



World Bank Administrative Tribunal

2012

Decision No. 463

**L.T. Mpoy-Kamulayi (No. 5),
Applicant**

v.

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

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

**L.T. Mpoy-Kamulayi (No. 5),
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), Florentino P. Feliciano (Vice-President), Mónica Pinto (Vice-President), Jan Paulsson, Francis M. Ssekandi, and Ahmed El-Kosheri.

2. This Application, the Applicant's fifth before the Tribunal, was received on 11 July 2011. The Applicant was represented by Stephen C. Schott of Schott Johnson, LLP, and the Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency.

3. The Applicant challenges the Bank's decision to deny an upward adjustment to his salary following a salary review by the Bank's Human Resources Compensation Management Unit ("HRSCM"). He also challenges the Bank's decision to "refuse any consideration" of his request to initiate an inquiry into his allegations of racial discrimination.

FACTUAL BACKGROUND

4. The Applicant joined the Bank in 1984 and is currently a Lead Counsel (level GH) in the Bank's Legal Vice Presidency ("Legal VPU"). In July 2008, he approached Ombuds Services ("OMB") and requested an analysis of his salary. OMB conducted an analysis which compared the Applicant to two groups of staff in the Legal VPU: (a) a group of ten lawyers, including the Applicant, who the Applicant believed to have similar legal practice experience to his own at the time of hiring and (b) seven lawyers, including the Applicant, who were promoted to Grade GH at the same time as the Applicant. As OMB's analysis contained confidential salary information, the full analysis was not shared with the Applicant, but OMB discussed it with him and suggested that the Applicant request a formal salary review. The Applicant did so in October 2008.

5. The Bank undertook a review of the Applicant's salary in early 2009. HRSCM compared the Applicant's salary to four groups of Bank staff: (a) 23 IBRD staff at grade GH, who were non-managers, within two years of the Applicant's age, and within one year of the Applicant's time in grade; (b) a subset of the first group comprising those staff members with either a master's degree or a doctorate; (c) a subset of the second group comprising those members of the second group whose average "rescaled" Salary Review Increase ("SRI") is within 1.0 point of the Applicant's rescaled average of 2.6 (reflecting an average SRI of between 3.2 and 3.3); and (d) a subset of the previous groups comprising those staff members whose rescaled SRI is within 0.5 points of the Applicant's rescaled average SRI of 2.6. This analysis resulted in the conclusion that the Applicant's salary was between 6.7% and 0.4% lower than the average salary of comparable staff members, and that his average SRI rating was 0.2 points below the average of this group of comparable staff members. Noting that, in a broad grade system, as is used at the Bank, differences in salary between similar staff within the same grade are "inevitable," and that differences of 5-10% from the average are "not unusual," HRSCM concluded that the Applicant's salary appeared "technically correct and adequately positioned" and recommended against a salary adjustment.

6. In March 2009, the Bank's Ombudsman met with the Applicant's manager ("the Chief Counsel"), and the Senior HR Officer for the Legal VPU, to discuss the Applicant's salary. At this meeting, OMB shared its own analysis of the Applicant's salary and discussed the Bank's analysis. Following this meeting, the Chief Counsel informed the Applicant that he would not recommend a salary adjustment. On 30 June 2009, the Applicant filed an appeal with the Appeals Committee, Appeal No. 1506.

7. In November 2009, the Applicant was recalled to headquarters by the General Counsel from his then duty station in Abuja, Nigeria. He sought advice from OMB and subsequently requested that the Office of Ethics and Business Conduct ("EBC") investigate his concerns about, among other things, racial discrimination, harassment and retaliation. On 25 March 2010, EBC notified the Applicant that after an Initial Review, including interviewing various staff members and reviewing pertinent documentation, they had closed his case because their investigations had not disclosed a factual basis supporting his allegations. The Applicant expressed his dissatisfaction with this decision and questioned it, but it was confirmed to him in an e-mail message of 1 June 2010 that

due to the lack of a “reasonable and sufficient evidentiary basis” and “lack of sufficient corroboration by the witnesses interviewed,” his allegations did not meet the threshold for further review. The same e-mail message noted that, as the Applicant was not the subject of EBC’s investigation, there was “no basis” for providing him with a copy of the work product of the EBC investigators. On 29 September 2010, the Applicant filed a Request for Review with Peer Review Services (“PRS”) regarding EBC’s decisions. On 5 October 2010, PRS notified the Applicant that this Request for Review could not be accepted as it fell outside the jurisdiction of PRS.

8. On 5 November 2010, PRS conducted a hearing of the Applicant’s Appeal No. 1506 regarding the Bank’s refusal to adjust his salary. In its Report dated 1 December 2010, the Panel determined that it was not within its scope of review to consider claims made by the Applicant that discrimination over the past 27 years had resulted in his “slow salary progression” as he claimed. Rather, its review was limited to events occurring within 120 days of the filing of the Statement of Appeal.

9. The Panel concluded that the decision to deny the salary increase was not arbitrary, but was based on an HRSCM salary review using the methodology used in other cases, as well as consideration of the OMB salary analysis. The Panel also concluded that the methodology HRSCM used in the Applicant’s salary review was fair, reasonable and based on established standards and procedures, and that the Bank had followed those procedures. The Panel noted that, at that time, there were no written guidelines addressing how HRSCM should conduct a salary review. However, the Panel was satisfied that HRSCM had established a practice and methodology for conducting salary reviews, and that it had followed that methodology in the Applicant’s case as it did in other staff members’ cases. The Panel noted that a Senior Human Resources Officer (“SHRO”) testified that HRSCM practice was to compare the subject of the review with other staff members doing the same type of work, taking into account age, years at the Bank, and years in grade level. The Panel also noted the SHRO’s testimony that the Applicant’s salary was not compared with the salary of other staff members in the Legal VPU because when HRSCM added the “identifying factor” (which appears to be age), the comparator group was reduced to zero. Another SHRO corroborated this testimony.

10. The Panel also concluded that there was no evidence that the decision was tainted by any illicit motivation towards the Applicant. It found that the Chief Counsel testified credibly that he trusted HRSCM's recommendation and followed it. The Panel concluded that there was no evidence that the Bank discriminated against the Applicant during the period under review and that HRSCM had determined the comparator group used in its review based on legitimate, non-discriminatory business reasons. On 4 January 2011, the Vice President, Human Resources accepted the Panel's recommendation to deny the Applicant's Appeal.

11. In this Application, the Applicant seeks \$138,000 in damages, plus interest; what he calls "indirect economic damages" of \$120,000; moral damages of three years' net salary; an order that EBC release to him the report of their investigation into his allegations of harassment and discrimination; and his legal costs in the amount of \$32,048.37.

THE CONTENTIONS OF THE PARTIES

The Applicant's main contentions

12. First, the Applicant contends that the decision not to adjust his salary following the salary review was based on a "fundamentally flawed" methodology which ignored the Ombudsman's analysis. He calls HRSCM's salary analysis "a shell game" and argues that it compares apples to oranges. According to the Applicant, the HRSCM analysis eliminated all lawyers practicing in the Legal VPU as comparators to focus instead on "an indeterminate array of H level staff who had the superficial characteristics of proximity in age, length in service, time in grade etc." He argues that this latter group "may be a group of the worst performers in the Bank, albeit at H level" and "could include women and staff of color who had been discriminated against themselves. They may have been cherry picked for the analysis or randomly selected ... We simply do not know."

13. The Applicant claims that a fair compensation review "based on his true comparators, i.e. legal staff at H level, would have resulted in a recommendation to adjust his salary by about 27%" which "the Ombudsman's analysis indicated would be

appropriate.” The Applicant argues that, to address the Bank’s statistical concerns about limiting the comparator group to staff in the Legal VPU, the Bank should have compared him “to a group of other Bank practicing lawyers from IBRD, IFC and MIGA” and should not have rescaled his SRIs based on “invented” SRI ratings. He contends that the salary review used “age as a proxy for experience” with the intent to “downgrade his legal practice experience of 25 years in the Bank” and to compare him with a comparator group with only 14 years of Bank experience. He notes that the Ad Hoc Increase Guidelines produced by the Bank provide that an extraordinary salary adjustment may be used

[t]o properly position a staff member’s salary relative to those of other staff doing similar work at the same grade. The ‘proper positioning’ would normally take into account not only the salaries of other staff at the same grade, but also factors such as experience, performance and time in grade.

14. The Applicant points out that these guidelines do not mention using age as a proxy for experience and argues that age should not be used to limit the comparator group because it is “not a valid indicator of experience, which is a factor totally independent of age.” He also emphasizes that these guidelines refer to salary position relative to “other staff doing similar work.” The Applicant argues that HRSCM “eliminated the possibility of identifying any comparators in the Legal VPU by limiting [the] search to GH level staff within 2.5 years of the Applicant’s age” and that he was “compared to a broad set of non-lawyers, solely on the basis of age.” He adds that age “when used as a criterion for employment, career advancement ... raises a ... presumption of age discrimination.” He refers to *Denis*, Decision No. 458 [2011], paras. 27 and 36, arguing that in that case the Tribunal accepted the Bank’s contention that it does “consider a staff member’s job title when developing appropriate ‘groups of comparators’ ... for proper positioning ‘relative to those [salaries] of other staff doing similar work.’” On this basis, the Applicant argues that “when it suited the Bank, it compared Ms. Denis with her true peers and threw out age as a proxy for experience.” He notes that the Bank’s “Guidelines for Remuneration of Short Term Consultants and Short Term Temporaries” classifies lawyers in Professional Grouping A such that they are eligible for “substantially higher remuneration as compared to other specialists such as economists.” He also refers to a 2011 report of the Brookings Institution (“First Thing We Do, Let’s Deregulate All the Lawyers”, Winston *et al.*, 2011) which found that in

comparison with 14 other professions, lawyers' compensation reflected a substantial premium.

15. Referring to the testimony of the SHRO in the PRS hearing, the Applicant notes that HRSCM attempted a comparison by function but concluded that there were no other comparable staff members. The Applicant refutes this and names what he contends to be 15 non-manager peers at Grade GH. He further contends this comparison group could have been expanded by including other lawyers from IFC and MIGA, and argues that the Bank has failed to explain why it could not compare his salary to that of younger GH level staff. The Applicant seeks to distinguish his position from that of the applicant in *Moussavi*, Decision No. 360 [2007], noting that Mr. Moussavi was an IT engineer, that there are many such IT staff throughout the Bank and that his peers "were scattered across many departments" whereas the Applicant's "peers in terms of job content, job title and job responsibilities are congregated within a single VPU."

16. The Applicant further contends that the SRI system is unfair and not transparent. He refers to *Moussavi*, at para. 47, where the Tribunal noted that the Bank should consider "establishing a more transparent and consistent approach to ... salary revisions." He contends that his "mathematically determined performance ratings" averaged 3.66 for the period in which he was at Level GH and that this would indicate a "consistent SRI rating of 3.3." The Applicant states that he has only been able to obtain his SRI ratings prior to 2009 through the hearing of his Appeal and that not even the Ombudsman had access to his SRIs. He argues that it is improper and unfair to keep secret the "critical" ratings "used to make career determinations."

17. Second, the Applicant contends that his Chief Counsel's decision not to adjust his salary amounts to an abuse of discretion in that the Chief Counsel knew that staff at level GH "considerably junior to the Applicant and with far fewer years of service had considerably higher salaries" but he chose not to grant the Applicant a salary adjustment or to obtain an "analysis of the Applicant's salary vis-à-vis a true comparator group of legal staff."

18. Third, the Applicant argues that "evidence uncovered in the salary review shows beyond doubt" that he "has been discriminated against on grounds of ethnicity and race."

He notes that despite his long service in the Africa Legal Practice Group he was not considered for promotion to Chief Counsel for Africa; rather, “a white staff member at his level with no experience in Africa was promoted over him through a non competitive appointment.” He also points to what he calls the “abnormal” history of holding his salary to the lowest quartile of his salary range from 2001-2009 such that after eight years he had not reached the mid-point of his salary range. The Applicant refers to a 1998 Bank report and a 2009 report of a civil society organization indicating that race-based discrimination exists in the World Bank. The Applicant claims that his Chief Counsel dismissed his claims of discrimination “out of hand and refused even to discuss ... Applicant’s grounds for the charge.” He refers to the 1995 Pelerei Report of the IMF which notes that in an organization like the IMF “there is unlikely to be ‘blatant or habitual action demonstrating discrimination’” and that discrimination “must be inferred through examining a series of events and occurrences whose pattern suggests a problem.”

19. Fourth, the Applicant argues that a complainant “who brings charges of misconduct to the EBC has a right ... to receive proof that such an investigation has been carried out ... by delivery ... of the report of investigation.” In his Reply, however, the Applicant states that he is no longer raising this claim, noting that it was addressed by the Tribunal in *Mpoy-Kamulayi (No.2)*, Decision No. 457 [2011].

The Bank’s main contentions

20. The Bank argues that “other senior lawyers whom [the Applicant] characterizes as his ‘peers’ ... have in fact all progressed more quickly than he through promotion and salary increases due to consistently superior performance ratings” and that “[the Applicant’s] ... salary is fully commensurate with [his] performance.” According to the Bank, what the “Applicant views as invidious discrimination is nothing more than the fair and inevitable differentiation amongst staff that occurs when individual staff are rewarded according to their varied levels of performance.”

21. The Bank contends that the Applicant received “a fair salary review conducted consistently with Bank policy and Tribunal precedent” and that his Chief Counsel “reasonably determined that no salary adjustment was warranted.” The Bank notes that the standard methodology used by HRSCM in the Applicant’s case took into account the

four factors that are the mandatory basis for the Bank's compensation system: pay grade, experience, performance, and time in grade, and that this methodology was upheld by the Tribunal in *Moussavi*. Specifically, the Bank argues that:

HRSCM appropriately compared the Applicant's salary to those of comparator groups defined by same grade level (Grade H); overall work experience (using age as a rough proxy, and limiting the comparator to those with two years age difference from Applicant); performance (based on average SRI ratings); and time in grade (within 1 year of Applicant's time at Grade H) ... Also consistent with HRSCM practice, as well as the Tribunal's holding in *Moussavi*, the pool was drawn from all staff across the Bank, not just the Applicant's department or Vice Presidency ... Had HRSCM sought to restrict the pool to LEG staff only ... it would have been impossible to pull together a sufficient sample size for meaningful comparison.

22. The Bank refers to *Denis* and notes that the Tribunal found that the Bank's "methodology in conducting ad hoc salary reviews was reasonable" in the circumstances of that case. The Bank adds that the Tribunal is not "the proper forum in which to dictate a change in the Bank's overall compensation approach, away from performance, and towards a system solely based on tenure". In the Bank's view, the Tribunal should not evaluate the Bank's "general compensation philosophy" underlying the salary review methodology, but whether the Bank followed this methodology in the present case. The Bank notes that in *Moussavi*, at paras. 24, and 37-40, the Tribunal upheld the use of rescaled SRI ratings.

23. The Bank further argues that the Applicant's analysis "disregards performance as a key factor in salary" and states that the Tribunal has made clear that "fairness in compensation *compels* rather than prohibits differentiation in salaries based on relevant factors, such as job performance." (emphasis in original) Further, it points out that the Applicant's proposed comparator group included lawyers "who had been promoted to grade GI and included managerial, as well as non managerial, staff." According to the Bank, there were "not enough Grade H staff within LEG who had comparably low SRI ratings to the Applicant to provide a statistically meaningful comparison group."

24. The Bank also notes that the OMB analysis of the Applicant's salary between 2001-2008 indicated that "that the Applicant's OPE ratings followed a general downward

trend through the years; and that the Applicant's salary increases followed a roughly corresponding downward trend as well – which would explain his relatively slower salary progression over those years.” The Bank argues that the Applicant's arguments are similar to those rejected by the Tribunal in *Moussavi*, including the allegation that a lower salary indicated discrimination in itself; that SRIs should not be accorded so much weight in justifying a low salary; that education, overall work experience, and length of service at the Bank should be accorded more weight; and that the comparator group should be restricted to the Applicant's department or Vice Presidency.

25. The Bank states that “the final decision not to adjust [the Applicant's] salary was taken only after careful consideration of the HRSCM and OMB analyses, and after due consultation with LEG management and HR.” According to the Bank, while the Applicant's Chief Counsel “considered the Applicant's alternative analysis based on his self-identified LEG peer groups, as discussed with OMB, he did not consider the analysis to be as probative, given its failure to consider job performance, among other relevant issues.” The Applicant's relatively lower salary position, says the Bank, can be “explained by his relatively lower SRI ratings over the years” which “place him below the average.”

26. The Bank states that the Applicant was accorded the same salary review analysis received by staff in similar circumstances and that the Appeals Committee “rightly concluded, after a hearing, that the Applicant had no basis for suggesting that he was discriminated against or treated unfairly.” It adds that the Applicant presents no evidence of “supposed bias against him other than his view that the fact of his lower salary in itself indicates unfair treatment.”

27. The Bank also notes that after it challenged the Appeals Committee's jurisdiction to hear the Applicant's claim for purported discriminatory actions over some 25 years, the Applicant stated that he only intended to pursue his claim regarding the salary adjustment decision of 12 March 2009. Correspondingly, the Bank argues that the Applicant's claim of historical discrimination is not properly before the Tribunal as the Applicant “has not exhausted administrative remedies with respect to those claims” and “of course, they are time-barred.” Further, the Bank states that

while the Applicant redoubles his generalized allegations of racism in his Reply, he still does not present any evidence, let alone make a *prima facie* case, that would show that his salary review process was in any way influenced by his national origin, or any other improper factor. In fact, the salary review process is intentionally conducted without reference to any information about factors that are not relevant to compensation. For example, the HR Officer conducting the salary review does not know the name of the staff member, and therefore does not even know where the reviewed staff member is from, or what gender he or she is.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

28. The Tribunal initially notes that, alongside his other claims, the Applicant has raised allegations of discrimination on grounds of ethnicity and race, citing the fact that he was not considered for promotion for Chief Counsel and that his salary was “abnormally” held down between 2001 and 2009 as evidence of the discrimination. As set out in Staff Rule 3.00, para. 6.01(e), wrongful discrimination, including discrimination “on the basis of age, race, color, sex, sexual orientation, national origin, religion or creed,” is prohibited. While noting the Applicant’s point, by reference to the 1995 Pelerei report of the IMF, that discrimination may have to be inferred through examining a series of events, the Tribunal concludes that the Applicant has made only a cursory attempt in his submissions to substantiate his allegations with evidence that the Bank discriminated against him on illegitimate grounds. In *Moussavi*, Decision No. 360 [2007], the applicant also contended that his salary level was in itself evidence of discrimination. As the Tribunal said there, absent some credible evidence, and absent timely challenges to salary awards through the years, such a discrimination claim must fail. In the present case, no such credible evidence has been advanced.

29. In recent years, the Tribunal has been called upon to consider challenges to the Bank’s salary review practice. *See e.g. Moussavi; Denis*, Decision No. 458 [2011]. A number of principles have emerged from the Tribunal’s jurisprudence. The judgments in both *Moussavi* and *Denis* refer to the statement in *Nunberg*, Decision No. 245 [2001], para. 40, that the Tribunal’s “general approach to decisions involving the exercise of discretion is that it will not interfere or substitute its own judgment unless the decision constitutes an abuse of discretion.” The *Nunberg* decision itself refers to *de Merode*, Decision No. 1 [1981] and *Bertrand*, Decision No. 81 [1989]. In *Moussavi*, at para. 29,

the Tribunal explained that in considering a challenge to a salary review conducted by the Bank, the key issue will be whether the inclusion or exclusion of certain criteria in the process of the review renders it “arbitrary, unreasonable or otherwise an abuse of discretion.” The *Moussavi* and *Denis* judgments make reference to the Bank’s Principles of Staff Employment. In both cases, the Tribunal concluded, on the basis of Principle 2.1 and 6.1(c) in particular, that the Principles require fair and equitable treatment of staff members in their compensation, and that fairness compels the consideration of factors such as job performance, responsibilities, experience, grade level and the like when setting salaries. Differentiation between staff members, even extreme differentiation, can be justified on facts and criteria that have a basis in reason, are within the Bank’s discretion, and are fair and consistent with the Principles of Staff Employment, providing they do not violate the rights of the lower-paid staff member.

30. The Tribunal notes the Bank’s submissions that the Tribunal should not evaluate the Bank’s “general compensation philosophy” and that the Tribunal’s role in this case is limited. The Bank appears to argue that the Tribunal must accept whatever salary review methodology is chosen by the Bank and may only verify that such methodology was followed by the Bank in the present case. These contentions are unsound. They ignore the standards established in the Tribunal’s previous cases. The Tribunal will decide the present case in accordance with the principles described above as developed in its jurisprudence.

31. As the Applicant notes, the Bank’s “Ad hoc Increase Guidelines” provide that

extraordinary salary adjustments may be used ... to properly position a staff member’s salary relative to those of other staff doing similar work at the same grade. The “proper positioning” would normally take into account not only the salaries of other staff at the same grade, but also factors such as experience, performance and time in grade.

32. The Applicant’s first main contention is that his salary should have been compared with the salaries of other practicing lawyers employed by the Bank Group. He notes that the Bank’s “Guidelines for Remuneration of Short Term Consultants and Short Term Temporaries” (“Consultant Guidelines”) place legal staff in a category that makes them eligible for higher remuneration than other specialists. He also refers to a report of

the Brookings Institution which apparently confirms that as against a range of other professionals, lawyers typically receive substantially higher remuneration. He refers to *Denis* and points out that reference was made not only to non paralegal Grade GD comparators, but also to Grade GD paralegal comparators, to justify the outcome of the salary review in that case before the PRS Panel and this Tribunal. As stated in *Moussavi*, at para. 29, the issue which therefore confronts the Tribunal is whether the failure to compare the Applicant's salary by function renders the Bank's review of his salary "arbitrary, unreasonable or otherwise an abuse of discretion."

33. The Applicant refers to the SHRO's testimony at the PRS hearing that HRSCM attempted a comparison by function but concluded that there were no comparable staff members. The Bank submits that there were not enough level GH staff within the Legal VPU who had "comparably low SRI ratings to the Applicant to provide a statistically meaningful comparison group" and that some of the Applicant's proposed comparators had been "promoted to grade GI" and were managerial staff. The Applicant responds that, if that is right, the Bank should have compared him to other Bank practicing lawyers from IBRD, IFC and MIGA. The Bank points out that the Tribunal rejected the argument made in *Moussavi* that Mr. Moussavi should have been compared only to staff at the same grade level in his department. But the argument in that case was made on a different basis, namely, that a comparison limited to Mr. Moussavi's department would have revealed discrimination and bias in the setting of salaries. The Tribunal was not persuaded by this argument. In any event, the argument in the present case is rather different. The Applicant contends, by reference to the Bank's Consultant Guidelines and the Brookings Institution report, that comparing him to a group of non-lawyers is to compare him against a group that would generally be expected to receive lower remuneration than his practicing lawyer peers at the Bank.

34. The Bank's Consultant Guidelines place legal (as well as finance, investment, management and strategy) consultants into one of three groups, "Grouping A." In the 2011 fiscal year, the market reference point of the range of daily net fees for Grouping A specialists, with more than 17 years experience, was \$706 at the Bank's headquarters. This compares against market reference points of \$564 and \$558 for equivalent specialists in Groupings B and C respectively. In other words, the Bank's Consultant Guidelines appear to recognize a market reference point substantially higher for

Grouping A specialists (around 25% higher in the case of specialists with more than 17 years experience), as against that of specialists in the other two groupings. Taking this into account, there appears to be some merit in the Applicant's contention that comparing the salaries of legal staff against staff in other groupings is unreasonable, because the Bank's own Guidelines suggest that staff in Grouping A are generally able to command higher salaries than peers in other fields. The positioning of a Grouping A staff member's salary among salaries from other groupings (for which remuneration is generally lower) may not be relevant to the fairness and equity of that staff member's salary. There is no evidence that this occurred in the present case, but in theory, it would be possible to create the impression that an unusually low salary of a Grouping A specialist is fairly positioned by comparing it only against that of specialists in the other groupings, who are generally compensated at a lower rate.

35. In previous cases, the Tribunal has acknowledged that the Bank has discretion as to how it undertakes salary reviews. For example, in *Moussavi*, at para. 29, the Tribunal held that the Bank was entitled to choose between potentially relevant factors in selecting comparators, excluding some and including others. The issue, in the Tribunal's view, was whether the omission of a particular factor rendered a salary review "arbitrary, unreasonable or otherwise an abuse of discretion."

36. As the Tribunal made clear in *de Merode*, at paras. 46-47, it is not for the Tribunal to substitute its own judgment for that of the Bank in the exercise of discretion, although discretionary power is "not absolute power." The Bank would abuse its discretion if, for example, it made a decision based on reasons

alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and technical competence'. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff.

37. In *Marshall*, Decision No. 226 [2000], para. 21, the Tribunal confirmed once again that it may review discretionary decisions "to determine whether there has been an abuse of discretion, in that the decision was arbitrary, discriminatory, improperly

motivated or carried out in violation of a fair and reasonable procedure.” In *Desthuis-Francis*, Decision No. 315 [2004], para. 23, the Tribunal explained that where no reasonable basis can be presented for a decision it will commonly be arbitrary or capricious.

38. The Ad hoc Increase Guidelines make clear that salary adjustments are intended “to properly position a staff member’s salary relative to those of other staff doing similar work at the same grade.” The question is whether this means that the Bank is required to undertake a comparison by function, i.e. a comparison with staff doing “similar work.” As the Applicant points out, in *Denis*, the Tribunal made express reference to the positioning of Ms. Denis’ salary not only against staff at the same grade level, but also against other staff with the same job function. The issue is whether a salary review must take account of the fact that the staff member whose salary is the subject of the review works in a field that is generally more highly compensated than some other fields.

39. In the present case, even if it were shown that all 22 comparators used in the HRSCM analysis specialized in professional disciplines generally compensated at a lower rate than legal staff, the Tribunal notes that the Bank did not rely on the HRSCM analysis alone. The Bank states, and the PRS Panel accepted, that the Chief Counsel considered both the HRSCM salary review and the OMB salary analysis before making his decision. The OMB analysis compared the Applicant to other legal staff, and it is a matter of record that the Chief Counsel met with OMB to discuss that analysis. The Bank states that while the Chief Counsel “considered the Applicant’s alternative analysis based on his self-identified LEG peer groups, as discussed with OMB, he did not consider the analysis to be as probative, given its failure to consider job performance, among other relevant issues.”

40. However, the Tribunal takes the view that the principal purpose of a salary review, as reflected in the Bank’s Ad hoc Increase Guidelines, is to compare a staff member’s salary “to those of other staff doing similar work at the same grade.” The Tribunal is not convinced that the Bank compared the Applicant’s salary to that of those doing “similar work” in the present case, and considers this an obstacle to the Bank’s proper consideration of the relevant facts. The Tribunal understands that the Bank considered that other factors, such as age, made a comparison by job function impossible,

but in the circumstances of this case, determines that the “similar work” criterion should be given precedence over other factors in identifying the comparator group. The Tribunal will therefore direct the Bank to undertake a further review of the Applicant’s salary and include a comparison of the Applicant’s salary against that of other Lead Counsel (level GH) in the World Bank Group.

41. The Applicant’s second main contention is that age is an arbitrary criterion, in that it is not a valid indicator of overall work experience “which is a factor totally independent of age.” He alleges that it was HRSCM’s use of age as a factor which prevented his salary from being compared to that of other Legal VPU staff members. He also says that the use of age as a factor raises a “presumption of age discrimination,” presumably on the basis that limiting the comparator group by age may conceal the fact that the salary of a more senior staff member is unfairly positioned as against the salaries of younger staff. The Tribunal found in *Moussavi*, however, at para. 31, that using age as a factor in establishing comparators “based on the assumption that a staff member’s age would reflect work experience both before coming to the Bank and during his or her term of service at the Bank” was not unreasonable or arbitrary. As the Tribunal noted, the use of age as a factor was thought to be particularly appropriate given the number of persons who are recruited to the Bank from mid-level and high-level career positions elsewhere. The same considerations apply in this case, it being understood that age should not be used to manipulate the essential role of similarity of function.

42. The Applicant’s third main contention is that the SRI system is neither fair nor transparent. In particular, he attacks HRSCM’s rescaling of his SRI scores for the purpose of the salary analysis. He states that his “mathematically determined performance ratings” averaged 3.66 for the period in which he was at Level GH and that this would indicate a “consistent SRI rating of 3.3.” The Applicant states that he has only been able to obtain his SRI ratings prior to 2009 through the hearing of his Appeal and that not even the Ombudsman had access to his SRIs. He argues that it is improper and unfair to keep secret the “critical” ratings “used to make career determinations.” As the Bank points out, the Tribunal considered similar arguments in *Moussavi*, at paras. 35-41, and also explained the Bank’s approach to rescaling. There the Tribunal accepted the Bank’s arguments that SRIs must be accepted as accurate and controlling. The Tribunal also concluded that the rescaling of SRIs for the purposes of a salary review was

explainable, fair and reasonable, and as such not an abuse of discretion. The Tribunal accepted the Bank's contention that the 3.1-3.3 ratings were used as a convenience rather than an accurate reflection of relative performance.

DECISION

- (1) Within 60 days of the date this judgment is delivered, the Bank shall
 - (i) undertake a review of the Applicant's salary as of February 2009 and include, along with other factors, a comparison of the Applicant's salary against that of other Lead Counsel (level GH) in the World Bank Group, determine whether the Applicant's salary was properly positioned, and if it was not, provide an appropriate remedy; and
 - (ii) share with the Applicant the results of the salary comparison (taking appropriate steps to protect confidential information) and the Bank's findings in relation to the positioning of the Applicant's salary.
- (2) The Bank shall contribute to the Applicant's attorneys' fees in the amount of \$20,000.
- (3) All other claims are dismissed.

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

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Paris, France, 27 June 2012