007. The WC Administrator sent extensive questionnaire forms to all treatment providers, advising the Applicant that her claims had been processed previously without the required medical documentation. Accordingly, the WC Administrator was in its view now trying to complete the Applicant's records. The Applicant experienced additional stress and anxiety about getting her claims reimbursed. She also objected to supplying some of the information requested by the WC Administrator, invoking what she considered to be her rights to confidentiality. Her treatment providers expressed concern about her condition, which in their view, was exacerbated by her difficulties with the WC Administrator.

11. At the WC Administrator's request, the Applicant's primary physician submitted a Treatment Plan. Previously, the WC Administrator had selected an Independent Medical Examiner ("IME") who turned out to be a specialist in treating troubled adolescents, and without experience in PTSD. The Applicant was referred to another IME who was qualified in respect of PTSD, and who issued a report on 1 October 2007 agreeing with the Treatment Plan suggested by the Applicant's physician, except for treatment by a gynecologist which was not approved. The WC Administrator also required that the Treatment Plan be reviewed every three months. The Applicant appealed the denial of coverage of her gynecologist to the WC Review Panel. During the course of this appeal, the WC Administrator reversed its prior denial and approved the costs associated with the gynecologist.

12. On 25 August 2007, while on short term disability, the Applicant wrote to the President of the Bank seeking his help. In particular, she asked to remain employed at

IFC, to have her depleted annual leave reinstated and to have her past claims reimbursed. The Applicant received a response from the Vice President of Human Resources (“HRSVP”) proposing a course of action which included receiving long term disability benefits.

13. On 29 December 2008 the WC Administrator asked the Applicant to consult with another IME, this time to determine whether her employment with the Bank should be continued or ended for ill-health. This new IME Report dated 5 February 2009 stated that the Applicant’s employment should be terminated for ill-health on 7 April 2009. The Applicant was approved for long term disability through 30 June 2009, and informed that additional medical documentation would be required by that date if she desired an extension of benefits under the Bank’s Long term Disability Program. The long term disability period ending 30 June 2009 was subsequently extended to 30 September 2009.

14. At around the same time, the WC Administrator denied certain claims which had previously been reimbursed as part of the Treatment Plan approved by the IME. The WC Administrator explained that such denial was necessitated by the fact that prior approval for such services had not been sought from the prior administrator, even though the Applicant had been reimbursed for those services.

15. On 19 February and 2 March 2009 the Applicant and the Bank entered into an MOU, the material provisions of which are reproduced in paragraph 50 below. In the MOU the Applicant agreed to “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” in the DRC and “all other claims and causes of action relating thereto, excepting only those circumstances specified in Article 2.” Article 2 of the MOU provides that the

Applicant's "waiver of claims and causes of action does not and will not prevent any pending or future claims or appeals" under the WC and Disability Programs. The Applicant also agreed "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."

16. The MOU specified certain financial benefits to the Applicant. In particular, pursuant to the MOU, her salary was increased retroactively by 10% as of 1 January 2008 and another 9% as of 1 July 2008; and the Bank agreed to pay her a lump sum equivalent to 16 months' salary calculated on the basis of the Applicant's adjusted salary as discussed.

17. In addition, the MOU sought to address certain specific acts or procedures of the WC Administrator, about which the Applicant had complained. Thus, the Bank undertook to inform the Applicant about current and future practices of the Bank to "ensure security of staff." The MOU further provided that the Applicant would be treated "as other similarly situated staff, former staff, or retirees" under the Bank rules, and that the MOU does not constitute an admission by the Bank of any wrongdoing. By the MOU, the parties agreed to "settle and release all claims that arose prior to the 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."

18. Furthermore, the Bank represented to the Applicant that with respect to all independent medical examinations "conducted pursuant to the standard procedures" of the Bank for assessment of continuing eligibility for long term disability benefits, the Bank would make "all reasonable and good faith efforts" to ensure that the medical practitioner assigned to the Applicant would be a duly certified member of the World Psychiatric

Association with appropriate expertise in PTSD. The WC and Disability Administrators would, the Bank represented, assess medical conditions with respect to long term disability under paragraph 3.09 of Staff Rule 6.22. The Bank further represented that consistently with the terms of the Staff Rules, the Medical Insurance and the Staff Retirement Plan, during any period of long term disability, the Applicant's contribution would be paid by the Bank until her recovery from disability, retirement or death. The Bank stated that it would take "any reasonable and good faith efforts" to ensure that in respect of any short or long term disabilities, the Applicant would have "an appropriate and consistent contact with the [the Bank's] disability administrator ... [and] within the Office of Compensation Management of the [Bank]," who would be fully briefed about the Applicant's situation.

19. On 3 March 2009, the day following the signature of the MOU by the Bank, the Applicant informed the Bank that she would be filing a case contesting the actions of the WC Administrator and asked permission to do so directly before the Tribunal. The Bank declined her request on the ground that the Applicant was required to exhaust all internal remedies prior to filing any case with the Tribunal. Nevertheless, the Applicant filed her Application directly with the Tribunal.

THE PRINCIPAL CONTENTIONS OF THE PARTIES

The Applicant's contentions

20. In response to the Bank's jurisdictional objection, the Applicant argues that the Tribunal should assume jurisdiction on the basis of "exceptional circumstances," because (1) filing another appeal would further damage the Applicant's already fragile health; and (2) it would be futile to exhaust internal remedies as the Bank would be unable to redress

her grievances. In addition, the Applicant claims that the WC and Disability Review Panels do not have jurisdiction or competence to make determinations about the fairness and effectiveness of the Bank's WC and Disability Programs.

21. The Applicant further alleges that the WC and Disability Administrators abused their authority by continuing to request additional medical information and reassess her claim, even after her illness had been determined to be compensable. The Applicant contends that the Bank was obligated to pay for all reasonable expenses, but instead repeatedly demanded additional information, denied several of the claims, constantly and arbitrarily changed reimbursement procedures, unreasonably delayed payments and disregarded IMEs' medical advice and recommendations. She argues that the Bank changed its procedures "whimsically" and retroactively, thereby increasing the Applicant's anxiety regarding reimbursements.

22. The Applicant also argues that the Bank breached the confidentiality clause of the MOU and that in any case the MOU is not relevant to the matters raised in her Applications.

The Bank's answer to the Applicant's contentions

23. The Bank argues that the Applicant's claims before the Tribunal are inadmissible because she did not exhaust her internal remedies, and the exceptional circumstances claimed by the Applicant apply only when an application is untimely. The Bank also states that the WC Review Panel and Disability Review Panel are competent to address the Applicant's claims.

24. On the merits, the Bank contends that finding an injury to be work-related does not obligate the Bank to approve all medical expense claims "without question." The Bank

notes that Staff Rule 6.11, paragraph 5.01, provides that when a claim is made for payment of medical expenses, the claims administrator will approve the course of treatment and the Bank will pay all “reasonable medical, hospital, and medical rehabilitation costs causally related to the injury, illness, or death.”

25. The Bank contends that most of the Applicant’s claims regarding the administration of the WC Program arose prior to the signing of the MOU, and are thereby barred by her waiver of claims. The only claims that would still be valid, according to the Bank, would be the ones that arose or were still pending after the signing of the MOU.

26. The Bank finally argues that even if the Tribunal were to accept that the WC Program policies were deleterious to the Applicant’s health, the solution would not be to exempt the Applicant from these processes, but to appoint a representative to manage the Applicant’s affairs. In any case, the Bank and the Administrator have already taken some measures to “introduce more structure into the workers’ compensation claim process by designing a new claim form,” the objective of which would be to obtain all necessary information upon the filing of the claim so that follow-up requests would be kept to a minimum.

27. The Bank also contends that the Applicant’s claims with respect to the MOU are “frivolous” and the Bank should be able to present its case before the Tribunal, the proceedings of which are confidential.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

Exhaustion of internal remedies

28. The Applicant contends that the Tribunal may admit her claims and assume jurisdiction over such claims on the basis of the “exceptional circumstances” present in

respect of these two Applications and invokes *Mustafa*, Decision No. 195 [1998], *Dey*, Decision No. 279 [2002] and *Hristodoulakis*, Decision No. 296 [2003] in support of her argument. More specifically, the Applicant argues that filing an appeal before the WC Review Panel or Disability Review Panel (the intermediate appeals bodies to which an applicant would go to appeal a decision of the WC or Disability Administrator, respectively) prior to coming before the Tribunal would only further damage her already fragile health. The Applicant also claims that requiring her to exhaust internal remedies within the Bank would be futile because the WC Review Panel and Disability Review Panel do not have the authority to redress her grievances and to make determinations about the fairness and effectiveness of the Bank's WC and Disability Programs.

29. The Applicant explains that her claims before the Tribunal are not about the denial of any particular claim for payment or reimbursement but rather claims about the whole system which, in the Applicant's view, lacks "any consistent or written standards." The authority of the two Review Panels, according to the Applicant, is to apply relevant rules and procedures and not to determine whether those rules and procedures themselves are adequate and provide the staff with a legally fair and efficient administration of benefits. The Applicant also claims that requiring her to resort to a Review Panel every time an administrator disapproves a specific claim constitutes an "unreasonably costly and time consuming process" which could go on indefinitely.

30. For its part, the Bank contends that the Applicant's claims before the Tribunal are inadmissible because she had not exhausted any of the internal remedies available within the Bank. The Bank notes that the Applicant relies on alleged "exceptional circumstances" to avoid any prior recourse to, and exhaustion of, internal remedies entirely.

31. The Bank argues that the WC Review Panel and Disability Review Panel may review not only specific claims for payment or reimbursement but also “a decision taken in connection with the administration of a compensable claim” which would include matters of general procedure in the processing of any particular claim.

32. Article II, paragraph 2, of the Tribunal’s Statute provides in pertinent part as follows:

No ... application shall be admissible, except under exceptional circumstances, as decided by the Tribunal, unless ... [t]he 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.

33. Workers’ compensation cases are governed by Staff Rule 6.11. Under paragraph 12.01 of the Rule,

[a] claimant who wishes to appeal the denial of a claim for workers’ compensation benefits *or a decision taken in connection with the administration of a compensable claim* may, within 90 days of receiving notice of the decision, request administrative review of the decision from an Administrative Review Panel. (Emphasis added.)

34. Staff Rule 6.22, paragraph 6.01, governs disability cases and is generally similar to Staff Rule 6.11 above. A claimant who wishes to appeal the final denial of a claim for disability benefits by the Disability Administrator may, within 90 days of receiving notice of the decision, request administrative review of the decision from an Administrative Review Panel.

35. The Tribunal has long established that exhaustion of internal remedies is of utmost importance: “It ensures that the management of the Bank shall be afforded an opportunity to redress any alleged violation by its own action, short of possibly protracted and expensive litigation before this Tribunal.” *Klaus Berg*, Decision No. 51 [1987], para. 30.

36. It is clear that the “exceptional circumstances” referred to in Article II, paragraph 2, of Tribunal’s Statute are not, as argued by the Bank, limited to untimely applications, but extend to failure to exhaust internal remedies. Similarly, the jurisdiction of a WC Review Panel or Disability Review Panel is not confined to specific claims for reimbursement or payment. The Staff Rules allow a Review Panel to accept for consideration claims concerning the general characteristics of the process of administration of the Bank’s WC and Disability Programs. Nevertheless, the circumstances of this case are sufficiently exceptional to make it appropriate for the Tribunal to address the core claims of the Applicant insofar as they relate to the whole process of administration of the WC and Disability Programs. Such is the view also expressed in the *amicus curiae* pleadings of the Staff Association. The Tribunal finds that the claims of the Applicant are admissible and within its jurisdiction.

Burden of proof

37. The Applicant argues that the burden of proving the merits of claims relating to illnesses with a psychiatric or psychological component should be borne by the Bank rather than by an applicant. The Tribunal does not find this assertion convincing. The possible types of human illnesses which arguably might include a psychiatric dimension appear to be indefinite. The gravamen of the Applicant’s assertion seems to be that discharging that burden of proof may require significant effort which may naturally be expected to carry with it a certain amount of stress. The Tribunal does not consider that the Applicant has made a substantial case for this contention. The general rule is that the party which asserts a claim must bear the burden of proving, at least *prima facie*, the truth and substantive merit of such claim. This is a matter of great seriousness which relates to

the basic structure of dispute resolution and the Applicant has not adduced any substantive reason why the Tribunal should reconsider this fundamental rule.

Arbitrariness of the Bank's WC and Disability Program

38. The Applicant next contends that the WC and Disability Administrators abused their authority in a number of ways. The specific contentions of the Applicant are:

- a) The WC Administrator continued to request medical information and re-assess each particular claim, even after the Applicant's illness had been determined to be compensable. This practice resulted in delays in the processing and payment of the Applicant's claims;
- b) The WC Administrator frequently and arbitrarily changed the reimbursement procedures;
- c) The WC Administrator retroactively applied new reimbursement procedures;
- d) The WC Administrator at times disregarded the IMEs' medical advice and recommendations; and
- e) The Bank implemented its WC and Disability Programs without any guidelines to provide staff members with predictability.

39. The Tribunal will deal with these arguments *seriatim*. The Tribunal notes at the outset that the governing general principle is found in Principle 2.1 of the Principles of Staff Employment which provides in relevant part that:

The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members. They shall not differentiate in an unjustifiable manner between individuals or groups within the staff and shall encourage diversity in staffing consistent with the nature and objectives of the Organizations. They shall respect the

essential rights of staff members that have been and may be identified by the World Bank Administrative Tribunal.

40. In respect of the Applicant's first contention, the Bank responds that, because an injury is determined to be compensable, it does not follow that all subsequent medical expense claims must be approved by the WC Administrator "without question." Paragraphs 5.01 and 5.02 of Staff Rule 6.11 provide that claims, to be reimbursable, must be approved by the claims administrator:

5.01 When a claim has been determined to be compensable, the Claims Administrator will approve the *appropriate course of medical treatment*. The Bank Group will pay all *reasonable* medical, hospital, and medical rehabilitation costs *causally related to the injury, illness, or death*.

5.02 A staff member must seek the authorization of the Claims Administrator *prior to an anticipated change in the course of treatment* by the treating physician to ensure such treatment is eligible for continued payment. A staff member must seek the prior approval of the Claims Administrator for any change of treating physician, either at his/her own initiative or by referral from the original treating physician. (Emphasis added.)

41. Under the above two provisions, "the appropriate course of medical treatment" of a claim determined to be compensable is subject to the approval of the WC Administrator. The consequence of the determination of compensability is that the Bank becomes obligated to pay "all *reasonable* medical, hospital and medical rehabilitation costs [which are] *causally related* to the injury, illness or death." The WC Administrator is authorized to determine both the reasonableness of the claimed cost and its causal relationship to the compensable event.

42. Similar rules govern the administration of the Bank's Disability Program. Paragraphs 4.02 and 4.03 of Staff Rule 6.22 govern the determination of whether a claim is compensable under this Program, and provide in relevant parts:

4.02 In the course of determining whether to approve disability benefits for the claimant, the Disability Administrator may require the claimant to undergo a medical examination at the Bank Group's expense by an independent medical examiner selected by the Disability Administrator. ...

4.03 The Disability Administrator will determine whether to approve disability benefits for the claimant *based on a review of the medical information submitted* and an assessment of the claimant's job requirements and capacity to perform such job requirements. *The Disability Administrator may require the claimant to provide further documentation* and may interview the claimant and/or the claimant's supervisor. The Disability Administrator will notify the claimant in writing of the disability determination. If the Disability Administrator approves the disability benefits, the Disability Administrator will advise the claimant and the Bank Group of the approval and the period of the disability benefits. ... (Emphasis added.)

43. Under these paragraphs, the Disability Administrator is clearly entitled to require a claimant to undergo a medical examination at the Bank's expense by an IME selected by the Disability Administrator. That administrator may require the claimant to submit medical information relating to the disability asserted. The administrator is also expressly authorized to determine the period of compensability of the disability.

44. The Applicant objects vigorously to submitting additional medical documentation. The medical documentation required by the WC Administrator or Disability Administrator must of course be relevant to the issue whether a compensable event has occurred. In *Courtney (No. 4)*, Decision No. 202 [1998], the Tribunal recognized that the Staff Rules expressly empower a claims administrator to ask for a medical examination of an applicant by an IME and to request additional documentation. The Tribunal stressed at paragraph 15 that the requests must be "reasonably pertinent to the disposition of the claim [C]onditioning an investigation and a grant of a compensable award upon the production of *obviously irrelevant documents* would constitute an abuse of discretion and a denial of due process." (Emphasis added.) Furthermore, the WC Administrator is required by the Staff

Rules to determine not only the compensability but also the continued compensability of a claim. Staff Rule 6.11 provides:

3.03 In the course of determining whether a claim is compensable or continues to be compensable, the Claims Administrator may require the claimant to undergo a medical examination at Bank Group expense by an independent medical examiner selected by the Claims Administrator. The Claims Administrator will provide the claimant with a copy of the report made by the independent medical examiner.

3.04 Failure by the claimant to provide medical and other information when so requested or to present himself/herself for a medical examination as described in paragraph 3.03 will result in a denial of the claim and discontinuation of benefits payments by the Claims Administrator. (Emphasis added.)

45. A close examination of her Applications indicates that the Applicant protests not so much the simple requirement of submission of additional medical information or undergoing further medical examinations. The thrust of her complaints appears to be that the procedures implemented in respect of her claims were changed several times, particularly upon the substitution of the WC Administrator. Moreover, at least some of these changed procedures were applied in respect of her claims retroactively. The WC Administrator informed the Applicant that it would not continue to approve payments of claims previously reimbursed on the ground that the procedures had not been followed in initially approving those claims. The Tribunal considers that the retroactive application of rules of procedure, the implementation of which had been forgone by a previous administrator, and the retroactive enforcement of modified rules, would commonly result in arbitrariness, and denial of due process on the part of the administrator. In such situations, the Bank could effectively be penalizing applicants for the failures and perhaps negligence of the Bank's administrators. Such consequences may be expected to be particularly distressing and probably harmful to claimants suffering from psychiatric

difficulties, such as PTSD. Equally, however, it does not appear that the Applicant was required to return any payments that had been made to her.

46. The Bank has recognized that rules of procedure in place within the Bank and its affiliates are sometimes less than perfect and has suggested that appropriate operating procedures should be developed and implemented. The Tribunal agrees with the Bank that the Staff Association may, in collaboration with HR, play a particularly helpful role in formulating and developing appropriate procedures, including a right to be represented by a relative or friend, and a modified application form.

The confidentiality clause of the MOU

47. The Tribunal turns to the Applicant's contention that the Bank violated the confidentiality clause in Article 5 of the MOU, which provides in part as follows:

b) The parties authorize the World Bank Group *to disclose the terms of this MOU only to those World Bank Group officials who may need to review, approve and/or execute the terms of this settlement MOU.* In particular, if this MOU impacts any conditions of employment, those elements of this MOU will be disclosed to the HR Office for Global Employment Policy & HR Services, or IFC's Director of Human Resources. Otherwise, the terms of this MOU shall remain strictly confidential.

...

g) [The Applicant] may pursue a claim for breach of this MOU, after providing the IFC/WBG with an opportunity to cure the breach within a reasonable period of time, by filing claims with the Appeals Committee or directly with the World Bank Administrative Tribunal *If the parties file for a breach of this MOU, the MOU itself may be used as evidence in that proceeding without violating the confidentiality provisions of this MOU.* (Emphasis added.)

48. The Applicant asserts that the terms and conditions of the MOU are not pertinent in addressing and resolving the Applicant's contentions. The Bank argues to the contrary that the Applicant's claims relate to the entire process of the Bank's administration of its WC and Disability Programs, and that these claims are barred under the MOU "to the extent

that they relate to claims (including the processing thereof) for worker's compensation benefits that were paid on or before her acceptance of the MOU on February 19, 2009." In other words, the Bank argues that the Applicant has waived her claims relating to process under the MOU. The Bank is here pleading rightly that it must have the right to present any and all defenses it has against the Applicant's claims. The Bank too is entitled to due process; the fundamental principle is that each party shall be accorded a full hearing. A "pivotal" defense of the Bank is that the Applicant, by entering into the MOU with the Bank, has waived her claims relating to process. Clearly, the Applicant's claim and the Bank's countering claim must be examined under the terms of the MOU: several provisions of the MOU are perforce pertinent in the consideration of the Applicant's case. Accordingly, the Applicant's allegations about breach of the confidentiality clause of the MOU by the Bank are rejected.

Has the Applicant waived her claims by entering into the MOU?

49. It is useful to recall that the claims asserted by the Applicant are not claims relating to payment or reimbursement of particular expenses allegedly compensable under the Bank's WC and Disability Programs. They are claims relating to the asserted failure of the Bank to live up to the standards set out in Principle 2.1 of the Principles of Staff Employment quoted earlier (*see* paragraph 39). By the time the Applicant executed the MOU, most of her particular claims relating to the payment of certain expenses under the WC and Disability Programs had in fact been resolved and paid. Thus, the question that arises is the following: What claims of the Applicant were intended to be settled by the Bank through the medium of the MOU?

50. The critical provisions of the MOU provide:

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* while [the Applicant] was on IFC mission in the Democratic Republic of the Congo as a result of which she suffered and continues to suffer from Post Traumatic Stress Disorder, *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.

Article 2. *[The Applicant's] waiver of claims and causes of action does not and will not prevent any pending or future claims or appeals under the World Bank Group Worker's Compensation and Disability programs, under the Staff Retirement Plan, or with respect to denial of coverage or benefits, whether or not such claims arise out of the December 9, 2005 security incident. [The Applicant] shall not pursue any such claim or appeal as a breach of this MOU, but she retains full rights with regard to all such claims, which shall be separate from this MOU, and she may pursue such claims in accordance with the Staff Rules, the Staff Retirement Plan, or other rules, policies or procedures generally applicable to staff, former staff or retirees of the Bank Group.*

Article 3.1. WBG confirms that it has been supplementing [the Applicant's] short term disability (STD) payments since October 2007 in order to ensure that she received 100% of her salary during the period of STD. ...

Article 3.2. Increase the Applicant's net salary by 10% effective and retroactive to January 1, 2008....

Article 3.3. Concurrent with the implementation of the net salary increase [above], [the Applicant's] July 1, 2008 net salary increase of 5% shall be revised to 9% ... retroactive to July 1, 2008. ...

Article 3.4. Disburse to [the Applicant] a lump sum payment equivalent to sixteen (16) months' salary, calculated based upon [the Applicant's] final net salary upon her separation from the Bank Group after the adjustments described in Paragraphs 3.2 and 3.3 hereof, payable upon separation from employment. Upon acceptance of this payment, [the Applicant] agrees to settle and release *any and all claims or appeals relating to, or arising from, her separation from the Bank Group*, with the exception of her rights to benefits on termination, as per Article 4, paragraph 11.

...

Article 5(d). This MOU does not constitute an admission by the World Bank Group, its managers or staff members of any wrongdoing. However, *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.* (Emphasis added.)

51. The Applicant asks the Tribunal to order the Bank and WC Administrator to cease harassing her and seeks compensation of no less than \$250,000 for the alleged harassment. She also seeks attorneys' costs not only for the proceedings before the Tribunal, but also for past "procedures, which would not have been incurred, had Respondent been guided by principles of fairness and due process." Turning to the consideration received by the Applicant through the execution of the MOU, the Tribunal notes that the most significant part of it consisted of benefits over and above payments provided or to be provided by the Bank under its WC and Disability Programs, Staff Retirement Plan, Medical Insurance Plan and other "generally applicable World Bank Group rules and policies." These extraordinary benefits consist of firstly, the retroactive promotional salary increases given to the Applicant, and secondly, the lump sum payment equivalent to 16 months salary calculated on the Applicant's net salary as adjusted by the promotions specified in the MOU, which were paid upon separation from employment.

52. The question thus translates into what was the Applicant giving up in return for receiving these extraordinary benefits? Admittedly, the drafting of the MOU could be improved but the Tribunal considers it clear that the Applicant undertook to forego the filing of generalized claims arising, *not* from the compensability or non-compensability of particular invoices said to be causally related to her PTSD, but rather from allegations of failure on the part of the Bank, acting through its WC and Disability Administrators, to

comply with the standards set out in Principle 2.1 of the Principles of Staff Employment. The Tribunal finds that those claims were waived by the Applicant in the MOU.

DECISION

The Tribunal decides:

- (i) to dismiss the Applicant's claims for relief; and
- (ii) to recommend that the Bank, with the cooperation of the Staff Association, proceed to formulate and develop appropriately detailed rules of procedure that claimants and administrators should follow in the processing of claims for payment or reimbursement under the WC and Disability Programs of the Bank.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 9 December 2009