



**World Bank Administrative Tribunal**

**2018**

**Decision No. 596**

**EV,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

**(Preliminary Objection)**

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

**EV,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Judges Mónica Pinto (President), Abdul G. Koroma, and Janice Bellace.
2. The Application was received on 9 February 2018. The Applicant was represented by Alice C. Hwang and Marie Chopra of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by Ingo Burghardt, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 2 October 2018.
3. The Applicant challenges the non-confirmation of his appointment effective 13 September 2017.
4. The IFC has raised a preliminary objection to the admissibility of this Application. This judgment addresses that preliminary objection.

#### FACTUAL BACKGROUND

5. On 14 September 2015, the Applicant joined the IFC as an Associate Investment Officer, Level GF, in the Global Tourism, Retail and Property team within the Global Manufacturing, Agribusiness & Services (MAS) Department. He held a five-year term appointment and his letter of appointment stated that his appointment "will be subject to a probationary period of one (1) year, which may be extended for up to one additional year."
6. On 17 February 2016, the Applicant had a mid-year discussion by telephone with his Supervisor, a Principal Investment Officer in MAS. According to the Supervisor, the overall

feedback received to date on the Applicant's performance was positive, although he identified two areas for improvement, namely, "'proactiveness' and asking pertinent questions during appraisals."

7. On 31 August 2016, the Supervisor and an MAS Senior Human Resources (HR) Business Partner met with the Applicant to discuss his Fiscal Year 2016 (FY16) Annual Review. The Applicant was informed that his probationary period would be extended for six months, until 13 March 2017, to address the following areas of development: "(i) timeliness of deliverables; (ii) punctuality to meetings (external and internal); (iii) diligent preparation for meetings [...]; [and] (iv) proactivity in order to get involved in multiple tasks." At the end of this meeting, the Supervisor indicated that he would no longer supervise the Applicant because the Supervisor had been promoted.

8. By email dated 7 October 2016, the Applicant was informed of his performance rating of 2 for FY16.

9. In mid-November 2016, the MAS Global Administrative Manager informed the Applicant that she would be his new supervisor and manager. She proposed to move the Applicant to MAS Administration and Finance, the team which she headed. The Applicant would also be made "available" to the manufacturing group in the MAS Europe, Middle East and North Africa (EMENA) unit. The Applicant's co-supervisor and mentor would be the Chief Investment Officer.

10. On 3 January 2017, the MAS Global Administrative Manager officially assigned the Applicant to the MAS Administration and Finance team. The Applicant moved his desk to join the MAS EMENA unit and his co-supervisor, the Chief Investment Officer. On 6 January 2017, he met with the Chief Investment Officer to discuss potential work projects.

11. On 22 February 2017, at the end of his extended six-month probationary period, the Applicant had his Fiscal Year 2017 (FY17) mid-year discussion with the MAS Global Administrative Manager and the MAS Senior HR Business Partner. The Applicant was informed that his probationary period would be extended for another six months because he needed to

demonstrate his ability to work on a team. At this meeting, the MAS Global Administrative Manager also asked the Applicant to draft his FY17 work objectives, which he did.

12. On 11 September 2017, the MAS Global Administrative Manager and the MAS Senior HR Business Partner met with the Applicant to inform him that his probationary period was not successful and that his appointment would be terminated effective 13 September 2017. When he requested a performance review for FY17, the Applicant claims that he was informed that there was no point in doing a performance review since his appointment would not be confirmed.

13. The Applicant's appointment was terminated effective 13 September 2017.

14. The Applicant filed his Application with the Tribunal on 9 February 2018, after having received an extension of time from the Tribunal. He challenges the non-confirmation of his appointment.

15. The Applicant seeks the rescission of the non-confirmation decision and the removal and destruction of performance evaluations and references to non-confirmation from his personnel file. In addition, he seeks financial compensation for (i) the "IFC's violations of the Staff Rules, denial of due process, and denial of a fair opportunity to be confirmed"; (ii) "the willful harm to and mismanagement of [the Applicant's] career, professional reputation and personal life"; (iii) "the loss of potential benefits and income [...]"; (iv) "intangible damages and distress"; and (v) "the pain and suffering caused [to the Applicant]."

16. On 7 March 2018, the IFC filed a preliminary objection.

17. For the preliminary phase of the proceedings, the Applicant claims legal fees and costs in the amount of \$25,582.11.

## SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

*The IFC's Contentions*

18. The IFC requests that the Application be partially dismissed with respect to the following contentions, which it submits are separate claims: (i) the Applicant's FY16 Annual Review was unfair and unbalanced; (ii) the Applicant received inadequate warning about deficiencies in his performance during FY16 and at his FY17 mid-year discussion; (iii) the Applicant did not have sufficient opportunity to prove his ability; (iv) the Applicant was not adequately supervised; (v) the Applicant did not have adequate guidance; and (vi) the IFC failed to comply with Staff Rule 4.02, paragraph 2.02, regarding evaluation during the probationary period.

19. The IFC also identifies five administrative decisions prior to the non-confirmation decision, namely, the FY16 Annual Review, two mid-year discussions, and two extensions of the probationary period, all of which, the IFC asserts, should have been appealed through internal mechanisms. According to the IFC, the Applicant did not appeal any of these decisions within the relevant period.

20. The IFC argues that the Applicant should have sought review of his FY16 Annual Review and his FY17 mid-year discussion through the Performance Management Review process within thirty calendar days of receiving the written performance decisions. The Applicant did not utilize the Performance Management Review process, so the IFC contends that "there is no reason why Applicant should now be permitted to rely on stale, inadmissible claims in support of his non-confirmation decision." The IFC submits that these are separate claims from the non-confirmation decision because the Applicant refers to an "unfair and unbalanced FY16 annual performance review" and because one of the remedies sought by the Applicant is the removal and destruction of performance evaluations from his personnel file.

21. Regarding the Applicant's claims about inadequate warning about deficiencies in his performance, inadequate opportunity to prove his ability, inadequate supervision and guidance, and the IFC's failure to comply with Staff Rule 4.02, paragraph 2.02, the IFC states that these

alleged deficiencies occurred during the twenty-four months prior to the non-confirmation decision. The IFC contends that the Applicant did not timely exhaust remedies in respect of these claims. The IFC argues that the 120-day limit has long since passed in respect of these claims so they are “irretrievably barred from review by the Peer Review Services [PRS].”

22. The IFC submits that these claims are not receivable, absent any explanation from the Applicant about his failure to exhaust internal remedies, any exceptional circumstances, and any agreement between the parties to submit the Application directly to the Tribunal.

23. The IFC rejects the contention that the Applicant was not reasonably aware of any materially adverse impact on his employment until September 2017. Instead, the IFC asserts that the Applicant’s FY16 Annual Review and FY17 mid-year discussion made the Applicant “well aware of the possible consequences of his performance evaluations and the extensions of his probationary period.”

24. As well, the IFC argues that the decisions to extend the Applicant’s probationary period are clearly adverse decisions that should have been challenged because “[a] staff member on probation has an interest in being definitively employed.”

25. The IFC accepts that the Tribunal may examine “whether the [IFC] abused its discretion when it did not confirm Applicant’s appointment.”

### ***The Applicant’s Response***

26. The Applicant submits that “[r]equiring probationary staff members to challenge any and all decisions to extend probation in order to preserve review of events during the entire probationary period makes no sense as a policy matter and, indeed, is inimical to the purpose of probation.”

27. The Applicant argues that he reasonably became aware of the adverse decision in September 2017, when the IFC decided not to confirm his appointment, and, thus, he timely appealed this decision to the Tribunal.

28. The Applicant claims that the matters which he complains about, namely, the FY16 Annual Review, inadequate warning about deficiencies, failure to give him an opportunity to prove his ability, failure to provide adequate supervision and guidance, and failure to comply with Staff Rule 4.02, paragraph 2.02, were neither “separate claims” that require the exhaustion of internal remedies nor manifestly adverse employment actions, until they culminated in the non-confirmation of his appointment. Rather, he characterizes them as “critical, highly relevant facts [...] of surrounding circumstances that preceded non-confirmation.” The Applicant specifically notes that the FY16 Annual Review “forms essential background to understanding [the Applicant’s] non-confirmation claim.”

29. The Applicant denies that the two extensions of his probationary period, in September 2016 and March 2017, put him on notice that his appointment would not be confirmed. Rather, he argues that a distinction must be made between non-confirmation, which is an adverse decision, and the extension of a probationary period, which is not an adverse decision in and of itself. He notes that “a probationer cannot know whether a decision to extend probation is materially adverse until a non-confirmation decision is made at the end of probation.”

30. The Applicant recalls that “[t]he Tribunal’s jurisprudence in non-confirmation cases confirms that the Tribunal does not limit scrutiny of the World Bank Group’s conduct to the non-confirmation decision itself, but rather reviews management’s course of conduct throughout the entire probationary period.”

#### THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

31. The parties agree that the Applicant’s claim concerning the non-confirmation of his appointment is properly within the Tribunal’s jurisdiction. However, the IFC objects to the Tribunal’s review of alleged administrative decisions that were taken prior to the non-confirmation

decision on the basis that the Applicant has not exhausted all other remedies within the Bank Group, as required by Article II(2)(i) of the Statute of the Tribunal.

32. The Applicant submits that, in previous non-confirmation cases, the Tribunal has “review[ed] management’s course of conduct throughout the entire probationary period.” The IFC distinguishes the present Application from those cases, *Motabar*, Decision No. 346 [2006] and *Koçlar*, Decision No. 441 [2010], on the basis that those applicants exhausted internal remedies.

33. The Tribunal notes that the applicant in *Motabar* challenged the non-confirmation decision before the Appeals Committee and requested relief, including the revocation of performance reviews, compensation for the failure to pay him a mobility premium, and a salary increase. The Appeals Committee found that the claims relating to the mobility premium, first interim performance evaluation, and salary increase were not timely and reviewed only the non-confirmation decision. The applicant challenged the same decisions before the Tribunal, and the Bank objected to the admissibility of the claims that the Appeals Committee found to be untimely.

34. The Tribunal found that it had jurisdiction to examine the applicant’s first interim overall performance evaluation, stating:

Given these fast-moving and overlapping events, [...] and given the obviously more grave implications of his 22 April 2004 notice of non-confirmation, the [a]pplicant’s failure to challenge his first interim OPE [Overall Performance Evaluation] by 6 May is fully understandable and indeed excusable. Moreover, the validity of the first interim OPE is so intimately related to the [a]pplicant’s challenge to the decision not to confirm his appointment [...] that attempting to exclude consideration of that OPE would likely prove to be futile. *Motabar*, para. 21.

35. In *Koçlar*, the Bank argued that the Tribunal should dismiss, as untimely, the applicant’s challenges of decisions taken prior to the 90-day deadline for submitting appeals to the Appeals Committee. In dismissing the Bank’s preliminary objection, the Tribunal held, at para. 20:

A staff member whose contract has not been renewed is entitled to submit and rely on all materially relevant facts pertaining to the decision taken by HRSVP [the Vice President, Human Resources]. These include facts that support the staff member’s



claim that she was not treated fairly because her performance had not been assessed against a well-defined work program. Obviously such failure, if proved, could be pertinent and inseparable from the decision taken by the Bank not to renew her contract. [...] Nor is it proper to dissect the evidence pertinent to the challenged decision and place time limits on individual actions taken by the Bank, which should be evaluated cumulatively to determine whether the staff member was treated unfairly or arbitrarily. It would be perverse to create incentives for a staff member to raise a grievance, merely to protect their position, before a materially adverse decision has been taken.

36. There is precedent for the Tribunal to review actions or omissions taken prior to a non-confirmation decision and which have not been challenged through internal processes. For example, in *Motabar*, the Tribunal noted the applicant's claims of failures of due process and references to assurances of confirmation of appointment when he was considering initial employment. The Tribunal, in that case, allowed the applicant to pursue these claims "when [the applicant] and the Respondent present on the merits [of] their respective positions" on the non-confirmation decision. *Id.*, para. 24.

37. In *BZ*, Decision No. 474 [2013], the applicant joined the Bank in October 2010 and was informed in July 2011 that his probationary period would not be extended and that his appointment would not be confirmed. In reviewing the non-confirmation decision, the Tribunal inquired into whether there was evidence of problems with the applicant's performance and examined the applicant's performance evaluation, including the substance and the procedure followed. *Id.*, paras. 51, 54, 56-58, and 59.

38. On the basis of *BZ*, it is clear that the Tribunal may examine all of the relevant facts leading to the non-confirmation decision, such as performance evaluations, even if the only decision challenged by an applicant is the non-confirmation decision itself.

39. In *Bhadra*, Decision No. 583 [2018], the applicant challenged the non-renewal of his term appointment and characterized certain management actions, throughout the term of his two-year contract, as retaliation, discrimination, and harassment. He submitted his application directly to the Tribunal. The Tribunal considered the propriety of the extension of the applicant's probationary period and the reasons for the non-renewal, including whether the non-renewal was

improperly motivated. In doing so, the Tribunal examined all of the surrounding facts leading up to the decision in question. *Id.*, paras. 61, 63, 78, and 87.

40. In *McNeill*, Decision No. 157 [1997], para. 30, the Tribunal articulated the scope and extent of review of non-confirmation decisions during or at the end of a probationary period as based

on the basic idea that the purpose of probation is “the determination whether the employee concerned satisfies the conditions required for confirmation” (*Buranavanichkit*, Decision No. 7 [1982], para. 26), that is to say, in the language of Staff Rule 4.02, the determination whether the probationer is “suitable for continued employment with the Bank Group.”

41. The Tribunal also acknowledged that a staff member on probation enjoys procedural guarantees for fair treatment. In *Khan*, Decision No. 293 [2003], para. 39, the Tribunal stated:

In assessing whether there has been an abuse of discretion, the Tribunal will review whether the Bank has extended to the probationer the procedural guarantees of due process and the right to have a fair opportunity to prove her ability. (*McNeill*, Decision No. 157 [1997], para. 44.)

42. In *Zwaga*, Decision No. 225 [2000], para. 37, the Tribunal referred to due process in connection with probation as consisting of adequate warning about criticisms or deficiencies in the probationer’s work and adequate opportunities to defend himself. The Tribunal also noted, at para. 38:

[O]ne of the basic rights of an employee on probation is the right to receive adequate guidance and training (*Rossini*, Decision No. 31 [1987], para. 25) and that it is [the Tribunal’s] duty to make sure that the Bank’s obligation to provide a staff member on probation with adequate supervision and guidance has been complied with in a reasonable manner. (*Salle*, Decision No. 10 [1982], para. 32.)

43. Thus, in order to review the non-confirmation decision, the Tribunal cannot ignore the IFC’s treatment of the Applicant throughout the probationary period as well as the IFC’s assessment of the Applicant during this period. To do so would be to review the decision in a vacuum.

44. Regarding the IFC's argument that the Applicant should have sought review of the FY16 Annual Review and the mid-year discussions through the Performance Management Review process, the Tribunal acknowledges that the Applicant should not be allowed to bypass the Performance Management Review process and come directly to the Tribunal for such claims *per se*. However, the Tribunal finds that, in this case, the Applicant relies on the FY16 Annual Review and the mid-year discussions to support his claim that the non-confirmation decision was unfair and arbitrary. They are relevant to the Tribunal's review of the non-confirmation decision insofar as they may be evidence of, for example, whether the proper procedures were followed throughout the probationary period and the assessment of the Applicant's performance and suitability for the position.

45. Similarly, the Tribunal finds that management's alleged inadequacies and failures, including with respect to guidance and training, during the probationary period are not "separate claims," but may be examined by the Tribunal as relevant facts. In examining the non-confirmation decision, it is necessary for the Tribunal to consider the Applicant's performance and management's treatment of the Applicant during the probationary period.

46. The Tribunal holds that there is no rule that requires the Applicant to appeal to PRS every instance of management's failure to act according to the terms of his appointment, where he claims that these instances cumulatively led to an improper decision not to confirm his appointment. It would be contrary to the efficient administration of justice and impractical to require the Applicant to challenge before PRS every individual decision, directly related to the non-confirmation decision, each time it arose.

47. The Applicant's primary claim in this case is the non-confirmation decision following a probationary period. He is entitled to submit this claim directly to the Tribunal. The Tribunal finds that the Applicant may also submit any claims directly related to the non-confirmation decision to the Tribunal.

DECISION

- (1) The IFC's preliminary objection is dismissed; and
- (2) The IFC shall pay the Applicant the amount of \$25,582.11 in legal fees and costs for this preliminary phase of the proceedings.

/S/ Mónica Pinto

Mónica Pinto

President

/S/Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., 18 October 2018