



World Bank Administrative Tribunal

2020

Decision No. 627

**FK,
Applicant**

v.

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

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

**FK,
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 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 10 October 2019. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by Edward Chukwuemeke Okeke, Interim Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 5 May 2020.

3. The Applicant challenges (i) the non-extension of his Institutional Staff Resources Program (ISRP) assignment; (ii) the decision not to shortlist him for the Senior Operations Officer position in the Education Global Practice, Middle East and North Africa Region (GED05); and (iii) the insufficient notice of termination.

FACTUAL BACKGROUND

4. The Applicant joined the Bank on 10 December 2012 on a four-year term appointment as Manager of the Human Resources Strategic Staffing and Mobility Unit.

5. In mid-2013, various reorganizations of the Human Resources (HR) function of the Bank, such as the integration of the HR functions of the International Bank for Reconstruction and Development and the International Finance Corporation, caused the Applicant's work program to be fragmented between different units. For a time, the Applicant was reassigned as Lead Specialist to HR Strategy and Operations. In 2016, the Applicant was reassigned to the Global HR Shared

Services unit as Lead HR Specialist. Upon starting this work program, however, the Applicant learned that Shared Services did not have work for the Applicant and the Applicant instead joined a Chief Financial Officer's office Helpdesk Simplification project as Project Lead.

6. Throughout his term appointment, the Applicant consistently received positive performance feedback despite his frequently shifting role, as reflected in his Overall Performance Evaluations (OPEs).

7. In 2016, the Applicant sought to obtain other employment within the Bank so that he would still be employed after his initial contract was set to expire, but he was unsuccessful.

8. On 10 May 2016, the Applicant was notified by the Human Resources Vice President (HRVP), that his term appointment would not be extended and would end on 9 December 2016.

9. Thereafter, the Applicant sought and obtained an ISRP assignment as Lead HR Specialist with GED05. The ISRP was a Category C assignment designed for "high-performing staff at all grade levels with in-demand skills who have been genuinely displaced during VPU [Vice Presidential Unit] restructurings and budget cutbacks, and for whom an alternative assignment would be available except for budget constraints."

10. The ISRP assignment was set to last for twelve months, beginning 9 January 2017. Shortly after the ISRP began, the Applicant requested and the HRVP approved an extension of the end date until 31 January 2018. In an email exchange between the Applicant and a Manager, Human Resources Development Corporate Operations (HRDCO), regarding the extension request, the Manager, HRDCO explained that "an ISRP less than 18 months, may be extended at a later time, based on business demand and up to the full 18 months and subject to the sponsor's agreement." Eighteen months is the maximum duration for any ISRP assignment.

11. The Applicant's role during this assignment with GED05 was

to provide HR support to the Kuwait School Education Quality Improvement Program, including by conducting a functional review of the staffing and HR

arrangements of the program and recommending the ideal HR structure required to support the program.

The Applicant was successful in this role. In his 2017 OPE, the Applicant's supervisor (the Practice Manager) praised the Applicant's work and wrote:

The Kuwait education program has greatly benefited from [the Applicant's] expertise and experience. He played a critical role in strengthening the program capacity and management. He demonstrated his knowledge of HR and program operational aspects in an effective manner. [The Applicant] also demonstrated excellent client orientation and teamwork, establishing strong relationships with the client and all members of the team. He always has innovative ideas to solve problems and is willing to tackle any problem. He is proactive and shares his knowledge with colleagues. The team find him invaluable to the successful functioning of the program.

12. On 14 November 2017, the Practice Manager emailed the HRVP, requesting an extension of the Applicant's ISRP to eighteen months. In her email, the Practice Manager noted the Applicant's "significant contributions" and that the extension would "give [the Applicant] time to complete the activities he has started and to allow us to explore the path towards transitioning him to the Education GP [Global Practice]." According to the Bank, the Practice Manager requested the extension only after the Applicant asked her to make the request and conveyed to her that making such a request "was merely a formality and that an extension would be granted."

13. On the same day, the HRVP replied to the request and denied the extension, writing that the "agreement was for 12 months and [the HRVP] cannot sustain using the ISRP beyond this." The HRVP added that he was "more than happy to assist you in discussing with [other Bank staff] in order that you can expedite the transition to the education GP."

14. On 28 November 2017, it was announced that the HRVP would be leaving the Bank effective 31 January 2018. An Acting HRVP was subsequently named.

15. On 8 December 2017, the Applicant emailed the HRVP again requesting a six-month extension of the ISRP, explaining that the extension would allow his current assignment to last until the end of the fiscal year and provide time for the Practice Manager to create a position for

him to transfer into. The HRVP replied, stating that he would “not sanction any additional extension or time to [the Applicant’s] current ISRP.” He added:

I understand the current period [elapses] at the end of January and [unfortunately] we will not be in a position to support any additional funding thereafter. As I mentioned, if your practice Manager/Director wishes for you to continue in a role then, let them pay for your skills and time as necessary.

16. On 18 January 2018, the Practice Manager sent an email to the Acting HRVP repeating her request for the extension of the Applicant’s ISRP. On 22 January 2018, the Acting HRVP responded, writing:

I have confirmed that the request for an extension has already been denied by the HRVP. However, I understand that [the HRVP] has advised that he would be helpful in working with your GP and or Practice Group. Have there been any discussions on that front that we could explore to help [the Applicant]?

The Practice Manager replied that “at this time we are unable to offer a position to [the Applicant] and that is why we had asked for the extension. We were hoping that with a six month extension, things may change and we could revisit that option.”

17. Following this second denial of the Practice Manager’s request for an extension and with the end of the ISRP near, the Applicant sought assistance from the Executive Director of the Netherlands (Netherlands ED) and other countries and the Executive Director of Sierra Leone and other countries, as the Applicant was a dual national of the Netherlands and Sierra Leone. On 24 January 2018, the Netherlands ED emailed the Acting HRVP and the Vice President of the Human Development Practice Group, asking them to look into the Applicant’s case and assist the Applicant in securing an extension of the ISRP. The Netherlands ED further noted the Applicant’s willingness to drop his position from the GH level to GG, in order to support an eventual transition into a position in GED05.

18. The Acting HRVP initially responded, explaining that the request for an extension had been previously denied but that he continued to be willing to assist with the transition to a position. On 26 January 2018, the Vice President of the Human Development Practice Group then responded with a “middle-ground solution” whereby the ISRP would be extended by three months

and a GG-level position would be advertised. He noted that there would “likely be stiff competition for a job in education,” but that he could “promise a fair process and timely resolution.”

19. According to the Bank, the Acting HRVP made it “clear that a GG-level position would need to be advertised immediately—by the end of the month—in order for [the] Applicant’s ISRP extension to be processed.” According to the Applicant, the Director of Strategy and Operations in charge of approving the ISRP extension “insisted that she would not approve the extension unless she was given a vacancy number for the position.” The Applicant contends, based on his own experience working in HR, that “this had never been a requirement in other instances.”

20. Both parties agree that multiple departments worked quickly to post a position in GED05 in order for the Applicant’s ISRP extension to be processed before the assignment was set to expire. According to the Applicant, “in order to speed up the process and ensure that a vacancy was posted before [the] ISRP assignment expired, [the Acting HRVP] initially asked [the Applicant] to draft the Terms of Reference (‘TORs’) for the position.” Therefore, the Applicant claims that he drafted the TORs to reflect “the particular needs of GED05, including the need for a candidate with experience with the growing Reimbursable Advisory Services (‘RAS’) programs in the Middle East and North Africa Region.” The Bank denies that the Applicant was asked by anyone to draft the TORs.

21. Ultimately, GED05’s management chose not to use the Applicant’s draft TORs, as he would be applying for the position. Instead, on 31 January 2018, a GG-level Senior Operations Officer position was posted with a standard set of TORs for such a position. According to the Applicant, while “[m]any of the duties of this role mirrored those that [he] was already performing” in his ISRP assignment, “the vacancy did not fit the actual position,” as it listed a Spanish language requirement and excluded experience with the RAS programs. The Bank asserts that “the posting included far more language about operations experience than the draft that [the] Applicant had prepared.”

22. The Senior Operations Officer position had a closing date of 28 February 2018. When the position was posted, the HR Operations Recruitment Services Team emailed the Practice Manager

instructions for the next steps, which included that “[s]hortlisting takes place within three days of job closing or within three days of receipt of longlist.” The Applicant submitted his statement of interest before the closing date.

23. The Practice Manager created a shortlisting committee (SLC) for the position consisting of an Operations Advisor in Investment and Program Lending, a Lead Economist in the Education Global Practice, a Senior Education Specialist in GED05, and an Operations Analyst in GED05. The Applicant notes that no one from HR was included on the SLC. The Bank maintains that a Senior HR Business Partner “served as an external advisor to the [SLC] but did not participate in its deliberations.”

24. In late March 2018, the Applicant met with the New HRVP. During this meeting, the Applicant discussed the work he had been doing with GED05 as well as the challenges he faced in getting an extension of his ISRP assignment. On 31 March 2018, the Applicant emailed the Practice Manager regarding his conversation with the New HRVP, noting that the New HRVP was “supportive of another extension of [the Applicant’s] ISRP.” The Practice Manager responded on 17 April 2018, informing the Applicant that the shortlisting process for the position would be completed by the end of the month and stating that she was “frankly not inclined to go again through the ISRP extension process after having gone through it twice.”

25. The SLC met on 12 April 2018 to review the twenty-five candidates who had applied for the position. During this meeting, the SLC decided upon six of these candidates for the shortlist; the Applicant was not included on the shortlist. The Practice Manager followed up with the SLC chair after the meeting to ask about two candidates who had not been shortlisted, including the Applicant. The SLC met again on 6 June 2018 to reassess the shortlist based on questions asked by the Practice Manager and decided to add a seventh candidate (not the Applicant).

26. On 25 April 2018, in a meeting with the Applicant, the Practice Manager informed him that he had not been shortlisted for the position. In its notes on candidates who were not selected for the shortlist, the SLC wrote:

Although [the Applicant] is currently providing cross support to the hiring unit, he does not have relevant operational experience. He is an HR specialist with some experience on the RAS portfolio, but does not have the relevant experience for this position to the level of other candidates.

27. The Applicant states that he was surprised by the decision not to shortlist him, as he believed the position was created due to his situation and he was promised a fair chance to compete. According to the Applicant, the Practice Manager responded to his surprise by informing him that she had no role in the selection process. According to the Bank, the Practice Manager informed the Applicant that “he did not have the appropriate background in education and operations to fill the position.” The record shows that the candidates selected to the shortlist all had backgrounds working in operations at the Bank.

28. After informing the Applicant that he was not selected for the shortlist, the Practice Manager offered a Short Term Consultant (STC) appointment to the Applicant so that he might finish his HR assignments. Because accepting the STC appointment would require the Applicant to forgo the separation payments to which he was entitled, the Applicant ultimately decided not to accept the appointment.

29. On 30 April 2018, the Applicant’s employment with the Bank ended.

30. On 3 August 2018, the Applicant wrote to the Tribunal requesting an extension to file an application until after attempts at mediation had concluded. The Tribunal granted the request and decided that the Applicant would notify the Tribunal when Mediation Services had closed the case if the Applicant wished to proceed with a case before the Tribunal.

31. On 6 August 2018, the Applicant and the Acting HRVP signed an agreement to mediate. The parties were unable to reach a mutually agreeable solution through mediation.

32. On 14 September 2018, the Applicant submitted a request for review to Peer Review Services (PRS), requesting review of the decisions not to:

- i) Extend his ISRP assignment to the “*full*” eighteen (18) months (Non-Extension Decision);
- ii) Shortlist him for the position of Senior Operations Officer, Level GG, with GED05 (Job # 180192) (Position) which he alleges “*was created to use [his] skill and experience*” (Non-Shortlisting Decision); and
- iii) Provide him sufficient notice that his WBG [World Bank Group] employment would end on April 30, 2018 (Decision Regarding Notice).

(Emphasis in original.)

33. A hearing was held on 6 March 2019. On 2 May 2019, the PRS Panel issued its report for Request for Review No. 444. The Panel found that

the WBG acted consistently with [the Applicant’s] former contract of employment and terms of appointment in making the Non-Shortlisting Decision and the Decision Regarding Notice, and also followed a fair and proper process with regard to these decisions. The Panel also determined that there was no evidence of bad faith in making the three decisions under review.

The Panel also found, however, that

the Non-Extension Decision did not have a reasonable and observable basis and that management did not follow a fair and proper process in making the Non-Extension Decision. Accordingly, the Panel recommends that the WBG compensate [the Applicant] in the amount of six (6) months of his net salary.

34. On 10 May 2019, the World Bank Group Chief Executive Officer informed the Applicant that the Bank accepted the PRS Panel’s recommendations.

35. On 15 July 2019, the Applicant wrote to the Tribunal requesting an extension of time to file an application. On 16 July 2019, the Tribunal responded granting the request and allowing the Applicant until 10 October 2019 to file an application.

36. On 10 October 2019, the Applicant submitted this Application to the Tribunal. He challenges (i) the non-extension of his ISRP assignment; (ii) the decision not to shortlist him for the Senior Operations Officer position in GED05; and (iii) the insufficient notice of termination.

37. The Applicant seeks the following relief: (i) “[a]ppointment on a four-year term contract to a mutually-agreeable GH-level Human Resources position retroactive to May 1, 2018 or, alternatively, four years’ net salary in lieu of such appointment”; and (ii) “in addition to the 6 months’ salary already awarded to him by Peer Review Services, such additional amount as the Tribunal deems fair and just for the harm to [the Applicant’s] career, professional reputation, and personal life; the loss of potential benefits and income; and the intangible damages and distress caused to [the Applicant] as a result of the contested decisions listed above.”

38. The Applicant claims legal fees and costs in the amount of \$33,747.53.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The Applicant’s Contention No. 1

The non-extension of the Applicant’s ISRP assignment was an abuse of discretion

39. The Applicant contends that management’s decision not to extend his ISRP assignment to eighteen months was an abuse of discretion because it was arbitrary and lacked a reasonable and observable basis.

40. The Applicant contends that “the non-extension decision was arbitrary because it ignored the fact that the proposed extension was supported by [the Applicant’s] supervisor and based upon business need.” The Applicant supports this contention by citing the email from the Manager, HRDCO, in which he was told that “an ISRP less than 18 months, may be extended at a later time, based on business demand and up to the full 18 months and subject to the sponsor’s agreement.” According to the Applicant, the email sent by the Practice Manager requesting an extension of the ISRP demonstrates that the proposed extension was supported by his supervisor and that there was a business need as she stated that the extension would allow the Applicant to complete his projects.

41. The Applicant further contends that the non-extension decision was “arbitrary because it frustrated the purpose of the assignment.” Referring to the Manager, HRDCO’s comments before PRS that an ISRP is “intended to help high performing staff members remain in the employment

of the [Bank],” the Applicant suggests that his ISRP assignment would have been “highly successful” had it “been able to bridge the gap between the end of his contract with HR and a new contract with GED05.” The Applicant contends that HR blocked this success by “unreasonably” denying the extension.

42. Next, the Applicant contends that the non-extension decision was arbitrary because “HR could not articulate a reasonable basis” for the decision. According to the Applicant, when the HRVP first denied the request for an extension, he gave no reason at all. Responding to the Bank’s contention that the non-extension decision was made based on “the non-availability of funding,” the Applicant states that the Bank

neither offers evidence that this condition—or any others—actually existed nor explains why these purported conditions overrode the GED05 business needs and [the Practice Manager’s] wishes.

During the PRS hearing, the Acting HRVP testified that

[the HRVP] declined the request to extend [the Applicant’s] ISRP assignment for six (6) months as [the HRVP] was skeptical about the intention of GED05 to hire [the Applicant] at the end of the ISRP assignment.

The Acting HRVP further stated that the HRVP denied the Practice Manager’s requests to extend the Applicant’s ISRP assignment because “[the HRVP] had given accommodations to [the Applicant] over two years and he was not going to give any more.” The Applicant suggests that these “post-hoc rationales” do nothing to justify the non-extension decision but instead “reflect and prove [the HRVP’s] animus toward [the Applicant].”

43. Finally, the Applicant responds to the Bank’s contention that the Applicant has already been compensated for the non-extension decision by claiming that “receiving compensation from PRS does not waive an applicant’s rights to pursue relief through the Tribunal.” The Applicant contends that he seeks additional compensation for “intangible harms,” including “severely undermining his ability to obtain continued employment with the Bank beyond the ISRP assignment.”

The Bank's Response

The non-extension decision was proper, and the Applicant has been adequately compensated

44. The Bank contends that the decision not to extend the ISRP assignment was proper because the Applicant was not entitled to an eighteen-month term for the assignment, either by the terms of the agreement or by subsequent communication related to the assignment. The Bank further contends that the Applicant has already been adequately compensated for this claim, as recommended by PRS, and that no further relief is warranted.

45. The Bank first disputes the Applicant's contention that eighteen months is a customary term for an ISRP assignment. The Bank asserts that assignments less than eighteen months do exist and that "[i]t is not the case that ISRP participants are entitled to an eighteen-month assignment simply by virtue of their participation in the program." The Bank supports its contention by explaining that "participants agree unambiguously to the duration of the ISRP term at the outset of the assignment." The Bank cites the Applicant's ISRP contract, which stated: "Your assignment in the ISRP will be for a period of 12 months until January 8, 2018, at which time your resignation/retirement from the World Bank, as evidenced by your signature below, will become effective." The contract further stated: "I, the undersigned, accept the terms and conditions of this memorandum and hereby *resign/retire* from the World Bank effective January 9, 2018." (Emphasis in original.) Citing the Tribunal's decision in *DG*, Decision No. 528 [2016], para. 17, the Bank contends that the "ISRP agreement was a 'self-executing' agreement and no other action was necessary for its terms—including the duration of the assignment—to take effect."

46. The Bank next objects to the Applicant's reliance on the email from the Manager, HRDCO to support his contention that the non-extension decision was arbitrary. While recognizing the Tribunal's jurisprudence in *Schlemmer-Shulte*, Decision No. 316 [2004], para. 29, citing *Kopliku*, Decision No. 299 [2003], para. 10, that "[o]ne restriction on the Bank's renewal decision 'arises when circumstances warrant the inference by a staff member that the Bank has indeed made a promise to extend or renew his or her appointment either expressly or by unmistakable implication,'" the Bank contends that "[the Manager, HRDCO's] remark was not an express promise or unmistakable implication that Applicant's ISRP agreement would be renewed."

According to the Bank, the conditions indicated by the Manager, HRDCO in his email “should not be read as sufficient to trigger an extension of the contract.” To the Bank, “[i]t is plain that other conditions existed—for example, availability of funding—that [the Manager, HRDCO] did not and was not required to set forth exhaustively.”

47. Finally, the Bank contends that the Applicant has been adequately compensated by PRS, since the “Applicant understood that the ISRP program could only last for a maximum of eighteen months and therefore suffered no loss of future benefits or income, professional damage, or other harm resulting from the Non-Extension Decision.”

The Applicant’s Contention No. 2

The Applicant was treated unfairly during the shortlisting process for the Senior Operations Officer position

48. The Applicant contends that he was treated unfairly during the shortlisting process for the Senior Operations Officer position because (i) his qualifications for the position were not given appropriate consideration because the SLC relied upon an inaccurate job description; (ii) the SLC was improperly constituted and thereby unfair to the Applicant; and (iii) his consideration for the position was marred by unfair bias against him.

49. The Applicant first contends that “GED05’s rush to create and post a position before [the Applicant’s] ISRP assignment expired led to it posting generic TORs that excluded a key component of the practice’s portfolio: the RAS programs.” The Applicant submits that the “incorrect TORs” must have misled the SLC about the type of candidate GED05 was seeking and therefore caused the SLC to fail to appropriately consider the Applicant’s relevant experience. The Applicant further contends that, if the TORs did accurately reflect the position GED05 was seeking, then it was he who was misled. To the Applicant, “it was highly unfair for management to lead [the Applicant] to believe that it was creating a position for which he had a genuine chance to compete” when actually “management created a position for which *he could not compete* because—according to the [Bank]—he was unqualified.” (Emphasis in original.)

50. The Applicant next contends that the SLC was improperly constituted, as “GED05 management failed to include an HR representative on the SLC.” The Applicant submits that the “Tribunal has established that a shortlisting committee must include an HR representative, whose role is to provide procedural guidance and ensure that due process is followed.”

51. Finally, the Applicant contends that “[the Practice Manager] was biased against [the Applicant] and therefore denied him fair consideration for the position.” To support this contention, the Applicant claims that the Practice Manager

(1) exerted significant influence over the shortlisting decision; (2) clearly resented the difficulties associated with [the Applicant’s] ISRP extension; (3) disapproved that [the Applicant] had sought the assistance of his Executive Directors to create a GG-level position; and (4) provided no reason to [the Applicant] why he was not shortlisted for the position.

The Bank’s Response

The non-selection decision was proper as the Applicant was not qualified for the position

52. The Bank contends that “the selection process was fair and was appropriately aimed at selecting the most qualified candidate.” The Bank submits that the SLC was properly created, that it carefully reviewed the applications received and met to discuss a shortlist, that it documented its decision making for each candidate, and that it ultimately selected the candidate with the most relevant experience.

53. The Bank responds to the Applicant’s first contention by stating that “it was Applicant’s understanding of the job that was incorrect” and that “the Terms of Reference used in the actual posting was accurate for the job duties and selection criteria of a senior operations position.” The Bank submits that the Applicant was not misled as “[t]he record is replete with references to the position being an open competition.”

54. The Bank next submits that, while it is a recommendation that an HR representative serve on an SLC, it is not a requirement. The Bank also notes that an HR representative did serve as an external advisor to the SLC, although he did not participate in any deliberations.

55. Finally, the Bank disputes the Applicant's contention that the Practice Manager was biased against the Applicant. The Bank contends that the Practice Manager was supportive of the Applicant throughout his ISRP assignment, and that she did not serve on the SLC; therefore, any views she might have could not have influenced the non-shortlisting decision.

The Applicant's Contention No. 3

The SLC's failure to follow its own guidelines deprived the Applicant of fair notice regarding the termination of his appointment

56. The Applicant contends that the SLC's failure to follow its own guidelines deprived him of fair notice regarding the termination of his appointment, since he was not told about the non-shortlisting decision until three business days before his ISRP assignment ended. The Applicant notes that the SLC's own guidelines, which he finds in an email from HR Operations to the Practice Manager, required shortlisting to take place within three days of the vacancy's closing date or the receipt of the longlist. The Applicant further notes that the SLC did not meet until a month and a half after the vacancy closed, which the Applicant contends "was not simply a minor transgression," but rather one which resulted in the Applicant having only three days' notice that his employment was ending.

The Bank's Response

The Applicant received sufficient notice of his termination

57. The Bank contends that the Applicant is conflating "two separate issues—first, the end date of his ISRP, and second, his non-shortlisting for the Position." According to the Bank, the non-shortlisting decision had no effect on the end date of the Applicant's ISRP assignment. The Bank submits that the Applicant understood that the end date of the ISRP assignment was 30 April 2018 when he was notified of the ISRP extension, so he therefore had sufficient notice of the termination date.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

Whether the non-extension of the Applicant's ISRP assignment was an abuse of discretion

58. Principle 2.1 of the Principles of Staff Employment provides that the Bank “shall at all times act with fairness and impartiality and shall follow a proper process in [its] relations with staff members.”

59. While the Tribunal has not yet considered the issue of non-extension of an ISRP assignment, it has a rich jurisprudence related to the non-extension of other temporary appointments.

60. In *CP*, Decision No. 506 [2015], para. 36, the Tribunal recalled that there is no right, absent unusual circumstances, to the extension or renewal of temporary appointments. “Even so, the decision not to extend a Fixed-Term contract, like all decisions by the Bank, must be reached fairly and not in an arbitrary manner.” *Tange*, Decision No. 607 [2019], para. 111. As the Tribunal held in *Barnes*, Decision No. 176 [1997], para. 10, “[T]he Bank’s decision not to renew the contract at the expiration of its predetermined term, however discretionary, is not absolute and may not be exercised in an arbitrary manner.” *See also Carter*, Decision No. 175 [1997], para. 15.

61. As the Tribunal stated in *AK*, Decision No. 408 [2009], para. 41:

Decisions that are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack a reasonable and observable basis, constitute an abuse of discretion, and therefore a violation of a staff member’s contract of employment or terms of appointment.

See also ET, Decision No. 592 [2018], para. 91; *DO*, Decision No. 546 [2016], para. 33; *Desthuis-Francis*, Decision No. 315 [2004], para. 19; *Marshall*, Decision No. 226 [2000], para. 21; *de Raet*, Decision No. 85 [1989], para. 67.

62. The Applicant contends that the non-extension decision was an abuse of discretion because it was arbitrary and because the Bank “could not articulate a reasonable basis” for the decision. In

determining whether the non-extension decision was an abuse of discretion, the Tribunal considered the email from the Manager, HRDCO, which explained that “an ISRP less than 18 months, may be extended at a later time, based on business demand and up to the full 18 months and subject to the sponsor’s agreement.” The Applicant submits that the proposed extension was based on business demand and agreed to by the sponsor, as demonstrated by the Practice Manager’s emails requesting the extension. The Applicant further submits that, in making the non-extension decision, HR never denied that there was a business need for the extension, but rather proposed that it be met by advertising a permanent position. Considering the email exchanges in which the Practice Manager requested the extension, the Tribunal finds that the record supports that the proposed extension was based on business demand and agreed to by the sponsor.

63. The Bank contends that the conditions set in the Manager, HRDCO’s email “should not be read as sufficient to trigger an extension” of the ISRP assignment. The Tribunal notes, however, that the Applicant does not contend that the extension of the assignment was contractually guaranteed by meeting the conditions set forth in the email. Rather, the Applicant contends that, given the Bank’s obligation to treat him fairly, the Bank must offer a “reasonable justification for the denial of the extension” and submits that the Bank has failed to do so. The Bank offers that the non-extension decision was made based on other factors such as the availability of funding.

64. In considering the record before it, the Tribunal finds that the Bank had several opportunities when it might have stated a reasonable basis for the non-extension decision. On the first occasion, the November 2017 non-extension decision, the HRVP offered no justification for the denial. In response to the Applicant’s second request for an extension in December 2017, the HRVP responded only that HR would “not be in a position to support any additional funding” after the ISRP assignment ended. In January 2018, the Acting HRVP responded to the Applicant’s further request for an extension by responding only that the HRVP had already denied the request. During the PRS hearing, the Acting HRVP did not cite a lack of funding to justify the non-extension decision, but instead explained that the HRVP denied the extension because he “was skeptical about the intention of GED05 to hire [the Applicant] at the end of the ISRP assignment.”

65. Recalling the Tribunal's established precedent, *see, e.g., AK*, para. 41, "[d]ecisions that are arbitrary [...] or lack a reasonable and observable basis, constitute an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment." Given that the proposed extension to the ISRP assignment was based on business demand and agreed to by its sponsor and given the inconsistent justifications for the non-extension decision and the lack of support for these justifications in the record, the Tribunal finds that the non-extension decision lacked a reasonable and observable basis and thereby constituted an abuse of discretion.

Whether the Applicant was treated unfairly during the shortlisting process for the Senior Operations Officer position

66. Turning to the shortlisting process for the Senior Operations Officer position, the Applicant submits that he was treated unfairly in three ways: (i) his qualifications for the position were not given appropriate consideration because the SLC relied upon an inaccurate job description; (ii) the SLC was improperly constituted and thereby unfair to the Applicant; and (iii) his consideration for the position was marred by unfair bias against him.

67. In *ET*, para. 91, citing *DO*, 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, para. 41; *Desthuis-Francis*, para. 19; *Marshall*, para. 21; *de Raet*, para. 67.

68. 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.

See also Jassal, Decision No. 100 [1991], para. 37.

69. Regarding the shortlisting of candidates for a position, the Tribunal in *AH*, Decision No. 401 [2009], para. 40, held 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.

70. The Tribunal will review the shortlisting process for the Senior Operations Officer position in accordance with these standards. It considers first whether the Applicant's qualifications were given unfair consideration due to an inaccurate job description, second the Applicant's contention regarding improper procedure, and finally whether the non-shortlisting decision was the product of unfair bias.

71. The Bank maintains that "the selection process was fair and was appropriately aimed at selecting the most qualified candidate" and that the Applicant was not shortlisted for the position because "he did not have the relevant operational experience required for the Position," as opposed to the shortlisted candidates who "had extensive operations experience." The Applicant contends that his qualifications were not given the appropriate consideration because the TORs for the position were for a generic Senior Operations Officer position and did not "reflect the particular needs of GED05." The Tribunal notes that the Practice Manager met with the SLC twice to discuss what qualifications she was looking for in a candidate and, in light of this, the Tribunal finds that the Applicant's "serious doubts about whether the SLC properly understood the unit's needs" are unwarranted.

72. The Applicant further contends that, if the SLC was not misled as to the TORs for the position, it was he who was misled, as he was led to "believe that the role was one that fit his skill set and for which he could fairly compete." The circumstances of the Applicant's claim are similar to those of the applicant in *EM*, Decision No. 578 [2018], para. 102, in which the Tribunal found that the Bank had breached its promise to the applicant "to create a position which the [a]pplicant

could reasonably apply and compete for as an attempt to resolve the [a]pplicant's 'permatemp' situation."

73. As the Tribunal stated in *EM*, paras. 61–63:

The first question which the Tribunal must address is whether there was in fact a promise made by the Vice President to the [a]pplicant and, if so, the nature of that promise. See *Bigman*, Decision No. 209 [1999], para. 6. As was emphasized in *Chavakula*, Decision No. 277 [2002], para. 15, evidence that a promise was made would "in any event have to be proven unequivocally [...]." Similarly, in *Moss*, Decision No. 328 [2004], para. 45, the Tribunal expressed the need for "an unequivocally proved promise, a clear and irrefutable commitment or assurance [...]."

At the same time, in the absence of such an unequivocal statement, there may be circumstances which lead to the inference of a promise. In *Kopliku*, Decision No. 299 [2003], para. 10, the Tribunal held that: "Another restriction upon the Bank arises when circumstances warrant the inference by a staff member that the Bank has indeed made a promise [...] either expressly or by unmistakable implication."

Thus, in order for the Tribunal to find the existence of a promise, the record must show either an "unequivocal" statement which amounts to a promise or circumstances which lead to the "unmistakable implication" that a promise was made.

74. The Tribunal will therefore consider whether there was a promise made to the Applicant and, if so, the nature of that promise. The Tribunal reviewed the email exchange between the Netherlands ED and the Vice President of the Human Development Practice Group, in which the Vice President of the Human Development Practice Group outlined a "middle-ground solution" to the Applicant's situation whereby the ISRP would be extended by three months and a GG-level position would be advertised. The Vice President of the Human Development Practice Group noted that there would "likely be stiff competition for a job in education," but that he could "promise a fair process and timely resolution." The Tribunal also considered the Netherlands ED's statement earlier in the email exchange where he expressed the Applicant's "willingness to drop his position from GH to GG-level and to take on work that will support the program of the practice."

75. Reviewing the record before it, the Tribunal is satisfied that there is evidence that a promise was made to the Applicant to create a position for which he could fairly compete; however, as was the case in *EM*, para. 66, “there is insufficient evidence on the record to support a conclusion that the position promised [...] was intended to match the [a]pplicant’s qualifications and responsibilities.” The promised position would be at a lower grade than the Applicant’s current position and would require experience that did not necessarily line up with the Applicant’s qualifications; the Applicant was, however, given the opportunity to apply and compete for the position, in full satisfaction of the promise.

76. The Applicant further contends that because he “was expecting that he would have a chance to compete for the Senior Operations Officer position [...] he would at least be interviewed.” While it is true that in *EM*, para. 102, the Tribunal found that “[b]y not shortlisting the [a]pplicant, the Bank limited her ability to effectively compete for the position,” there was ample evidence in that case that the applicant met the criteria for the position. *See EM*, para. 78. The Tribunal also considers that, in the *EM* case, the Bank failed to provide records which explained the selection criteria, the recruitment process, or why the applicant was not shortlisted. *See EM*, para. 73. Here, the record contains the selection criteria for the position, details relating to the shortlisting process, and the SLC’s notes on why the Applicant was not shortlisted for the position (as well as notes on the qualifications of those candidates who were shortlisted). Recalling the Tribunal’s decision in *Riddell*, para. 23,

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.

77. Based on the record before it, the Tribunal is satisfied that the Applicant was given a fair opportunity to compete for the Senior Operations Officer position in fulfillment of the promise made to him even though, ultimately, he was not shortlisted for the position.

78. Turning to the Applicant’s contention that the SLC was improperly constituted, the Tribunal noted in *BK*, Decision No. 444 [2010], para. 46:

Principle 4.1 of the Bank's Principles of Staff Employment states that the purpose of the Bank's "recruitment policy shall be to seek to attract staff members of the highest caliber appropriate to job requirements." In this regard, the Tribunal notes that the Bank's Shortlisting Guidelines state that the shortlisting process should be guided by principles such as "objectivity," "transparency," "rigor," and "diversity." The Guidelines also state that the objective is to:

Create a short-list of candidates considered to be the best qualified to put forward for interviews. Shortlisting is screening a long list of candidates against the selection criteria for the job. The short list of candidates should also represent the diversity and fungibility requirements of the sector. A Hiring Manager will typically convene a shortlisting committee (SLC) of up to 4 people, with at least one from outside the hiring unit. Shortlisting results must be documented.

See also Iqbal, Decision No. 485 [2013], para. 40.

79. The Tribunal further found in *BK*, para. 56, that

[t]he principles of "objectivity," "transparency," "rigor," and "diversity" cannot be implemented unless the SLC is composed of staff members from more than one unit in addition to an HR Officer. These objectives in recruitment are realized if the Bank makes its shortlisting process uniform with clear guidelines and when the composition of a shortlisting committee is diverse.

See also DK (Merits), Decision No. 552 [2017], para. 104; *Iqbal*, para. 41.

80. The Applicant contends that the SLC was improperly constituted because it did not include an HR representative "whose role is to provide procedural guidance and ensure that due process is followed." The Bank asserts that, contrary to the Applicant's contention, "an HR representative is not required to serve on shortlisting committees" and submits that, "[i]n this case, [a Senior HR Business Partner] served as an external advisor to the [SLC] but did not participate in its deliberations." The Senior HR Business Partner did testify before PRS "that he did not have any role in the SLC," but added that "his role in the selection process was limited to advising the SLC to ensure that the selection process was conducted in line with HR policies and guidelines." The record demonstrates that the SLC was otherwise properly constituted, with four members including two from outside the hiring unit.

81. The Tribunal considered the role of an HR representative in an SLC in *BK*, para. 51, finding that “an HR Officer is not typically a full member of the SLC” and citing the testimony of the HR Officer in question that the HR representative participates in the shortlisting process “as an external witness, external witness – not a voting member, not a voting person. A witness and a sort of gatekeeper – for the process to be followed, some due process.”

82. The Tribunal observes that, while the Senior HR Business Partner was not a listed member of the SLC, he served the SLC in an advisory capacity to ensure that a proper process was followed. The Tribunal further considers that such a role is consistent with applicable HR policies and guidelines, as discussed in *BK*. Moreover, the record shows that the Senior HR Business Partner fully performed his advisory role, as the shortlisting process met the requirements of the principles of objectivity, transparency, rigor, and diversity, in accordance with Tribunal precedents, demonstrated by the SLC’s thorough record of its notes regarding both the longlist and shortlist of candidates. In light of these considerations, the Tribunal dismisses the Applicant’s contention that the SLC was improperly constituted and thereby unfair.

83. The Applicant finally contends that his consideration for the position was marred by unfair bias against him, specifically bias on the part of his supervisor, the Practice Manager. The Applicant relies on the Practice Manager’s role as the hiring manager for the position, in which she briefed the SLC on what she was looking for in a candidate, and her testimony before PRS, in which she expressed that she did not like how the position was created, to support his claim of unfair bias. The Applicant further points to the Practice Manager’s rejection of any further extension of his ISRP assignment in March 2018, after he met with the New HRVP, as evidence of her bias against him.

84. In reviewing the record, it is clear the Practice Manager advised the SLC on the qualities she was looking for in a candidate for the position, testified before PRS that “she does not like positions being created just to hire pre-identified candidates,” and rejected the Applicant’s final attempt to extend his ISRP assignment. The entirety of the record, however, does not reflect that the Practice Manager was unfairly biased against the Applicant or influenced the SLC against shortlisting the Applicant. The Practice Manager supported the Applicant throughout his ISRP

assignment, asking HR on multiple occasions to extend his ISRP assignment. The Applicant contends that the Practice Manager only became biased against him *after* the Senior Operations Officer position was created, but, even then, the record demonstrates that she went to the SLC to ask why the Applicant was not shortlisted for the position. Finally, after informing the Applicant that he was not shortlisted for the position, the Practice Manager offered the Applicant an STC position, so that he might continue his employment with the Bank. The Tribunal cannot reconcile the Applicant's contention of the Practice Manager's bias with her actions toward him. The Tribunal rejects the Applicant's contention of bias.

85. The Tribunal finds that the Applicant was treated fairly during the shortlisting process for the Senior Operations Officer position and dismisses the Applicant's claim regarding unfair treatment.

Whether the Applicant was deprived of fair notice regarding the termination of his appointment

86. The final issue the Tribunal must address is whether the Applicant was deprived of fair notice regarding the termination of his appointment because of the SLC's failure to follow its own guidelines. According to the Applicant, the SLC's guidelines required shortlisting to take place within three days of the vacancy's closing date or receipt of the longlist, citing an email from HR Operations to the Practice Manager. The record reflects that the SLC did not meet within three days of the vacancy's closing date and that the Applicant did not learn of the SLC's decision not to shortlist him for the position until 25 April 2018, shortly before his ISRP assignment ended. According to the Bank, this "automated email" cited by the Applicant was sent by HR to hiring managers. The Bank states that the email did not set forth a rule, but "served simply as a recommended timeline for hiring managers supervising the selection process," and notes that this email was not sent to candidates. The Tribunal finds that any such guidance has no relevance in itself as to the issue of whether adequate notice was given.

87. In *DG*, para. 71, the Tribunal considered the date from which the terms of an ISRP agreement could be challenged and found it to be the date on which the agreement was signed, explaining:

After the signing of the agreement, the [a]pplicant's separation on the ground of retirement was no longer voluntary but, indeed, mandatory with effect on a particular date, i.e., 16 January 2015, provided that certain conditions were met, i.e., the [a]pplicant did not elect to retire sooner than the date indicated in the agreement and that she did not seek and accept reassignment outside of IEG [Independent Evaluation Group] during and before the end of her ISRP assignment. It was only in that latter case that the terms and conditions of the ISRP agreement would lapse. The agreement was therefore self-executing and no further action was needed and certainly not, as the [a]pplicant alleges, an additional confirmation by Mr. L that the agreement would be enforced. It was in effect a form of a mutually agreed separation agreement according to which the [a]pplicant agreed to separate on the ground of retirement from the employ of the Bank in exchange for working in IEG for one additional year. It is clear therefore that, if the [a]pplicant disagreed with the terms of the agreement and particularly her separation and questioned its validity, she had 120 days to challenge it from the time of its signature.

88. As with the applicant in *DG*, here the Applicant's ISRP agreement was self-executing from the date on which it was signed, and no further action was necessary to enforce its terms, namely the termination of the assignment. While accepting a new position would have caused the terms of the Applicant's ISRP agreement to lapse, applying for and not being shortlisted for a position had no effect on the terms of the ISRP agreement. Because the Applicant's ISRP assignment had been extended from its initial date of termination, the Tribunal finds that the Applicant received fair notice of the end of his assignment on the date on which the extension was granted. The Applicant's claim that he was deprived of fair notice is therefore dismissed.

Concluding remarks

89. The Applicant has already been compensated for six months' salary as recommended by PRS for its findings regarding the non-extension decision; specifically, PRS recommended the Applicant be awarded three months' salary "for lack of a reasonable and observable basis for the Non-Extension Decision" and three months' salary "for unfair treatment including inconsistent communications regarding the Non-Extension Decision." Here, the Applicant "seeks additional compensation for the intangible harms [the non-extension decision] caused him; namely, severely undermining his ability to obtain continued employment with the Bank beyond the ISRP assignment."

90. As stated in *DB*, Decision No. 524 [2015], para. 133, “the Tribunal is free to take into account any compensation already received by an applicant, and to adjust accordingly any award the Tribunal itself chooses to make.” Had the Applicant’s ISRP assignment been extended to the maximum eighteen months, it would have ended on 9 July 2018. Following the extension agreed upon so the Applicant could compete for a position in GED05, the ISRP assignment ultimately ended on 30 April 2018. The Tribunal therefore finds that the non-extension decision shortened the duration of the ISRP assignment by a little over two months. Considering the Applicant’s request that he be awarded additional compensation for his inability to obtain continued employment following the end of the ISRP assignment, the Tribunal finds that the Applicant was so affected for about two months. Considering further that the Applicant was already compensated for six months’ salary, the Tribunal finds that no further compensation is warranted for the non-extension decision.

91. The Applicant has prevailed in one of his claims, and the Tribunal finds that in light of this some contribution to the Applicant’s legal fees and costs is warranted.

DECISION

- (1) The Bank shall contribute to the Applicant’s legal fees and costs in the amount of \$11,000.00; and
- (2) 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.