



World Bank Administrative Tribunal

2013

Decision No. 478

**David Tanner,
Applicant**

v.

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

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

**David Tanner,
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, Ahmed El-Kosheri, Andrew Burgess and Abdul G. Koroma.
2. The Application was received on 1 November 2012. The Applicant was represented by Anthony Russell of Chen Palmer Public and Employment Law Specialists. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency.
3. The Applicant contests the termination of his employment on grounds of abandonment of office pursuant to Staff Rule 7.01, paragraph 9.02, arguing that this wrongful dismissal was the culmination of a series of unjustified actions by the Bank.

FACTUAL BACKGROUND

4. The Applicant, a national of New Zealand, joined the Bank as a Forensic Accountant as an Extended Term Consultant on 8 September 2008 in the Integrity Vice Presidency (“INT”). On 30 November 2009, he was appointed on a term contract as a Senior Forensic Accountant, Level GG. In his Overall Performance Evaluation (“OPE”) for the period December 2009 to June 2010, the Applicant received two ‘Outstanding/Best Practice’ ratings, as well as several ‘Superior’ ratings for his results assessments.
5. In early April 2011, the Applicant was approached by Lowndes Jordan, a law firm, which requested that he provide expert evidence in a civil trial in New Zealand which arose from a 2004 criminal case in which he had been a witness. He informed his supervisor, Ms.

Mikhlin-Oliver, by e-mail on 4 April 2011, that he had been requested to provide expert testimony and “would like to assist but would need to take 2 weeks unpaid leave for the trial itself.” The Applicant enquired whether there were any impediments to his providing expert evidence besides work commitments and missions. On 13 April 2011, based on the information provided by the Applicant, and after discussions with Mr. Nardolillo, Manager, INT Strategy & Core Services (“INTSC”), Ms. Mikhlin-Oliver communicated to the Applicant that “it should be fine” for him to give expert evidence, and also provided him with the intranet link on the World Bank Group’s policies on Leave without Pay.

6. On 18 April 2011, the Applicant confirmed to Lowndes Jordan his ability to provide a “signed written expert witness statement ... and if necessary give evidence in person.” In this letter, the Applicant stated “I have received confirmation from the World Bank, my employer, that they see no impediment to me giving this evidence. As previously indicated, I will need to take unpaid leave.” The Applicant made the following fee proposal in his letter:

Preparation and provision of signed statement	25, 000
Attendance to give evidence orally (assuming 5 full days)	25, 000
Total Fee	USD 50, 000

7. The Applicant noted that the final fee would depend on the actual number of days spent in court and that he would issue an interim fee note for delivery of a signed statement. Lowndes Jordan accepted the Applicant’s proposal and concluded an agreement on that basis at the beginning of May 2011. On 23 April 2011, the Applicant met with Ms. Mikhlin-Oliver to discuss the possibility of a telecommuting arrangement. On 12 May 2011, while on mission for INT in Nairobi, Kenya, the Applicant submitted the signed statement to Lowndes Jordan in accordance with their agreement. He was paid the sum of 25,000 USD around 20 June 2011.

8. On 20 July 2011, the Applicant informed Ms. Mikhlin-Oliver that he would be paid for his involvement as an expert witness, but neither stated that he had already provided part of those services nor that he had received payment. On the same day, Ms. Mikhlin-Oliver submitted to Mr. McCarthy, INT Vice-President, a proposal stating a business case to permit

the Applicant to telecommute from Auckland, New Zealand. A one-year telecommuting arrangement with a six-month evaluation period was approved pursuant to a Telecommuting Agreement dated 10 August 2011. The telecommuting arrangement was to commence from 25 August 2011 and last until 25 August 2012.

9. On 18 August 2011, following consultation with Mr. Nardolillo, Ms. Mikhlin-Oliver requested authorization, on behalf of the Applicant, from the Bank's Outside Interests Committee ("OIC") which considers requests by staff to undertake outside activities in a personal capacity. In the e-mail addressed to Ms. Dyer, Chair of the OIC and copied to Mr. Bach, Senior Conflicts of Interest Officer of the Office of Ethics and Business Conduct ("EBC"), Ms. Mikhlin-Oliver noted that the Applicant intended to take leave without pay for the time required to prepare for and give his testimony in New Zealand, and expressed her support. On 24 August 2011, the Applicant left Washington, DC to commence the telecommuting arrangement in New Zealand.

10. On 5 September 2011, the Applicant received an e-mail message from Lowndes Jordan informing him that he was no longer required to provide in-court expert testimony. The Applicant communicated this message to Ms. Mikhlin-Oliver, but did not mention that he had already received payment in relation to the case and she did not enquire. On 8 September 2011, the Applicant received a letter, following e-mail exchanges, from a lawyer representing other parties in the case, formally engaging the Applicant to provide expert testimony at the trial. The agreed fee for this testimony was 25,000 USD, under the same conditions as the previous fee arrangement with Lowndes Jordan. The Applicant indicated to Ms. Mikhlin-Oliver that he was interested in providing this expert testimony "subject to availability and the Bank's approval."

11. Between 31 August and 11 September 2011, Ms. Mikhlin-Oliver, Mr. Bach and Ms. Dyer corresponded on the request for OIC approval and the possible leave options which the Applicant could take and their implications. On 9 September 2011, Mr. Bach requested from the Applicant additional information which would assist OIC in reviewing his request. The information requested included the amount of money he would receive. On 11 September

2011, in an e-mail message addressed to Mr. Bach and copied to Ms. Mikhlin-Oliver, Ms. Dyer, and Mr. Nardolillo, the Applicant attached the terms of the initial agreement and the written brief he submitted to Lowndes Jordan. This constituted the first time the Applicant's manager was made aware of the amount the Applicant would be paid and the terms of his engagement as an expert witness. On 21 September 2011, Mr. Bach responded to the Applicant noting that it was unclear whether there were multiple consultancies to be carried out. Additionally, Mr. Bach stated that "the material you submitted on 11 September 2011 appears to indicate that you may have already undertaken some activity without formal OIC approval." Mr. Bach strongly recommended that the Applicant refrain from proceeding with further activity without OIC's formal approval as failure to do so may constitute misconduct pursuant to Staff Rule 3.00, paragraph 6.01. Mr. Bach added that "should a review of the forwarded documents suggest that you may have engaged in prior outside activities before the Outside Interest Committee was contacted, EBC reserves the right to conduct an initial review into a possible occurrence of misconduct." On 26 September 2011, the remaining lawsuit was abandoned by the plaintiff and the Applicant's services were no longer required. The Applicant states that he did not receive any additional payment.

12. From late 2011, the previously good relationship between the Applicant and his manager, Ms. Mikhlin-Oliver, began to break down. On 3 October 2011, the Applicant received a Notice of Alleged Misconduct from EBC informing him of a review into allegations that he may have committed misconduct by engaging in outside employment without securing the necessary approval from OIC prior to doing so; and failing to fully inform his manager on his outside activities when attempting to obtain permission. The Applicant was informed by Ms. Mikhlin-Oliver that his Salary Review Increase ("SRI") would be held "in abeyance" pending the outcome of the EBC review, but that his ultimate SRI would be awarded retroactively to 1 July 2011. The Applicant sought clarification of the basis upon which calculation of his SRI was being withheld, and enquired about the impact of EBC's review on his SRI rating. Ms. Mikhlin-Oliver responded on 28 October 2011 noting that "behavioral expectations are an integral part of the performance evaluation. It is important to await the outcome of the EBC process before confirming the appropriate

SRI in order to assess whether EBC's ultimate findings would have an impact on the behavioral aspects of the evaluation."

13. In an e-mail message dated 9 March 2012, Ms. Mikhlin-Oliver informed the Applicant that she was launching a six-month interim evaluation of the telecommuting arrangement pursuant to the 10 August 2011 agreement, as well as a mid-term performance evaluation, and requested the Applicant's assistance in identifying feedback providers. The Applicant queried the timing of the review of the telecommuting arrangement and argued that it should be deferred until after EBC's review. Ms. Mikhlin-Oliver responded on 12 March 2012 that the EBC review was separate and distinct from an evaluation of the efficacy of the telecommuting arrangement or a mid-term performance evaluation. The Applicant challenged Ms. Mikhlin-Oliver, referring to her e-mail message of 28 October 2011 in which she justified deferral of the SRI on the grounds that "behavioral expectations are an integral part of the performance evaluation." Ms. Mikhlin-Oliver responded that "this mid-year performance review does not involve the completion of an OPE, but is intended to form part of an ongoing performance conversation." She further explained the basis upon which the telecommuting agreement was being reviewed and stated that "[f]or the purposes of the mid-term performance review and the telecommuting evaluation, the technical and behavioral assessments of your performance will be based on the feedback I have received and my own observations."

14. On 15 May 2012, Ms. Mikhlin-Oliver informed the Applicant by e-mail that the telecommuting arrangement would be terminated on the grounds that it no longer met INT's business needs. The Applicant was requested to return to Washington, DC by mid to late July with the possibility of returning by 25 August 2012, the stipulated end date of the Telecommuting Agreement. On 5 June 2012, Ms. Mikhlin-Oliver reminded the Applicant of the need to finalize his return date. The Applicant responded expressing surprise at INT management's decision to terminate the telecommuting arrangement without any discussion or negotiation, especially as he had "completed all duties and work as requested." He further noted that the basis of the decision was unclear to him, and indicated that he had hoped the telecommuting arrangement would be renewed. The Applicant concluded by stating that the

“cost for me to return to Washington, DC ... is not only uneconomic, but unfeasible and in my view unrealistic especially when my current work program is entirely based in the EAP region. Due to the above reasons it seems sensible that a Mutually Agreed Separation needs to be considered.” In subsequent e-mail messages between the Applicant and Ms. Mikhlin-Oliver, the Applicant continued to contest the basis upon which the telecommuting agreement was terminated, and stated that if a Mutually Agreed Separation (“MAS”) was not reached he did not intend to resign. However, Ms. Mikhlin-Oliver noted that INT management was not in a position to reconsider its decision on telecommuting and reiterated her request that the Applicant return to Washington, DC.

15. On 13 June 2012, EBC informed the Applicant that it had closed the case related to its review of his outside activities because there was insufficient factual basis to support the misconduct allegations against him. The Applicant’s OPE and SRI were completed and the Applicant was awarded an SRI rating of 3.3. Following unsuccessful negotiations on a MAS throughout the months of June, July and August, the Applicant, in an e-mail message on 21 August 2012, informed Ms. Mikhlin-Oliver that he would “not be making a counter-offer in relation to INT’s mutual agreement for separation ‘offer’ as it is clear that INT Management are not acting in good faith, but rather will explore pursuing [his] grievances via the Bank’s dispute resolution mechanisms.” On 24 August 2012, Ms. Mikhlin-Oliver responded in an e-mail message which, *inter alia*, confirmed that the Applicant’s decision not to pursue the MAS offered by INT management was within his discretion, and informed him that if he did not return to the office in Washington, DC by 24 September 2012 — 20 consecutive business days following the end of the telecommuting arrangement — management would proceed to terminate his employment with the Bank for abandonment of office under the provisions of Staff Rule 7.01, paragraphs 9.02–9.04. This message was reiterated by e-mail on 19 September 2012.

16. On 10 October 2012, Mr. McCarthy, Vice President of INT, sent the Applicant a Notice of Termination for Abandonment of Office. In the notice, the Applicant was informed that since he failed to resume his duties in Washington, DC by 24 September 2012, the decision had been taken to terminate his employment with the Bank for abandonment of

office. The termination of his employment was effective 15 October 2012, and the Applicant was informed that he would be paid a lump sum in respect of accumulated annual leave.

17. The Applicant filed his Application on 1 November 2012, seeking *inter alia*: 1) the remainder of the income for his term contract i.e. 15 October 2012-29 November 2013, plus Bank contributions for retirement, a total of USD 185,457.94; 2) compensation for permanent income lost due to permanent change in career quantified at USD 439,562.27; 3) compensation for the incorrect 2011 OPE/SRI grading of 3.2 instead of 5; 4) compensation for non-payment of entitlements by the Bank of the Resettlement Grant according to Staff Rule 7.02, paragraph 3.04 at USD 7,000; 5) compensation in lieu of receiving 20 business working days' notice of termination estimated to be USD 12,500; 6) compensation for stress, humiliation and mental suffering in the amount of USD 50,000; and 7) estimated legal fees of USD 18,400.

18. On 20 December 2012, the Bank filed a "Preliminary Objection to Jurisdiction" challenging admissibility of all the claims with the exception of the claim concerning the termination of the Applicant's contract. On 8 January 2013, the Applicant filed a Response to the Preliminary Objection. On 4 February 2013, the Respondent filed its Written Comments on the Applicant's Response. On 26 February 2013, the Applicant filed a Response to the Respondent's Written Comments.

19. In its letter dated 25 March 2013 addressed to both parties, the Tribunal observed that the Applicant appeared to acknowledge that certain matters were not individual claims but rather evidence relevant to the wrongful dismissal claim. In the circumstances of this case, the President of the Tribunal considered there to be a significant overlap of issues and decided that the preliminary objection should be joined with the merits pursuant to Rule 8, paragraph 5 of the Tribunal's Rules.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

20. The principal issue in this case as agreed by the parties is the termination of the Applicant's employment contract on grounds of abandonment of office. The Applicant challenges the grounds on which his contract was terminated and asserts that he was always available to perform his official duties until 11 October 2012 when he received formal notice that his contract would be terminated on 15 October 2012. The Applicant contends that INT management was required to give him 20 working days' notice of termination and that the termination letter of 11 October 2012 was the only formal notice he received. According to the Applicant the e-mail messages from Ms. Mikhlin-Oliver were not "notices" and the "emails themselves did not state that they were formal notices of any intended action." He contends that there was no "serious attempt to contact [him] and warn [him] of the seriousness of the situation."

21. The Bank asserts that its decision to terminate the Applicant's employment for abandonment of office pursuant to Staff Rule 7.01, paragraphs 9.02–9.04 was proper and not an abuse of discretion. The Bank argues that all the requirements under Staff Rule 7.01, paragraphs 9.02–9.04 relating to abandonment of office were met. First, according to the Bank, the Applicant did not make himself available at his duty station of Washington, DC for over four months after he was first informed that the telecommuting arrangement would be terminated. Secondly, the Bank argues that the Applicant was informed on numerous occasions of the implications of failing to report for duty in Washington, DC. The Bank further argues that "even after [the Applicant] was notified of the possible termination decision on 24 August 2012, the Respondent gave the Applicant yet another month to comply with Ms. Mikhlin-Oliver's request to return to Washington, DC by September, 24, 2012." Finally, the Bank contends that on 10 October 2012, the Applicant was properly notified of the decision to terminate his employment on grounds of abandonment of office.

22. The relevant Staff Rules on abandonment of office are contained in Staff Rule 7.01, paragraphs 9.02–9.04. Paragraph 9.02 provides that:

A staff member abandons office when he or she fails, without excuse acceptable to the manager responsible for the position, to make himself or herself available to perform official duties for the following periods:

- a. A continuous period of 20 working days; or
- b. A period of time less than 20 working days or recurring periods of less than 20 working days each if the manager has a reasonable basis to conclude that the staff member has abandoned his/her office.

23. Staff Rule 7.01, paragraph 9.03 provides that:

After reasonable attempts are made to contact a staff member and to warn of the possibility of termination if the staff member does not report to duty, a decision to separate a staff member for abandonment of office will be made by the Manager of the Manager responsible for the position (at Level GI or above) in consultation with the Manager, Human Resources Team or a designated official.

24. Under Staff Rule 7.01, paragraph 9.04 “notice of termination of employment for abandonment of office may be given immediately following a decision to separate.”

25. Having reviewed the evidence in this case, the Tribunal is satisfied that the Bank complied with the procedures in Staff Rule 7.01. Following the decision to terminate the Telecommuting Agreement on 15 May 2012, the Applicant was given ample notice via e-mail that his refusal to return to Washington, DC would be treated as abandonment of office. As the Tribunal held in *Mbida-Essama*, Decision No. 399 [2009], para. 22 “e-mail is certainly a reasonable method of communication in today’s workplace especially in the Bank.” E-mail was undoubtedly the routine and familiar form of communication between the Applicant and his manager, and one which the Applicant utilized on a regular basis in the course of his employment at the Bank. It was through e-mail that the Applicant gave Ms. Mikhlin-Oliver notice of his decision not to return to Washington, DC and his willingness to consider a mutually agreed separation. The Tribunal finds that Ms. Mikhlin-Oliver’s e-mail messages to the Applicant of 5 June, 7 June, 10 June, 13 June, 17 August, and 24 August 2012 constituted adequate notice of the adverse implications of his failure to resume his duties in Washington, DC. It would have been wholly unnecessary for Ms. Mikhlin-Oliver to state that her e-mail messages were “formal notices of any intended action” especially in light of the fact that the Applicant and the Bank were discussing his

separation from the organization. In such a context it is reasonable to expect that the seriousness of the situation would have been evident to the Applicant.

26. Furthermore, the Applicant's assertion that the Bank was required to provide him with a notice period of 20 working days is misconceived. Staff Rule 7.01, paragraph 9.02 makes clear that the 20 working days relates to the length of time in which the staff member fails to make himself or herself available to perform official duties. There is no notice period contained in paragraph 9.04; rather it provides that the "notice of termination of employment for abandonment of office may be given immediately following a decision to separate." As the Staff Rules do not provide a notice period, the Applicant was entitled to "reasonable notice and the fixing of a specific date for separation for abandonment of post." *See In re Kennedy*, Judgment No. 265, UN Administrative Tribunal, 19 November 1980, para. XII.

27. On 24 August 2012, Ms. Mikhlin-Oliver expressly informed the Applicant that

with the termination of your telecommuting arrangement on August 25, 2012, you are expected to resume your duties in DC on August 27, 2012. If you fail to do so and unless you report for duty in DC between then and September 24, [2012], please be advised that management will proceed to terminate your employment with the Bank for abandonment of office under the provisions of Staff Rule 7.01, paras 9.02 – 9.04.

28. The Applicant failed to heed this warning and did not resume his duties in Washington, DC. In addition, the Bank only formally terminated the Applicant's employment on 11 October 2012. The Tribunal is satisfied that the Applicant was provided with reasonable notice of the termination of his contract.

29. The Applicant asserts that he was always available to perform his official duties and on this matter the Tribunal again refers to Staff Rule 7.01, paragraph 9.02 which clearly states that "a staff member abandons office when he or she fails *without excuse acceptable to the manager responsible for the position*, to make himself or herself available to perform official duties" (emphasis added). Therefore, the Applicant must have provided an excuse,

explanation or justification acceptable to his manager as to why he was failing to make himself available to perform the official duties in the manner requested.

30. This case raises for the first time in the Tribunal's jurisprudence the question of what amounts to the failure of a staff member to, "*without excuse acceptable to the manager responsible for the position*, make himself or herself available to perform official duties." To this end, the statement of the United Nations Dispute Tribunal in a similar case is instructive. It held that:

The Applicant cannot claim that she had reported to duty as of 1 June 2011 on the grounds that she was sitting in the cafeteria or in other premises of the United Nations in New York since *the Administration gave her specific instruction as to the location to which she should report for duty and the individuals to whom she should report. Any other conduct on her part which did not comply with those directions cannot be deemed an effective resumption of her work.* Furthermore, it constitutes a failure to comply with the requirement that staff members "follow the directions and instructions properly issued by the Secretary-General and by their supervisors" pursuant to rule 1.2(a) of the Staff Rules. *Kamanou v. Secretary-General of the United Nations*, Judgment No. UNDT/2012/050, UN Dispute Tribunal, 16 April 2012, para. 38 (emphasis added).

31. The Tribunal finds that the Applicant's failure to report for duty in Washington, DC amounted to an abandonment of office notwithstanding his assertion that he was able to perform his tasks outside his duty station. It is insufficient for the Applicant to state that he could have performed his duties in Auckland, New Zealand. That option was not available to him once the Telecommuting Agreement was terminated. The Applicant was thus no longer authorized to work away from his duty station which was Washington, DC.

32. The Tribunal finally considers the Applicant's contention that the Bank failed to provide him with termination of contract benefits, particularly the Resettlement Grant. The Applicant was informed by a Human Resources Officer that he was not eligible to receive the Resettlement Grant since he was already based in Auckland, New Zealand, his place of resettlement, at the time his contract was terminated. The Applicant argues that the Staff Rules do not attach any conditions to eligibility for the Resettlement Grant based on

residency, and the fact that he lived in New Zealand under the telecommuting arrangement was inconsequential to his claim for the Resettlement Grant.

33. The Tribunal finds that the Applicant's argument is unsupported by the Staff Rules. Staff Rule 7.02, paragraph 1.03(d) defines resettlement as "moving a staff member's residence to the place of resettlement." Here, the Applicant had already set up residence in the place of resettlement at the time his contract was terminated. Furthermore, Staff Rule 7.02, paragraph 3.04 provides that the purpose of the Resettlement Grant is to "help defray costs associated with preparations during a move to and settling in at the place of resettlement." The Applicant's situation does not meet this definition. The Applicant contends that he still has possessions to be shipped from the United States. However, shipment of personal effects is not a cost anticipated by the Resettlement Grant, but rather by the Optional Removal Grant which the Applicant received. The record also demonstrates that the Applicant has received all the termination benefits to which he was entitled.

34. In light of the foregoing, the Tribunal finds that the Applicant's employment was properly terminated pursuant to Staff Rule 7.01, paragraphs 9.02–9.04. In addition, the Applicant was ineligible to receive the Resettlement Grant under Staff Rule 7.02 given his circumstances at the time of the termination of his employment with the Bank.

Interim review and termination of the Telecommuting Agreement

35. Related to the termination of the Applicant's employment, and therefore admissible in this case are the Applicant's complaints concerning the interim review and termination of the Telecommuting Agreement and the leave advice he received. The Tribunal will first address the complaint most directly connected with the termination of the Applicant's employment, namely the interim review and termination of the telecommuting arrangement. The Applicant contends that INT management arbitrarily exercised its right to review the telecommuting arrangement on an unfair and prejudicial basis. He further contends that the decision to review the Telecommuting Agreement was linked to the "EBC inquiry" and that management's unwillingness to delay the interim evaluation of the telecommuting

arrangement until after completion of the “EBC inquiry” caused him prejudice. The Bank argues that the interim review was proper and conducted according to the terms of the Telecommuting Agreement.

36. The Tribunal finds that the Telecommuting Agreement expressly provided for a six-month evaluation. The Agreement also provided that the “continuation of the telecommuting arrangement beyond the initial six months will be contingent on the result of such evaluation,” and that as Director of Strategy and Core Services, Ms. Mikhlin-Oliver would “carry out a six-month evaluation of the arrangement to ensure it [was] working effectively and that business needs [were] met.” The Applicant has failed to proffer any evidence to suggest that there was an explicit or implicit waiver of this important requirement in the Telecommuting Agreement. Similarly, the Applicant does not substantiate his claims that the decision to conduct the interim review was in any way connected to the EBC review or that INT management was not transparent in its decision to terminate the agreement. On the contrary, as described above, Ms. Mikhlin-Oliver clearly explained to the Applicant the rationale behind the decisions to conduct the interim review and terminate the telecommuting arrangement. Consequently, the Tribunal finds that the Applicant has failed to establish an abuse of discretion.

Wrong and untimely leave advice

37. The Applicant contends that he sought advice from his supervisor on the type of leave most appropriate for the time taken to provide expert witness testimony for Lowndes Jordan, and that she and Mr. Nardolillo provided him with untimely and inappropriate advice. According to the Applicant, OIC approval would have been unnecessary had he been advised to apply for Administrative Leave instead of Leave without Pay. In the Applicant’s view, the advice he received triggered an unfortunate chain of events.

38. The Tribunal finds this contention lacking in merit as it has, on several occasions, reminded staff members of their obligation to familiarize themselves with the Staff Rules expressly referenced in their letters of appointment. As in *Vick*, Decision No. 295 [2003],

para. 28 not only was the Applicant “reminded in his letter of appointment that he would be bound by the Staff Rules in effect at the time of his reappointment and as amended from time to time, but [he] had easy access to these Staff Rules.” Furthermore, “the Respondent is not under an obligation to inform each staff member of his rights and duties under the Staff Rules which are published and disseminated precisely with the object of ensuring that all staff are kept informed.” *Courtney (No. 3)*, Decision No. 154 [1996], para. 32.

39. The Tribunal finds that the record does not show that the Applicant requested leave advice from his supervisor. On the contrary, the record demonstrates that the Applicant, without providing details, merely informed Ms. Mikhlin-Oliver of his intention to take unpaid leave and she directed him to the relevant Staff Rules. The Applicant then entered into an arrangement with Lowndes Jordan in which he expressly stated that he proposed to charge a fee for his services. Once Ms. Mikhlin-Oliver became aware that the Applicant would be remunerated as an expert witness, she sought OIC approval on his behalf on that basis. The Applicant seeks to shift the responsibility to his supervisor and OIC. According to the record, it was only after OIC approval was sought that the question arose as to whether unpaid leave was the appropriate leave option for the Applicant to undertake paid unofficial activity in his personal capacity. The Tribunal finds that the Applicant did not receive wrong advice, and that it was his responsibility to familiarize himself with the Staff Rules. Had the Applicant been led astray by his supervisors that would have been a different matter. The Applicant, as a staff member, should have been aware that clarification from EBC, and where required, approval from OIC is necessary prior to undertaking any paid outside activity. Staff Rule 3.02, paragraph 3.01 provides that:

Staff members are restricted in the degree to which they may accept paid employment or otherwise provide services for another organization, whether as an employee, director, partner or otherwise, during their Bank Group employment. The staff member is responsible for ensuring that any such employment or service allowable under this Staff Rule is compatible with Principle 3 under the Principles of Staff Employment and is permitted under local law. If a staff member has any doubt whether these requirements are met, she/he shall seek the advice of the Office of Ethics and Business Conduct (EBC) and, where required, the approval of the Outside Interests Committee (the “Committee.”)

40. The Applicant's failure to discharge his responsibility in this respect leaves him without a sustainable grievance. Furthermore, the Applicant's attempt to characterize the provision of expert testimony at the request of a party for a fee as a civic responsibility akin to jury duty is untenable to say the least.

Admissibility of the Applicant's other grievances

41. The Applicant raises other complaints against the Bank which he contends do not constitute separate claims, but rather constituted the different "aspects that created a breakdown in the employment relationship." He challenges:

- a) The referral of "factually wrong allegations" to EBC;
- b) EBC's alleged conflict of interest in assessing the allegations and conducting the fact finding review;
- c) The alleged failure by EBC to properly assess the allegations initially;
- d) The conduct of the fact finding review and the Draft EBC Report;
- e) The length of the fact finding review;
- f) INT's delay in filing the Applicant's 2011 OPE/SRI;
- g) The withholding of the Applicant's FY2011 OPE/SRI and the eventual grading;
- h) The absence of Administrative Leave or workaround arrangements during EBC's review;
- i) The alleged threat by Ms. Mikhlin-Oliver that EBC would require the Applicant to repay the sum of USD 25,000 which he received from Lowndes Jordan;
- j) The allegedly prejudicial interim re-evaluation of the Telecommuting Arrangement;
- k) The "micro-management" of the INT – IAD Joint Review work performed by the Applicant;
- l) The "poor management" of the PNPM case.

42. The Tribunal notes the jurisdictional challenges raised by the Bank that all claims raised by the Applicant related to EBC's investigation are time-barred, pursuant to Article II.2(ii) of the Tribunal Statute and that all claims raised by the Applicant regarding his managers' actions are inadmissible because the Applicant failed to exhaust other remedies available within the Bank before submitting these claims to the Tribunal pursuant to Staff Rule 9.03, paragraph 6.02. The Applicant contends that he did not file these claims within 120 days of the date he received notice of completion of the EBC review because he

“entered into discussions, in good faith, with INT Management and HR about potential exit options.” He states that “an email dated 21 August 2012 confirms when the Applicant first became aware of the withdrawal by the Respondent of the “early out” option, which effectively ended those discussions” and that this email “constitutes receipt of notice ... that the relief asked for would not be granted” such that the 120-day time limit ran from that date. The Applicant further argues that his claims concerning the deferral of his 2011 OPE and SRI ratings should be deemed admissible pursuant to the exception in Staff Rule 9.03, paragraph 6.04. In the alternative, the Applicant argues that his negotiations with the Bank amount to exceptional circumstances.

43. Article II.2 of the Tribunal’s Statute provides, in relevant part, that for an application to be admissible, the Applicant must have:

(i) “the applicant has exhausted all other remedies available within the Bank Group;” and

(ii) the application is “filed within one hundred and twenty days after the latest of the following: (a) the occurrence of the event giving rise to the application; [or] (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for will not be granted”

44. The Tribunal has explained in several cases the important reasons for the requirement that Bank decisions be reviewed in a timely manner and that internal remedies be exhausted (see *Dhillon*, Decision No. 75 [1989], paras. 22-25; *Steinke*, Decision 79 [1989], paras. 16-17; *de Jong*, Decision No. 89 [1990], paras. 29-33, 36-37, 44-46). As was held in *Jalali*, “not having raised them before and not having taken them through administrative review, the Applicant cannot now incorporate these earlier decisions by the Bank as part of a “pattern” that can be indefinitely subjected to review by the Tribunal.” *Jalali*, Decision No. 148 [1996], para. 35. The Tribunal finds that the Applicant has not convincingly demonstrated that the claims listed above form part of the factual matrix relevant to the termination of his employment.

45. Furthermore, the Tribunal has made clear that requests for reconsideration, confirmation or explanation of the Bank's position do not generally lead to a new decision providing the Applicant with an additional period of time to file his application. *H (No. 4)*, Decision No. 385 [2008], para. 37; *Agerschou*, Decision No. 114 [1992], para. 42; *Sharpston*, Decision No. 251 [2001], para. 36. The Tribunal has held that the prescribed time limits are very "important for a smooth functioning of both the Bank and the Tribunal." *Agerschou*, para. 42.

46. As to the existence of exceptional circumstances, the Tribunal considers this issue on a case-by-case basis, taking into account several factors, including the extent of the delay and the nature of the excuse invoked. *Yousufzi*, Decision No. 151 [1996], para. 28. The Applicant bears the burden of establishing exceptional circumstances justifying relief (*Malekpour*, Decision No. 320 [2004], para. 22) and this burden cannot be satisfied by allegations of a general nature, but requires reliable and pertinent contemporaneous proof *Mahmoudi* (No. 3), Decision No. 236 [2000], para. 27; *Nyambal (No. 2)*, Decision No. 395 [2009], para. 30. While the Tribunal has given serious consideration to health concerns which prevented an Applicant from submitting his Application, the Tribunal does not consider settlement negotiations to be "exceptional circumstances" as contended by the Applicant.

47. The Tribunal will now consider the Applicant's claims regarding the deferral of his 2011 OPE and SRI pending the outcome of the EBC review. Staff Rule 9.03, paragraph 6.04 provides that Peer Review Services ("PRS") does not have the authority to review the following claims:

actions, inactions, or decisions taken in connection with staff member misconduct investigations conducted under Staff Rule 3.00, Staff Rule 8.01, or Staff Rule 8.02, including decisions not to investigate allegations, decisions to place a staff member on administrative leave, alleged procedural violations, factual findings, performance management actions taken pursuant to Staff Rule 3.00, and the imposition of disciplinary measures...

48. The Tribunal observes that the Applicant's OPE and SRI were not completed until 18 July 2012 precisely because INT management perceived a connection with the EBC review. The Tribunal finds that these claims fall within the Staff Rule 9.03, paragraph 6.04(d) exception as "actions, inactions, or decisions taken in connection" with misconduct investigations, and are therefore admissible.

*The decision to withhold the Applicant's OPE/SRI pending completion of the EBC review
and the SRI rating of 3.3*

49. The Applicant argues that the Bank exercised its discretion in a prejudicial manner, while the Bank contends that the decision to withhold the Applicant's 2011 OPE and SRI was reasonable and prudent. The Applicant may disagree with the decision taken to withhold his OPE and SRI ratings. He may also consider himself in some way prejudiced by this decision or believe that his eventual SRI grade should mirror his 2010 SRI rating of 5.0. Nonetheless, the Applicant once again fails to discharge his burden of proof and does not demonstrate how the Bank's decisions were arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure or lacked an observable and reasonable basis. The evidence shows that Ms. Mikhlin-Oliver provided an observable and reasonable basis for the impugned decisions. She further explained to the Applicant that:

deferring a decision on the SRI with the understanding that it would be paid retroactive to July 1, 2011, enabled [INT management] to strike an appropriate balance by avoiding a premature assessment on [his] SRI during the pendency of a review that related directly to behavioral aspects of performance while ensuring no harm by simply deferring the SRI and attendant salary increase, if any, that would be paid retroactive to the Bank's standard July 1 date.

50. Ms. Mikhlin-Oliver informed the Applicant of the basis for the SRI rating of 3.3 which corresponds with his overall performance rating, and the attendant salary increase of 2.10% which was "the maximum percentage under the 2011 Performance-Based Salary Increase Matrix for staff in Salary Range Zone 2." While a decision to delay completion of a staff member's OPE and withhold his SRI is never one which should be taken lightly, the Tribunal finds no abuse of process in the circumstances of this case.

Damages for the impact of the contested decisions on the Applicant's health and family

51. The Applicant asserts that he suffered stress, humiliation and mental suffering as a result of the contested decisions. The Tribunal finds that any negative impact of the contested decisions on the Applicant's health and family is not attributable to the Bank. The record demonstrates that both the EBC review and eventual termination of the Applicant's employment contract on grounds of abandonment of office could have been avoided had the Applicant provided his supervisor with complete information from the onset, familiarized himself with the Staff Rules, and acted accordingly. Under these circumstances, the Tribunal finds no basis to award the Applicant damages for the impact of the contested decisions on his health and family.

DECISION

The Application is dismissed.

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

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 3 October 2013