



World Bank Administrative Tribunal

2020

Decision No. 629

**EO (No. 2),
Applicant**

v.

**International Finance Corporation,
Respondent**

(Merits)

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

**EO (No. 2),
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Andrew Burgess (President), Mahnoush H. Arsanjani (Vice-President), Marielle Cohen-Branche (Vice-President), Janice Bellace, Seward Cooper, Lynne Charbonneau, and Ann Power-Forde.

2. The Application was received on 19 March 2019. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by Edward Chukwuemeke Okeke, Interim Chief Counsel (Institutional Administration), Legal Vice Presidency.

3. The Applicant challenges (i) his Fiscal Year 2017 (FY2017) Annual Review, (ii) his FY2017 performance rating of 2, (iii) the decision not to shortlist him for the Financial Officer position, Job # 170929, (iv) the decision not to select him for the Financial Officer position, Job # 170929, and (v) the refusal to provide feedback on the reasons why he was not shortlisted for the Financial Officer position, Job # 170929.

FACTUAL BACKGROUND

4. The Applicant joined the IFC in March 2009 as a Short Term Consultant. In July 2009, the Applicant began a term appointment as an Associate Financial Officer in a unit of the Office of the Vice President, Treasury & Syndications. In July 2011, he was promoted from Associate Financial Officer to Financial Officer, Level GF, Step 2. The Applicant consistently received satisfactory performance ratings and his appointment was extended multiple times. In early 2016, as part of a departmental reorganization, the Applicant was transferred to a new unit, where he would work under a different supervisor (his Supervisor).

5. On 27 July 2016, the Applicant met with his Supervisor, his previous supervisor, his Director, and a Human Resources (HR) Business Partner for a year-end performance review conversation. During this meeting, the Applicant was informed of deficiencies in his performance, to which he objected.

6. On 29 September 2016, the Applicant was informed that he would receive a performance rating of 2 for Fiscal Year 2016 (FY2016), which is the period from July 2015 through June 2016. The Applicant was also informed that he would be placed on an Opportunity to Improve (OTI) plan. In November 2016, the Applicant began the process of challenging his FY2016 Annual Review, the performance rating of 2, and the OTI through Administrative Review (AR) and then Performance Management Review (PMR). On 24 March 2017, the Applicant was informed that the IFC agreed with the PMR recommendations upholding the FY2016 Annual Review, the performance rating, and the OTI.

7. On 27 March 2017, the Applicant had a Mid-Year Conversation for FY2017 with his Supervisor; the meeting was also attended by the Applicant's Director (who was also the reviewing official for the FY2016 and FY2017 Annual Reviews), an HR Business Partner, and a Staff Association Representative. At this meeting, the Applicant was informed by his Supervisor that he had failed the OTI and that his appointment would be terminated. According to the Applicant, in a meeting the next day, he was informed by the Director that he should look for another job immediately, and that the OTI process was taking up too much of the Supervisor's time.

8. On 3 April 2017, the Applicant was informed that the OTI would be terminated immediately and that the OTI termination would be initiated in the system.

9. On 6 April 2017, the Applicant filed for sick leave, and was later approved for Short Term Disability (STD) in June 2017. The Applicant remains on disability benefits under Long Term Disability (LTD).

10. On 20 June 2017, the Applicant was informed by his Supervisor that his appointment would not be extended past its current end date of 27 January 2018.

11. On 17 October 2017, the Applicant submitted his first application to the Tribunal, challenging (i) the FY2016 Annual Review, (ii) the FY2016 performance rating of 2, (iii) the OTI, (iv) the recommended termination of his appointment for unsatisfactory performance, and (v) the June 2017 notice of non-extension.

12. The Applicant was first notified of his FY2017 Annual Review on 3 October 2017, when he received an automated message from ePerformance telling him that the Annual Review had been submitted to the reviewing official for approval. On 11 October 2017, the Applicant received another automated message indicating that the Director, as reviewing official, had approved the Annual Review. According to the IFC, management did not communicate with the Applicant regarding the FY2017 Annual Review because the “Applicant was on sick leave and then on short term disability.”

13. In the FY2017 Annual Review, the Applicant’s Supervisor stated, under the heading “Individual Business Objectives Summary,” that

[the Applicant] had a documented “Opportunity to Improve” (OTI) from October 11, 2016 to May 01, 2017. As mentioned in the mid-year review, the overall assessment of the OTI completion process was not satisfactory. [The Applicant] has been on a short term disability leave since the beginning of April 2017. Accordingly there is no further update.

Under the heading “Overall Supervisor Comments,” the Supervisor wrote only, “The overall assessment of the OTI completion progress for [the Applicant] is not satisfactory.”

14. On 27 October 2017, the Applicant received an email from his Supervisor stating: “Just wanted to let you know that your SRI [Salary Review Increase] rating for FY2017 is 2.” Because of this rating, the Applicant received no salary increase for FY2017.

15. The Applicant had no end-of-year conversation to discuss the FY2017 Annual Review, he was not asked to complete a self-evaluation, his colleagues were not asked to provide any feedback to inform the Annual Review, and he was not sent the draft Annual Review for comments.

16. In the meantime, the Applicant began searching for other positions within the World Bank Group following the March 2017 Mid-Year Conversation and subsequent instruction to look for another job.

17. On 24 March 2017, during a town hall meeting with the IFC Treasury Vice Presidency staff, the IFC Vice President and Treasurer made a statement to managers providing that, during the hiring process for positions within the Vice Presidential Unit (VPU), current IFC Treasury staff should be shortlisted. An IFC Career Development presentation given in March 2017 referred to the “VPU staff short listing rules.” This statement was repeated in an email to all Treasury staff on 5 June 2017, which confirmed that the VPU Leadership team committed to “[s]hort-listing all VPU staff the first time they apply for a position in a department other than their own. If that same staff member later applies for a different position in that same department and he/she is deemed to not have the right skill set for the position, short-listing is not required.”

18. On 5 May 2017, a Financial Officer position, Level GF-GG, Job # 170929, in IFC’s Client Solutions Global Support unit was announced, and the hiring manager designated Mr. X (Principal Financial Officer, Client Solutions Strategy) to lead the hiring process. On 22 May 2017, the Applicant applied for the position.

19. A Shortlisting Committee (SLC) was created, composed of Mr. X, Mr. Y (Senior Financial Officer, Client Solutions Strategy), and a third member who left the IFC before the SLC met to review the applications which had been submitted. Mr. X noted that he and Mr. Y were the two most senior members of the same unit. Mr. X provided oral guidance to Mr. Y to select candidates for the short list. Mr. Y later stated that there were over eighty applicants for the position, including ten internal candidates. There was no long list of candidates compiled, and, as stated by Mr. X, there

were no written summations produced regarding the assessment of the candidates ultimately chosen to be short-listed and interviewed. Mr. [Y] and [Mr. X] did the short-listing directly [themselves] and work in the same office, thus obviating the need for any written communication.

20. The shortlisting process was completed in July 2017 and four candidates were shortlisted; the Applicant was not shortlisted for the position. According to Mr. X, the Applicant was not shortlisted based on feedback Mr. X had received from a former supervisor of the Applicant in April 2017 indicating that the Applicant had performance issues and was on an OTI. It is Mr. X's recollection that he spoke with the former supervisor a number of times regarding several candidates who had applied for the position, as there were a number of candidates from her unit. At this time, the Applicant had not worked in the supervisor's unit for over a year. Mr. X has also stated that "[c]onsultations with other managers did not occur, as there were no other candidates from other departments that were seriously considered for the position."

21. The Applicant was not informed of the decision not to shortlist him. On 20 October 2017, the Applicant emailed the hiring manager requesting an update on the shortlisting process. On 23 October 2017, he forwarded the email to the HR contact for the position since he had not yet received a response. Later that day, he received an email from the hiring manager informing him that Mr. X was responsible for the hiring process for the position. Mr. X then emailed the Applicant informing him that they had already "shortlisted, interviewed, and hired someone for [the] position." The Applicant responded to the email requesting feedback on why he was not shortlisted. On 8 November 2017, the Applicant received an email from the HR contact informing him the selection process for the position was finalized. The Applicant also responded to this email requesting feedback on why he was not shortlisted.

22. Neither Mr. X nor the HR contact responded to the Applicant's request for feedback. On 24 October 2017, Mr. X emailed the HR contact asking her to discuss the Applicant's request for feedback. Mr. X stated that he was not inclined to provide feedback to the Applicant because he "didn't feel that it was likely to be a constructive conversation. And [he] wasn't sure what bank policies were on this." The HR contact did not respond over email, but Mr. X recalled an in-person conversation in which the HR contact told him, "No. You don't need to, there's a process going on with [the Applicant.]"

23. Mr. X stated during a Peer Review Services (PRS) proceeding "that he made the decision not to provide feedback to [the Applicant] as there was a 'tribunal process [filed by the Applicant]"

at the time.” Mr. X later explained that this statement “may have been using the word tribunal as kind of a proxy for [I]JS [Internal Justice Services] or whatever appeal that staff can have,” and that he “had no knowledge of any tribunal process regarding [the Applicant] at this point in time. This was feedback from HR that there was some sort of process going on with [the Applicant] at the time.” Mr. X maintains that “[he] didn’t make the decision. [He] referred the matter to HR, who came back and said [he] shouldn’t respond further to [the Applicant’s] request. So [...] [he] acted upon that guidance.” For her part, the HR contact “said that it is an uncomfortable situation to give feedback to someone when you know something is going on and when the reason for not being selected was performance based. [She] stated that her advice to Mr. [X] was that he was not obliged to give feedback to [the Applicant].”

24. On 26 December 2017, the Applicant filed a request for AR of his FY2017 Annual Review and performance rating, challenging the “unfairness of the OTI; [...] that his positive accomplishments were not taken into account; and [...] that the rating of ‘2’ hindered applications for other employment within the World Bank Group.” On 8 May 2018, the AR reviewer, a Manager in HR Client Services, forwarded his recommendation to the Applicant, concluding that he had “not found any evidence of either noncompliance with the annual performance management process, nor [the Applicant’s] overall performance having been inappropriately assessed and evaluated.”

25. In the same month, the Tribunal reached a decision in response to the Applicant’s October 2017 application. In *EO*, Decision No. 580 [2018], paras. 169–71, the Tribunal found

that the Applicant’s FY2016 Annual Review and performance rating were not arbitrary, unfair, or unbalanced. However, the participation of the Director, who was the Reviewing Official, at the year-end meeting constitutes a violation[;]

[...] that the OTI process was unfair and did not give the Applicant a “genuine chance to succeed.” In light of the flawed OTI process, the Tribunal further finds that the non-renewal of the Applicant’s appointment due to poor performance constitutes a failure in the proper exercise of managerial discretion[; and]

[...] that the Applicant has not made a *prima facie* case that he was the subject of retaliation.

26. The Tribunal ordered that

[t]he IFC shall have the option of reinstating the Applicant to a position in the World Bank Group similar to the one he was occupying at the time of the non-renewal of his appointment, but in a different unit, or paying the Applicant compensation in the amount of three years' net salary based on the last salary drawn by the Applicant;

and that

[t]he IFC shall rescind and remove all records of the OTI from the Applicant's personnel records.

27. On 17 May 2018, the Applicant continued his challenge to the FY2017 Annual Review and performance rating by requesting a PMR. Finding that the FY2017 Annual Review "was based entirely on [the Applicant's] performance in implementing the OTI," the PMR recommendation concluded

that there was not a reasonable and observable basis for awarding a performance rating of "2" since the OTI on which it was based did not meet the requirements of Staff Rule 5.03. Accordingly, I recommend a reassessment of [the Applicant's] FY17 performance evaluation, an upgrade of his FY17 performance rating from "2" to at least "3", and financial compensation by an amount equal to the difference, for the time that he was employed by IFC in FY18, between the salary associated with a rating of 2 and one associated with a rating of 3.

28. On 13 July 2018, the Applicant was informed by the IFC Vice President and Treasurer that he

[does] not accept the PMR recommendation as it is inconsistent with and already covered by the Tribunal's decision in this matter, especially given the fact that IFC has decided to pay damages rather than reinstate [the Applicant]. Further, the Tribunal concluded that [the Applicant's] performance review and rating were not arbitrary, unfair or unbalanced. With respect to [the Applicant's] performance evaluation record, this will be addressed according to the Tribunal's decision. Further, [the Applicant] already will have received compensation from the Tribunal with respect to [the Applicant's] performance management concerns. Therefore, this entire matter is *res judicata* and moot.

29. On 9 August 2018, the PMR reviewer emailed the IFC Vice President and Treasurer, clarifying that “[t]he recent Tribunal decision was concerning [the Applicant’s] FY16 performance evaluation and not FY17’s which was the subject of [the] review.” The IFC Vice President and Treasurer replied on 9 August 2018, thanking the reviewer for the clarification. No further action was taken.

30. On 16 February 2018, the Applicant filed a Request for Review with PRS challenging the “non-shortlisting for Job # 170929; his consequent non-selection; and IFC’s refusal to give him feedback regarding his not being shortlisted.”

31. On 18 October 2018, the PRS Panel issued its Report, concluding

that the non-shortlisting decision was made on a reasonable and observable basis and that there was no evidence of bad faith in making the decision. [...] [H]owever, [...] management did not follow a proper process in the manner in which it conducted the shortlisting process for the position. [...] [I]n this way, the WBG [World Bank Group] did not act consistently with [the Applicant’s] former contract of employment and terms of appointment.

Specifically, the Panel concluded that

i) the composition of the Shortlisting Committee (SLC) was not diverse; ii) there was no contemporaneous and detailed documentation of the shortlisting process; and iii) management failed to provide feedback to [the Applicant] regarding the outcome of his application for the position upon his request.

32. The Panel recommended “that the WBG provide [the Applicant] with compensation in the amount of three (3) months of his net salary.” Further, considering the Applicant’s challenge to the refusal to provide feedback, the Panel noted

that the Ethics and Business Conduct Department (EBC) is the unit within the WBG with the primary mandate and resources to review allegations of retaliation. Taking into account that [the Applicant’s] application filed with the Tribunal was offered as a reason not to provide him with feedback, in accordance with Staff Rule 9.03, Paragraph 11.03(a) (Powers of the Peer Review Chair and Panels), the Panel decided to share its Report with EBC for its review of [the Applicant’s] claim regarding the lack of feedback provided to him on the outcome of his application for the position, to the extent that EBC finds it appropriate.

33. On 15 November 2018, the Applicant was informed by the IFC Chief Executive Officer that he

[does] not accept the Panel's recommendation. [He] consider[s] this matter to be covered and resolved by the World Bank Administrative Tribunal's Decision No. 580 concerning [the Applicant's] Opportunity to Improve. The Tribunal provided [the Applicant] full compensation for all wrongs that stem from that performance management exercise. Therefore, this matter is moot.

34. EBC considered the Applicant's allegation of retaliation referred to it by PRS, but ultimately closed its investigation, finding "insufficient evidence to substantiate the allegation that Mr. [X] retaliated against [the Applicant]." Specifically, EBC found that there was "no evidence to indicate that Mr. [X] knew of [the Applicant's] application to WBAT [the Tribunal] at the time of the shortlisting or when he decided not to provide feedback."

35. On 19 March 2019, the Applicant submitted this Application to the Tribunal. He challenges (i) the FY2017 Annual Review, (ii) the FY2017 performance rating of 2, (iii) the decision not to shortlist him for the Financial Officer position, Job # 170929, (iv) the decision not to select him for the Financial Officer position, Job # 170929, and (v) the refusal to provide feedback on the reasons why he was not shortlisted for the Financial Officer position, Job # 170929.

36. The Applicant seeks the following relief: (i) rescission of the FY2017 Annual Review and the removal of all records of it from his personnel file, (ii) rescission of the FY2017 performance rating of 2 and the removal of all records of it from his personnel files, (iii) the award of a performance rating of at least 3 for FY2017, (iv) a retroactive salary increase of at least 4% consistent with a performance rating of 3 for FY2017, and (v) "[s]uch additional compensation as the Tribunal deems just and appropriate for the extraordinary stress caused by management's continuing unfair treatment of [the Applicant] and the further damage to his reputation."

37. On 30 April 2019, the IFC filed a preliminary objection, contending that the Tribunal's decision in *EO* covered all claims arising from the OTI process and therefore the Applicant's claims in the present Application were barred by the principle of *res judicata*.

38. In *EO (No. 2) (Preliminary Objection)*, Decision No. 622 [2019], paras. 56, 60, the Tribunal dismissed the IFC's preliminary objection, finding that decisions challenged in the present Application were not considered by the Tribunal in its previous judgment and that the Application is not barred by the principle of *res judicata*.

39. For the merits phase of the proceedings, the Applicant claims legal fees and costs in the amount of \$8,249.27.

SUMMARY OF THE CONTENTIONS OF THE PARTIES ON THE MERITS

The Applicant's Contention No. 1

The Applicant's FY2017 Annual Review and performance rating were arbitrary and unfair

40. The Applicant contends that his FY2017 Annual Review and performance rating were arbitrary and unfair as the Annual Review was based on the OTI which was subsequently invalidated by the Tribunal, did not assess the full year's work, was unbalanced, and denied the Applicant a fair process.

41. The Applicant first contends that, because the Applicant's FY2017 Annual Review was based entirely on the OTI which the Tribunal subsequently found unfair and ordered rescinded, the Annual Review "clearly cannot stand." The Applicant further submits that the Annual Review was arbitrary and unfair because it did not assess the full year's work, as it covered only the six months the OTI was in effect. The Applicant next contends that the Annual Review was unbalanced as it included only the comments of the Supervisor and failed to "fairly balance both positive and negative factors" as any positive feedback was "overlooked, minimized, or sidelined."

42. The Applicant contends that the Annual Review was arbitrary and unfair because it denied the Applicant fair process. The Applicant notes numerous instances where "[m]ost of the normal procedures associated with an Annual Review were ignored." First, despite statements from HR that "[t]he end-year performance conversation is a critical step in the annual performance management process," the Applicant notes that there was no evaluation conference to discuss the

Annual Review. The Applicant also notes he was not given the opportunity to provide his own self-evaluation; rather, his only input into the Annual Review were comments he made on the Mid-Year conversation. In addition, the Applicant further notes that his Supervisor did not ask him for, or consult with, any feedback providers. The Applicant further notes that the Director again “improperly participated in the performance evaluation process,” as the Director was also the reviewing official who signed the final Annual Review.

43. Finally, the Applicant cites Staff Rule 5.03, paragraph 2.01(b), which states that “[t]he Manager or Designated Supervisor shall provide the staff member with a written summary assessment of the staff member’s performance during the review period.” The Applicant notes that he was not sent a draft of the FY2017 Annual Review for his review and comments; “indeed, [his Supervisor] did not send it to him at all – ever.”

44. The Applicant notes that the IFC’s agreement to strike the FY2017 Annual Review from the record does not follow the PMR reviewer’s recommendations. Rather, the PMR reviewer recommended that a new performance evaluation be conducted, and that the Applicant should receive a performance rating of at least a 3. The Applicant recognizes, however, that at this stage “it is hardly practical to attempt to conduct a fair evaluation of [the Applicant’s] performance or to ‘modify’ the evaluation,” and that “removing all record of the FY17 Annual Review may be the best that can be done for [the Applicant].”

45. Regarding the performance rating, the Applicant submits that “[p]erformance ratings that are based on arbitrary performance evaluations will be set aside.” The Applicant notes that the IFC’s proposal to strike the performance rating of 2 and to adjust the Applicant’s salary as if he had received a performance rating of 3 is satisfactory, but contends that it is not enough to only set aside the rating of 2. Rather, the Applicant requests that the performance rating be replaced “with at least a satisfactory rating of 3” in order to compensate the Applicant for the ongoing losses as a result of the improper rating. The Applicant contends that a “specific performance rating is very different indeed from an absence of any rating” and seeks assurance that his record will reflect a rating of 3.

The IFC's Response

The IFC concedes that the Applicant's FY2017 Annual Review and performance rating should be stricken from his record

46. The IFC “accepts that both the FY17 performance evaluation and the performance rating of 2 can be analogized to ‘fruits of the poisonous tree’” and accepts that the “Applicant’s evaluation for FY17 and his performance rating of 2 should be stricken from his record.”

47. The IFC submits that “management acted in good faith without the foreknowledge that the Tribunal would subsequently declare the OTI invalid.” The IFC therefore agrees that the

Applicant will receive a performance rating of 3 with a salary increase of 4.081% at the end of the FY17. [The IFC] is ready to make the necessary adjustments to Applicant’s final salary, which would additionally and positively impact the three year salary award he had received in *EO* Decision No. 580, the disability payments, and [the IFC’s] contributions to the pension.

The IFC submits that this will adequately compensate the Applicant for the FY2017 Annual Review and performance rating and that any additional award of damages “would be an unfair windfall.” The IFC has emphasized that it “has undertaken to remove the SRI rating of 2 for FY2017 and replace it with an SRI of 3. For clarity, there will be no record of the Applicant receiving a performance rating of 2 for FY2017.”

The Applicant's Contention No. 2

The treatment of the Applicant during the shortlisting and selection for the Financial Officer position was arbitrary, discriminatory, and contrary to fair procedures

48. The Applicant contends that the Applicant’s treatment during the shortlisting and selection for the Financial Officer position was arbitrary, discriminatory, and contrary to fair procedures because there was no rational reason not to shortlist the Applicant for the position, the non-shortlisting was discriminatory and contrary to VPU rules, and the shortlisting process violated numerous mandated procedures. The Applicant finds the IFC’s acceptance of the PRS Panel’s recommendation to be “helpful,” but contends that the suggestion will not make him whole, as the

“Panel’s recommendations were far from adequate and recognized only some issues of process while ignoring others completely.”

49. The Applicant submits that, because the purpose of shortlisting is to “weigh the candidates’ qualifications on paper against the requirements of the job,” the “IFC’s attempt to argue that [the Applicant] was not sufficiently qualified even to be shortlisted for the Financial Officer position is completely unconvincing given his exceptional education and experience.” The Applicant suggests that the failure to shortlist him for the position was “unlikely to be based on his qualifications but rather on personal animus,” referencing previous professional difficulties between the Applicant and Mr. Y, one of the two participating members of the SLC.

50. The Applicant notes Mr. Y’s claims before PRS in which he stated that the Applicant was not shortlisted for the position because he was “not a quantitative modeler.” The Applicant contends that this statement “is both absurd and completely untrue,” as he “is an extremely qualified and highly experienced quantitative modeler.” The Applicant provides emails between himself and Mr. Y discussing modeling issues and statements from colleagues attesting to his quantitative modeling capabilities to support his contention. The Applicant also contends that Mr. Y’s explanation that the Applicant was not shortlisted because he lacked teamwork skills was without merit, as even the “utterly damning FY17 Annual Review conceded that ‘[the Applicant] is a good team player.’” Based on these statements, the Applicant contends that

Mr. [Y] had no justification whatsoever for determining that [the Applicant] did not merit selection; the justifications he offered are completely bogus; and the decision not to even shortlist him was completely arbitrary and based entirely on personal animus.

51. The Applicant also contends that the SLC’s non-shortlisting decision was arbitrary because it relied on performance feedback from a former supervisor. The Applicant notes Mr. X’s statement to PRS that the SLC did not shortlist the Applicant because the Applicant’s former supervisor told Mr. X about “‘negative performance feedback’ in April 2017 and told him that [the Applicant] was ‘on an OTI program.’” The Applicant notes that this former supervisor had ceased to be his supervisor a year before this “negative performance feedback” was given and suggests that her involvement in the shortlisting process was “both bizarre and highly irregular.” The Applicant

submits that Mr. X's reliance on the statement from the Applicant's former supervisor was in violation of the Non-Managerial Recruitment Guide's principle to "avoid old information, unsubstantiated generalizations or gossip." The Applicant also notes that performance documents are not supposed to be available to SLCs and that such information should only be considered at "the selection stage of the process."

52. The Applicant next contends that the non-shortlisting decision was contrary to VPU rules. The Applicant cites the commitment by the IFC Vice President and Treasurer to shortlist current IFC Treasury staff members during a recruitment process, which was reaffirmed in emails and presentations. The Applicant notes that, even though he was an IFC Treasury staff member, he was not shortlisted for the position. The Applicant contends that, "as an IFC Treasury staff member[, he] was entitled to rely on this commitment or promise." The Applicant submits that the failure "to automatically shortlist [the Applicant] – admittedly based solely on questions about performance," was not only in violation of VPU rules but was also discriminatory as it "resulted in his being treated differently from other IFC candidates."

53. The Applicant finally contends that the shortlisting process violated numerous mandated procedures, as the SLC consisted of two members (not three to four) from the same unit. Furthermore, the SLC failed to keep any records of the shortlisting process and refused to provide the Applicant with feedback on why he was not shortlisted. The Applicant notes that it was for these procedural failures that the PRS Panel recommended compensation, which the IFC now agrees to award. The Applicant requests that the Tribunal consider his arguments on the other claims related to the non-shortlisting decision and award him "appropriate additional compensation."

The IFC's Response

The IFC concedes that there were flaws in the shortlisting process

54. The IFC maintains that there was a reasonable and observable basis for the decision not to shortlist the Applicant, namely that he "did not have at least one critical skill deemed necessary for the position." The IFC accepts, however, that there were "flaws in the shortlisting process,

namely, lack of diversity in the composition of the Shortlisting Committee, and the lack of documentation of the deliberations of the Shortlisting Committee.” The IFC therefore accepts the recommendation by the PRS Panel to compensate the Applicant with three months’ net salary.

55. The IFC disagrees with the Applicant’s contention that the decision not to shortlist him was arbitrary and asserts that the Applicant lacked essential skills for the position. The IFC maintains that the “evaluation and determination of staff member’s skills and specializations are within managerial discretion” and submits that “[e]ighty candidates applied for the position, including ten internal candidates, the shortlisting committee determined that five candidates were a better fit than Applicant.”

56. The IFC further disagrees with the Applicant’s contention that the SLC inappropriately relied on performance feedback from a former supervisor. The IFC submits that Mr. X “was independently aware of Applicant’s performance deficiencies and teamwork skills issues. Mr. [X’s] discussions with Applicant’s former supervisor [were] simply a confirmation of what he already knew.”

57. The IFC finally contends that what the Applicant claims was a rule or promise to automatically shortlist current IFC Treasury staff members was merely guidance given to managers, who maintained “flexibility to tailor the guidance to the specific needs and specific situations of their units.” The IFC submits that the “fact that the guidance was not taken as a rule to be blindly followed is further evidenced by the fact that there were two other internal candidates who applied for the contested position who were not shortlisted.”

The Applicant’s Contention No. 3

The IFC repeatedly retaliated against the Applicant because of his first Tribunal case

58. The Applicant contends that there were three instances of retaliation against him because of his first Tribunal case. The Applicant submits that “[i]t is unquestionable that [he] engaged in activity protected from retaliation when he filed his first application with the Tribunal” and that

“he must surely be equally protected when he received a compensatory award from the Tribunal for some of his claims.”

59. As a first instance of retaliation, the Applicant notes that during the PRS process Mr. X, the person leading the SLC for the Financial Officer position, stated that “he made the decision not to provide feedback to [the Applicant] as there was ‘a tribunal process [filed by the Applicant] at the time.’” The Applicant notes that EBC declined to find that there was retaliation by Mr. X, but submits that no such finding was made because “Mr. [X] completely reversed his PRS sworn testimony and denied to EBC that he even knew at the time he refused to give feedback to [the Applicant] that he had a ‘tribunal process.’” The Applicant contends that this “reversal by Mr. [X] and its acceptance by EBC [do] not deserve any credit at all.”

60. The Applicant further submits that he was retaliated against for his successful Tribunal outcome when the IFC Vice President and Treasurer decided not to accept the PMR recommendation regarding the FY2017 Annual Review and performance rating and when the IFC Chief Executive Officer decided not to accept the PRS Panel’s recommendation regarding the shortlisting process. The Applicant contends that “the outcome of the PMR and PRS processes were clearly and overtly retaliatory for [the Applicant’s] success in his earlier Tribunal case *on different claims*” (emphasis in original). The Applicant submits that it is clear that “management was angry and upset by the Tribunal’s award in *EO* and refused to provide [the Applicant] with any further compensation for other wrongs.”

The IFC’s Response

The IFC did not have retaliatory animus toward the Applicant

61. The IFC accepts that the Applicant engaged in a protected activity when he filed his first application with the Tribunal, but it contends that, when it declined to accept the PMR and PRS Panel recommendations, it “was operating under a good faith (albeit erroneous) belief that the Tribunal’s decision to award Applicant three years of compensation over a flawed OTI covered all actions stemming from the OTI.” The IFC submits that the erroneous belief was made without

retaliatory animus toward the Applicant and that its acceptance of the recommendations of PMR and the PRS Panel have made the Applicant whole.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

Whether the FY2017 Annual Review and performance rating were arbitrary and unfair

62. The IFC has accepted that both the FY2017 Annual Review and performance rating “can be analogized to ‘fruits of the poisonous tree’, i.e. the failed OTI.” With this in mind, the IFC has agreed to rescind the FY2017 Annual Review and to strike the performance rating of 2 from the Applicant’s record. The IFC further agrees that the Applicant will be given a performance rating of 3 for FY2017 and the corresponding adjustments to the Applicant’s annual salary will be made. The IFC agrees that the Applicant’s compensation awarded in *EO* will likewise be adjusted in light of this salary increase, and that all necessary adjustments will be made to the Applicant’s pension contributions and disability benefits. The Applicant is satisfied with this remedy, and, therefore, the Tribunal accepts this remedy.

Whether the treatment of the Applicant during the shortlisting and selection for the Financial Officer position was arbitrary and contrary to fair procedures

63. The Tribunal recognizes that the IFC has conceded that the shortlisting process for the Financial Officer position was marred by several procedural failures. These include the improper composition of the SLC, the failure to keep records of the deliberations of the SLC, and the failure to provide feedback to the Applicant on why he was not shortlisted for the position when requested. The IFC has therefore agreed to pay the Applicant three months’ salary as recommended by PRS. The Applicant accepts that the PRS findings regarding these conceded procedural deficiencies were correct but maintains that there were other “serious failings in the selection process” which warrant additional compensation, namely that the treatment of the Applicant during the shortlisting process was arbitrary and contrary to fair procedures. The Tribunal will thus limit its consideration of the shortlisting process for the Financial Officer position to these additional claims.

64. The Tribunal's scope of review regarding selection decisions is clear. In *ET*, Decision No. 592 [2018], para. 91, citing *DO*, Decision No. 546 [2016], para. 33, the Tribunal reaffirmed that

it will not overturn a discretionary managerial decision, unless it is demonstrated that the exercise of discretion was “arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack[ed] a reasonable and observable basis, constitut[ed] an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment.”

See also AK, Decision No. 408 [2009], para. 41; *Desthuis-Francis*, Decision No. 315 [2004], para. 19; *Marshall*, Decision No. 226 [2000], para. 21; and *de Raet*, Decision No. 85 [1989], para. 67.

65. With respect to the selection and recruitment of staff members, the Tribunal in *Riddell*, Decision No. 255 [2001], para. 23, stated that

no staff member has a right to be selected to a particular position or to be included in a list of candidates for a position. The decision to select an applicant for a particular position, or to include him or her in a list of candidates, is discretionary and the Tribunal will not overturn such a decision unless it finds that it is tainted by bias or abuse of discretion.

66. In *Jassal*, Decision No. 100 [1991], para. 37, the Tribunal held:

It is not for the Tribunal, in assessing the validity of the selection or non-selection of a staff member, to undertake its own examination of that staff member's record, or a criterion-by-criterion assessment of his or her qualifications. That is for the Bank to do in the first instance, subject to review by the Tribunal only for abuse of discretion. But the Tribunal is charged with determining whether the Bank's decision was the product of bias, prejudice, arbitrariness, manifest unreasonableness, or unfair or improper procedure. Thus, if the Bank's conclusion regarding the Applicant's qualifications [...] altogether lacks support in factual evidence or reasonable inference, that conclusion must be found to be an abuse of discretion.

67. In *AH*, Decision No. 401 [2009], para. 40, the Tribunal found that

a staff member's qualifications of themselves are not sufficient to require being short-listed. Short-listing is a competitive process. Ordinarily several qualified applicants apply for a job, but only a handful are interviewed. That does not mean that the other candidates are not qualified, only that the ones selected are better fits for a particular position.

68. The Tribunal notes the Applicant's position that, contrary to Mr. Y's claims before PRS in which he stated that the Applicant was not shortlisted for the position because he was "not a quantitative modeler," he is in fact "an extremely qualified and highly experienced quantitative modeler." The Applicant supports his contention by providing emails between himself and Mr. Y in which they discuss modeling issues as well as statements from former colleagues attesting to his quantitative modeling capabilities. The IFC, however, maintains that the SLC, after evaluating the Applicant's qualifications, determined that the Applicant was skilled as a quantitative developer, but lacked quantitative modeling skills.

69. The Tribunal further notes that eighty candidates applied for the position and therefore infers that the shortlisting process was competitive. Recalling its jurisprudence in *AH*, para. 40, the Tribunal considers that, even if the Applicant believed he was qualified as a quantitative modeler, these "qualifications of themselves are not sufficient to require being short-listed." As stated in *Jassal*, para. 37, "It is not for the Tribunal, in assessing the validity of the selection or non-selection of a staff member, to undertake its own examination of that staff member's record, or a criterion-by-criterion assessment of his or her qualifications." While the Applicant may believe he was sufficiently skilled as a quantitative modeler to fill the position, and may in fact be a skilled quantitative modeler, it remains the case that those shortlisted for the position were determined to better fit the skills required. The Tribunal finds that there is no basis to set aside the SLC's evaluation of the Applicant's qualifications.

70. The Tribunal also notes the Applicant's contention that the non-shortlisting decision was arbitrary because it improperly relied on negative performance feedback from someone who was not the Applicant's current supervisor. According to the Non-Managerial Recruitment Guide for Open-ended/Term Staff, the shortlisting process should adhere to several principles, including:

Objectivity: Listen to all comments and input. Review candidates based on the requirements of the position/candidate profile and Hiring Manager's selection criteria priorities using current information, applications, references and your own direct experience. Avoid old information, unsubstantiated generalizations or gossip.

Transparency: Use the selection criteria and assessment method consistently with all the candidates.

Rigor: Apply the same, high standard of assessment to each candidate. If necessary, ask the candidate or their references for more information.

The Tribunal further notes the announcement on 21 March 2013 of the Human Resources Vice President that, beginning in the FY2014 performance cycle, the World Bank Group will “[r]emove the use of OPEs [Overall Performance Evaluations] in shortlisting committees.”

71. The Applicant points to Mr. X’s statement to PRS that the Applicant was not shortlisted based on feedback he had received in April 2017 from the Applicant’s former supervisor indicating that the Applicant had performance issues and was on an OTI. To the Applicant, this reliance on negative performance feedback was improper as such information should only be considered after the shortlisting process is complete. The Applicant also contends that such feedback “clearly ran afoul of the [Non-]Managerial [...] Recruitment Guide’s counsel to ‘avoid old information, unsubstantiated generalizations or gossip.’” The IFC contends that this conversation only confirmed what Mr. X already knew, as he was independently aware of the Applicant’s “performance deficiencies” through his participation in the annual Talent Review and Management Review meetings. The IFC objects to the Applicant’s characterization of the considered information as “old, unsubstantiated or gossip” and contends that Mr. X “had direct personal knowledge that Applicant had been placed on an OTI.”

72. The record reflects that Mr. X first became aware that the Applicant was having performance issues and was being considered for a performance rating of 2 during the FY2017 Talent Review and Management Review meetings. The record does not reflect, however, that Mr. X became aware through those meetings that the Applicant had been placed on an OTI. Further, the record demonstrates that Mr. X also spoke to the HR contact for the Financial Officer position regarding the Applicant’s performance. Mr. X stated that he “reached out to both of them [the Applicant’s former supervisor and the HR contact] to try to understand the nature of what [the Applicant’s] performance issues were in a bit more detail, particularly once he applied.” The Tribunal finds that these efforts by Mr. X clearly go beyond his own direct experience with the Applicant.

73. Further, in response to the Tribunal's order for production of documents inquiring as to whether he sought performance feedback from other candidates' supervisors during the shortlisting process, Mr. X stated that he consulted with the Applicant's former supervisor regarding several of the candidates who worked in her unit, but that "[c]onsultations with other managers did not occur, as there were no other candidates from other departments that were *seriously considered* for the position" (emphasis added).

74. The Tribunal notes that performance feedback to the same level of detail was not sought for all candidates prior to making the shortlisting decision. The Tribunal considers that this violates the requirements in the Non-Managerial Recruitment Guide for Open-ended/Term Staff to use the selection criteria and assessment method consistently and to apply the same high standard of assessment to each candidate. The Tribunal finds that the treatment of the Applicant by the SLC was arbitrary and contrary to fair procedures and, thus, improper.

75. The Tribunal will finally consider the Applicant's contention that the non-shortlisting decision was contrary to the "clear VPU rule," citing the commitment made by the IFC Vice President and Treasurer to shortlist current IFC Treasury staff members during a recruitment process. The IFC maintains that any such commitment was merely guidance and "not a mandatory HR policy."

76. The Tribunal observes, however, that such guidance, when supported by statements reaffirming the practice, may create a legal obligation that forms part of the conditions of employment. *See De Merode*, Decision No. 1 [1981], para. 112; *Stauffenberg*, Decision No. 38 [1987], para. 64. The Tribunal also considers its statement in *DO*, para. 46, where it considered the significance of HR guidance regarding recruitment, that the "importance of flexibility in decision-making is recognized; yet, established guidelines cannot be rendered purposeless by awarding managers unfettered discretion to stray from them as they see fit." The Tribunal further found in *DO*, para. 46, that "any decision to deviate from established best practices, which are recommended for the efficient and fair recruitment of staff, must not be arbitrary or lack a reasonable and observable basis." The Tribunal observes, then, that where a commitment is made

to follow some established guidance, managers do not have unrestrained discretion to abandon such guidance.

77. The Tribunal will now determine the nature of the commitment, if any, made as to shortlisting. The Tribunal observes that, first, the IFC Vice President and Treasurer stated at the 24 March 2017 town hall that, during the recruitment process for positions within the VPU, current IFC Treasury staff members should be shortlisted. Furthermore, the March 2017 IFC Career Development presentation referred to the “VPU staff short listing rules.” Finally, the 5 June 2017 email to IFC Treasury staff repeated that VPU Leadership committed to “[s]hort-listing all VPU staff the first time they apply for a position in a department other than their own.” The same email contained a qualification that, “[i]f that same staff member later applies for a different position in that same department and he/she is deemed to not have the right skill set for the position, short-listing is not required.” The Tribunal finds that the statement of the IFC Vice President and Treasurer and the subsequent reaffirmations demonstrate that, at the time the Applicant applied for the Financial Officer position, a commitment had been made to shortlist VPU staff the first time they applied for a position within the VPU. Even though such a commitment may have been intended as non-mandatory guidance, and it is not official HR policy, the Tribunal finds that the IFC could not deviate from this commitment with unlimited discretion.

78. The IFC submits that the fact that two other internal candidates were not shortlisted for the position proves that “the guidance was not taken as a rule to be blindly followed.” The Tribunal is not persuaded by this submission, as it does not have evidence before it as to whether it was the first time that either of those candidates applied for a position in a department other than their own and, if not, whether they had the right skill set for the position.

79. The IFC also contends that such a commitment was not meant to be followed where a candidate has documented performance issues. There is no evidence in the record to support such a caveat to the commitment. The Tribunal has already found that the SLC improperly considered information about the Applicant’s performance feedback in the shortlisting process, and the Tribunal concludes that the same information may not be relied upon here to excuse the IFC from its shortlisting commitment. The Tribunal finds that in not shortlisting the Applicant for the

Financial Officer position, as it was the first time he had applied for a different position in a VPU department other than his own, the IFC violated the commitment it had made.

80. Finally, the Tribunal refers to Principle 2.1 of the Principles of Staff Employment, which provides that the World Bank Group “shall at all times act with fairness and impartiality and shall follow a proper process in [its] relations with staff members.” It also refers to Principle 9.1, which provides that “Staff members have the right to fair treatment in matters relating to their employment.” The IFC’s fundamental duty of fairness toward the Applicant continued even while his employment was coming to an end, and the Tribunal observes that it is precisely because the IFC failed to uphold these obligations of fairness that the Applicant is successful in certain of his claims.

Whether the Applicant was retaliated against because of his first Tribunal case

81. The Tribunal will now consider the Applicant’s allegations of retaliation. The Tribunal observes that retaliation is prohibited under the Staff Rules. In *Bauman*, Decision No. 532 [2016], para. 95, the Tribunal held that

[a]s the Tribunal has frequently observed, the Staff Rules are clear that retaliation against any person “who provides information regarding suspected misconduct or who cooperates or provides information in connection with an investigation or review of allegations of misconduct, review or fact finding, or who uses the Conflict Resolution System” is prohibited. *See* Staff Rule 3.00, paragraphs 6.01(g) and 7.06, and Staff Rule 8.01, paragraph 2.03; *see also* CS, Decision No. 513 [2015], para. 104; *Sekabaraga (No. 2)*, Decision No. 496 [2014], para. 60. This prohibition extends also to retaliation against any person who is believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken.

82. The Bank Group’s “Living Our Values: Code of Conduct” describes retaliation in the workplace as follows:

Retaliation is “any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in a [protected activity].” (SR 8.02) It undermines trust among staff members as well as between staff and management and can have a debilitating effect on morale and workplace productivity. This can

lead to serious consequences for the World Bank Group: nobody will bring issues forward if they fear retaliation.

Retaliation in the workplace encompasses a range of behavior, from something as small as a remark to something as serious as an administrative action affecting a staff member's work program or employment. When taken as a means of retaliation, other examples can include: reprimand, discharge, suspension, demotion, denial of promotion, and denial of transfer. Any staff member who in good faith raises a concern is protected from retaliation. Consult the applicable policies for detailed information on the retaliation protections afforded to staff by the World Bank Group.

83. The standard of proof for any claim of retaliation is that an applicant must make a *prima facie* case to show the retaliatory motives behind the impugned decision. *See Bodo*, Decision No. 514 [2015], para. 77. However, as stated in *Bauman*, para. 99,

“[i]t is not enough for a staff member to speculate or infer retaliation from unproven incidents of disagreement or bad feelings with another person. There must be a direct link between the alleged motive and the adverse action to amount to retaliation” (*AH*, Decision No. 401 [2009], para. 36). The Tribunal has also recognized that “[a]lthough staff members are entitled to protection against reprisal and retaliation, managers must nevertheless have the authority to manage their staff and to take decisions that the affected staff member may find unpalatable or adverse to his or her best wishes.” (*O*, [Decision No. 337 [2005],] para. 49.)

84. Once the Applicant has established his *prima facie* case, “the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.” *DJ (Merits)*, Decision No. 548 [2016], para. 58, citing *de Raet*, para. 57.

85. The record is clear, and it is undisputed, that the Applicant engaged in protected activities when he filed claims with various IJS units and when he filed his first application with the Tribunal. The Applicant alleges that he was retaliated against in three instances for his use of IJS and the Tribunal: first, when the IFC Vice President and Treasurer decided not to accept the recommendations of the PMR reviewer because it was “inconsistent with and already covered by the Tribunal’s decision in this matter, especially given the fact that IFC has decided to pay damages rather than reinstate [the Applicant]”; second, when the IFC Chief Executive Officer decided not to accept the recommendation of PRS because he “consider[ed] this matter to be covered and

resolved by the World Bank Administrative Tribunal's Decision No. 580 concerning [the Applicant's] Opportunity to Improve. The Tribunal provided [the Applicant] full compensation for all wrongs that stem from that performance management exercise"; and third, when Mr. X refused to provide the Applicant feedback on why he was not shortlisted for the Financial Officer position.

86. The Tribunal will consider the first and second allegations together. The IFC maintains that the decisions of the IFC Vice President and Treasurer and the IFC Chief Executive Officer were made "operating under a good faith (albeit erroneous) belief that the Tribunal's decision to award Applicant three years of compensation over a flawed OTI covered all actions stemming from the OTI." To the IFC, this interpretation of the Tribunal's decision in *EO* was made without any retaliatory animus toward the Applicant. Recalling the Tribunal's holding in *Bauman*, para. 99, "[M]anagers must nevertheless have the authority to manage their staff and to take decisions that the affected staff member may find unpalatable or adverse to his or her best wishes."

87. As the Tribunal held in *Lewin*, Decision No. 152 [1996], para. 37, the Staff Rules do "not say that the Bank is under a legal obligation to accept the recommendations of the Appeals Committee. It is free to accept or reject all or part of them. The decision of the Bank is a matter of managerial discretion." The Tribunal observes that the same principle applies to the IFC's ability to accept or reject the recommendations of PMR and PRS. The Tribunal recalls its statement in *ET*, para. 91, citing *DO*, para. 33, that

it will not overturn a discretionary managerial decision, unless it is demonstrated that the exercise of discretion was "arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack[ed] a reasonable and observable basis, constitut[ed] an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment."

88. Here, the record demonstrates a reasonable and observable (though erroneous) basis for the IFC's decisions regarding the PMR and PRS recommendations, and the Tribunal finds that such decisions did not constitute an abuse of discretion. Further, the Tribunal considers the IFC's willingness to revisit its decisions regarding the PMR and PRS recommendations as evidence of its good faith. As such, the Tribunal finds that no retaliation occurred in these instances.

89. The Applicant's third allegation of retaliation concerns the refusal of Mr. X to provide feedback to the Applicant as to why he was not shortlisted when requested. According to the Non-Managerial Recruitment Guide for Open-ended/Term Staff, based on the results of the shortlisting process, the Hiring Manager or designated SLC member should provide feedback to internal candidates, if requested by the candidates. It further provides that

Feedback in the recruitment process is the information that is given to internal and external candidates to say why s/he was not longlisted/shortlisted/selected. Giving feedback helps a potential candidate learn and grow for the future, and as such is a great way to thank them for taking the time to consider the World Bank Group as a place to work.

The way feedback is provided and the person who is responsible for it depends on the status of a candidate

- Internal or external
- Not longlisted/shortlisted/selected.

Feedback should be given about the decision, either in writing or orally. Feedback to internal candidates and not selected interviewed candidates is more detailed than for others.

90. The Tribunal observes that it is undisputed that the Applicant, an internal candidate for the Financial Officer position, requested feedback regarding the non-shortlisting decision and that such feedback was never given. Further, the record demonstrates that a decision was made not to provide feedback to the Applicant. Following the Applicant's request, Mr. X reached out to HR for guidance. Mr. X stated that he was told by the HR contact for the position that he did not need to give the Applicant feedback because "there's a process going on with [the Applicant.]" Mr. X also stated that, at this time, he was personally unaware of the Applicant's first application to the Tribunal, but that he "assumed [the process] was a part of this challenge that was referenced the previous spring" in conversation with the Applicant's former supervisor.

91. The Tribunal also considers the initial drafts of Mr. X's Manager's Response to PRS Request for Review No. 418, in which tracked changes of the document demonstrate that the HR contact for the position wrote:

Following [the Applicant's] request, the [HR contact] supporting the VPU [...] informed him by email dated November 8, 2017, that the selection process on the

position had been finalized. At the time of his request, it is my understanding that [the Applicant] had started tribunal processes related to his performance and we were advised by HR that further communication on the issue is not necessary.

Each draft of the Manager's Response contained a similar statement until it was finally deleted after the draft was sent to management for review.

92. The Tribunal further considers the HR contact's explanation that

it is an uncomfortable situation to give feedback to someone when you know something is going on and when the reason for not being selected was performance based. [She] stated that her advice to Mr. [X] was that he was not obliged to give feedback to [the Applicant.]

The Tribunal is troubled that HR took this stance, since providing feedback is often uncomfortable yet still expected in the context of employee evaluation and development.

93. In reviewing the record before it, the Tribunal finds that multiple statements were made demonstrating a direct link between the refusal to provide feedback and the Applicant's use of IJS and the Tribunal, amounting to a *prima facie* case of retaliation. The Tribunal also observes that the IFC has not met its burden to "disprove the facts or to explain its conduct in some legally acceptable manner." *DJ (Merits)*, para. 58, citing *de Raet*, para. 57. The Tribunal recalls from the Bank Group's "Living Our Values: Code of Conduct" that retaliation is "any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in a [protected activity]," and "encompasses a range of behavior, from something as small as a remark to something as serious as an administrative action affecting a staff member's work program or employment." The IFC having not disproved the *prima facie* case of retaliation on the facts or provided a legally acceptable explanation, the Tribunal finds that HR's direction to Mr. X to not provide feedback to the Applicant may be construed as a measure of retaliation, and that the Applicant is entitled to compensation.

Remedy

94. The Tribunal has the discretionary power to design and award remedies as appropriate based on the circumstances of each case, taking into account Article XII of its Statute. In doing so the Tribunal may consider any remedies an applicant has received through other proceedings or in previous cases before the Tribunal. The fact that an applicant has received some compensation in his first case cannot, however, have a *res judicata* effect on any remedies received in subsequent cases. At the outset, the Tribunal observes that the Applicant was awarded compensation in the amount of three years' salary in his first case before the Tribunal. As the Tribunal explained in its decision on the IFC's preliminary objection to the Applicant's second Application, *EO (No. 2) (Preliminary Objection)*, paras. 54–56, the Tribunal did not consider any of the Applicant's present claims in his first case before it. In fact, due to the Tribunal's rules on admissibility, the Applicant could not have brought his present claims at the time of his first case. The Tribunal observes, then, that any harm the Applicant suffered as a result of the contested decisions is separate from that considered in *EO* and, as a result, was not contemplated in the Tribunal's award in that case. The Tribunal will now consider what compensation is warranted by the Applicant's present claims.

95. Regarding the Applicant's claims around performance, the Tribunal finds that the IFC's proposed remedy, as stated in its Rejoinder, is sufficient to compensate the Applicant.

96. Regarding the Applicant's claims around the shortlisting process for the Financial Officer position, the Tribunal considers that the IFC has already agreed to compensate the Applicant in the amount of three months' salary for certain procedural wrongs, namely the improper composition of the SLC, the failure to keep records of the shortlisting process, and the failure to provide feedback to the Applicant when requested. The Tribunal will now consider whether additional compensation is warranted for those procedural wrongs and what compensation is warranted for the Applicant's other successful claims regarding the improper use of performance feedback in shortlisting and the violation of the VPU shortlisting commitment.

97. In *BK*, Decision No. 444 [2010], the Tribunal awarded the applicant nine months' salary for process violations in two instances relating to deficient SLC composition. The Tribunal notes

that such a violation was one of many in this case. In *ET*, the applicant received one year's salary as compensation for the Bank's lack of transparency in the selection process and failure to give the applicant a fair chance to compete. In *EM*, Decision No. 578 [2018], the Tribunal ordered the Bank to pay the applicant the equivalent of a one-year Short Term Consultant contract for a breach of its promise in the shortlisting process. Considering these examples and the findings made here, the Tribunal finds that, in addition to the three months' salary already agreed to by the IFC, the Applicant should be compensated in the amount of six months' salary for his treatment during the shortlisting process.

98. Regarding the Applicant's claims of retaliation, the Tribunal considers previous awards where it has found retaliation. In *EG*, Decision No. 567 [2017], the Tribunal found that delaying the applicant's letter of reference because the applicant had gone to PRS was a measure of retaliation and awarded the applicant \$25,000. In *Bauman*, the Tribunal found that the applicant was terminated due to retaliation and ordered that the Bank pay the applicant the equivalent of a one-year Short Term Consultant contract at his most recent rate. In *AZ*, Decision No. 422 [2009], and in the parallel cases, the Tribunal awarded the applicants six months' salary for the established claims of retaliation. Considering these examples, the findings made here, and the circumstances of this case, the Tribunal awards the Applicant one year's salary for retaliation.

99. Because the Applicant was successful on his main claims, the Tribunal orders the IFC to pay the Applicant's legal costs and fees.

DECISION

- (1) The IFC shall change the Applicant's FY2017 performance rating to a 3 and make the corresponding salary adjustments, as well as the necessary adjustments to the Applicant's previous award, disability payments, and pension contributions, as agreed by the IFC;
- (2) The IFC shall pay the Applicant compensation in the amount of nine months' net salary, based on the last salary drawn as adjusted, for procedural violations and unfair treatment in the shortlisting process, inclusive of the three months' net salary already agreed to by the IFC;

- (3) The IFC shall pay the Applicant compensation in the amount of one year's net salary, based on the last salary drawn as adjusted, for retaliation;
- (4) The IFC shall pay the Applicant's legal fees and costs in the amount of \$8,249.27; and
- (5) All other claims are dismissed.

/S/ Andrew Burgess
Andrew Burgess
President

/S/Zakir Hafez
Zakir Hafez
Executive Secretary

At Washington, D.C., * 30 May 2020

* In view of the public health emergency occasioned by the COVID-19 pandemic and in the interest of the prompt and efficient administration of justice, the Tribunal conducted its deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary.