



**World Bank Administrative Tribunal**

**2021**

**Decision No. 659**

**GH,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

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

**GH,  
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 8 December 2020. The Applicant was represented by Alex Haines, barrister of England and Wales and attorney at the New York Bar, and Victoria Brown, barrister of England and Wales. The International Finance Corporation (IFC) was represented by David Sullivan, Deputy General Counsel (Institutional Affairs), Legal Vice Presidency. The Applicant's request for anonymity was granted on 21 October 2021.

3. In his Application, the Applicant contends that (i) the IFC "failed to follow a fair and proper process" in conducting its voluntary separation (VS) program, and (ii) the IFC "did not have a reasonable and observable basis not to grant the Applicant's application for VS, [...] and discriminated, or otherwise acted in bad faith, against the Applicant."

**FACTUAL BACKGROUND**

4. The Applicant joined the IFC in 1987 as an Investment Officer. He became a Chief Investment Officer in 2002 and in 2010 began working with the IFC Asset Management Company, Limited Liability Company (AMC). AMC was a wholly owned subsidiary of the IFC, incorporated in the state of Delaware, United States, "governed by the Delaware Limited Liability Company Act, 6 DC Code §18-1102 (2016)" and created to "mobilize and manage capital to invest in businesses in developing and frontier markets." The Applicant was an IFC staff member seconded to AMC and was one of eleven fund heads responsible for managing AMC's funds.

5. AMC's Board of Directors (AMC Board) consisted of the IFC's Executive Vice President and Chief Executive Officer (CEO) as Chairman, three independent Directors (i.e., not employees of either AMC or the IFC), and the AMC CEO, a former IFC Director seconded to AMC. The operating agreement setting out, *inter alia*, the financial and decision-making structure of AMC allocated the following functions to the AMC Board:

[A]ppointment of officers, upon [the] IFC's recommendation; appointment of AMC's independent auditors and approval of its annual audited financial statements; approval of AMC's formation of Funds; oversight of conflicts of interests; approval of AMC's human resources policies, consistent with [the] IFC's human resources policies; approval of other policies that [the] IFC delegates to it; and provision of guidance on AMC's operations other than decisions with respect to the Funds' investments.

6. AMC merged with the IFC effective 31 January 2020.

7. On 19 September 2018, the IFC CEO sent an email to all IFC staff announcing the start of a workforce planning (WFP) exercise on the part of the IFC to address staffing levels and needs.

The email stated in pertinent part:

[O]ver the next three years, we plan to rebalance the grade structure and reduce the percentage of GH level staff to around 12 percent – back to the level we had in FY08 [Fiscal Year 2008...].

The implementation of the VPU [Vice Presidential Unit] workforce plans will include various staffing actions. Among those will be separations, where necessary. The sequence will be as follows:

- (1) A voluntary separation program opened to all, but in most VPUs this will focus mainly on GH level staff (although in some VPUs, there will be smaller reductions of GG2 and other levels of staff). We expect the voluntary process to be complete by the end of November. The decision to accept or reject applications will be left to Management discretion based on specific criteria aligned with each VPU's business needs.
- (2) Based on the position plan at each level in each VPU, non-voluntary separations will be considered. [...]
- (3) In FY20 and FY21, we will continue our efforts to reach the desired grade structure, mostly through natural attrition and by hiring additional junior resources in our priority regions and sectors. Periodic reviews of our staffing

pyramid will allow us to fine-tune our plans as needed in accordance with evolving business needs.

8. To implement the WFP, the IFC announced a VS program, and a committee or panel was established within the Applicant's VPU to review the VS applications and decide to either accept or decline a volunteer's application based on business needs.

9. The AMC VPU Committee consisted of the AMC CEO, the AMC Deputy CEO and Chief Operating Officer (COO), and IFC Human Resources (HR) representatives. The AMC CEO was an IFC staff member seconded to AMC, and the AMC Deputy CEO and COO was an AMC direct hire. According to the IFC, the AMC Deputy CEO and COO was a member of the AMC VPU Committee due to the AMC CEO's health issues.

10. On 2 October 2018, the AMC Deputy CEO and COO sent an email to all "Principal level" AMC direct hire staff, stating:

Further to our staff meeting regarding implementation of workforce planning, we are formally launching a voluntary separation program targeted at Principal level staff. This program will be open until November 30, 2018.

Please note that not all volunteers will be accepted. A panel will review each application and will make a determination based upon our business needs going forward.

If you are considering volunteering for separation, I encourage you to contact [...]. Everyone's situation is different, and you should be well-informed before taking this decision.

Should you wish to volunteer for separation, please submit the attached Application Form for Voluntary Separation to [...] by COB [close of business] November 30, 2018.

11. The email of 2 October 2018 was not sent to the Applicant, because, according to the IFC, "only staff with the functional title of Principal in the AMC VPU were eligible for the VSP [VS program]," whereas the Applicant was a fund head.

12. An IFC WFP document, dated 4 November 2018, provided answers to frequently asked questions (IFC Workforce Planning FAQs). The IFC Workforce Planning FAQs stated in pertinent part:

**What is the FY19 process to implement voluntary separations? How will the decision to accept or reject an application be made? Who will be in the Committee?**

Each VPU in [the] IFC will announce a voluntary separation program, mainly for GH level staff whereby staff will be given an opportunity to apply for voluntary separation. The voluntary application process will be open until November 30, 2018, and the decision to accept or reject applications will be left to managerial discretion of each VPU. There will be a committee established within each VPU composed by the VP [Vice President], VPU Leadership team and HR to review the applications and recommend decisions to either accept or decline a volunteer's request based on business needs. The committee will review the applications in order of submission and decisions to be communicated to staff in December.

13. According to the Applicant, on or around 7 November 2018 he informed the AMC CEO that he was considering applying for VS, to which the AMC CEO replied that, while the Applicant's departure would be a loss for the IFC, the AMC CEO would support the Applicant's VS application.

14. On 12 November 2018, a Senior HR Business Partner sent two emails to the Applicant providing him with the VS application form and the estimated value of benefits the Applicant would receive should his VS application be approved.

15. On 27 November 2018, the Applicant submitted his VS application for consideration via email. In his cover email, the Applicant stated:

Please find attached my application for Voluntary Separation, duly signed. After fully 31 years of loyal service to [the] IFC and the WBG, and with the near-term prospect of the [...] Fund of Funds [...] being fully (and successfully) invested in the next few months, now is the logical time for me to take the first step in embarking on a new phase of my working life. Per my recent discussion with [the AMC CEO], I am concerned that, if I leave [the] IFC or go on Admin[istrative] Leave before the end of the main Investment Period for the [...] Fund on June 29, 2019, this will trigger a Key Person event under the terms of the [...] Fund Limited Partnership Agreement, in which I am a named Key Person. If a Key Person event

is triggered, this is likely to have a significant impact on the key investor relationships we have worked so hard to develop with [...] in particular, since 2012. On the other hand, based on our current projections, I have high confidence that [the] Fund will in fact, be fully committed by the end of June 2019, at which point the Key Person trigger falls away. In view of this, I strongly suggest that – assuming my application is approved – the standard terms of the Voluntary Separation package be slightly amended so that there is no ambiguity regarding my full commitment to the work of AMC and the [...] Fund until June 30, 2019, instead of only through April 30, 2019 as provided for in the standard package. The rationale for this suggestion is purely to avoid disrupting key investor relationships, with the attendant costs (trips to Japan, etc[.]), potential fee reduction and possible suspension of the investment program, all of which will be highly counter-productive. Please note that I have no personal reason or desire to extend my service from May 1 to June 30 – my suggestion is purely to help ensure a smooth transition from a business perspective. [The AMC CEO] indicated that he was supportive of this proposal in light of the clear business rationale, and I hope the Panel will also support it.

16. The AMC VPU Committee received seven VS applications, five of which were submitted by IFC fund heads, like the Applicant, and two of which were received from AMC direct hire staff (i.e., staff members holding employment contracts with AMC).

17. According to the IFC, the AMC VPU Committee discussed all seven staff members who applied for VS with the AMC Board, “but the Board was not asked to endorse or review any recommendations.”

18. According to the AMC Deputy CEO and COO, the AMC VPU Committee notified the Office of the IFC CEO and IFC HR of their accepted applications, and the Applicant’s VS application was not among those accepted. There is no contemporaneous documentation in the record of this communication.

19. On 19 December 2018, the Advisor to the IFC CEO sent an email to the AMC CEO stating, “Thanks to you and your panel for reviewing the volunteers in your VPU. You will find attached a complete list of volunteers with the final decisions endorsed by [the IFC CEO].”

20. Three of the five AMC VPU VS applications submitted by IFC staff members were accepted. The Applicant’s VS application was not accepted.

21. According to the Applicant, on 20 December 2018,

[the AMC CEO] called me to let me know that, even though he himself and the VPU-level committee he set up (as required under the VS procedure established by [the] IFC) had approved my application, my application for VS was declined by a higher level in the organization because I was considered too valuable to the business. He was apologetic, and it was clear from his comments that he himself had supported my application.

22. On 20 December 2018, the AMC CEO sent an email to the Applicant informing him that his VS application had been rejected, noting, “I will not repeat the arguments for the decision.”

23. On 21 December 2018, the Applicant received, via email, an update on the VS program from the IFC CEO, which stated:

The voluntary separation program [...] allowed us to significantly limit the need for involuntary separations. In all, 212 volunteers were considered for a 100 percent Mutually Agreed Separation (MAS) package. The volunteers were vetted at two levels – VPU and Corporate – to ensure fairness. Of those, the panels accepted 179 volunteers. The panels took great care in considering each case based on agreed overarching principles and specific criteria aligned with each VPU’s business needs.

24. On 26 December 2018, the Applicant wrote an email to the AMC CEO expressing his disappointment with “the unfair treatment” and requesting the AMC CEO’s “support in taking whatever steps may be available to secure a reversal of the decision in my case.” On the same day, the AMC CEO replied to the Applicant’s email, promising that he “will have serious conversations with [the IFC CEO], other colleagues from the MT [Management Team] and HR about your case and others. This will be one of my main priorities in early 2019.”

25. On 8 January 2019, the Applicant wrote another email to the AMC CEO expressing his appreciation “for listening to me earlier today and for all the efforts I know you are making to try to find an appropriate resolution of the matter.” The Applicant further stated, “[T]he outcome of the process certainly feels unfair and my sense is that it was not handled transparently in accordance with the written communications from [the IFC CEO].” The AMC CEO responded the

following day, stating, “We should have a discussion today in the afternoon at the MT. Let me see what reaction I get at the MT and will talk to you thereafter.”

26. On 10 January 2019, the Applicant emailed the AMC CEO, thanking him for his “open and frank leadership style,” stating further:

Thank you in particular, for sharing the details you shared, both about the way the Workforce Planning decisions were made for AMC and about the [Management Team] discussion that you triggered to discuss how to handle those voluntary separations (VS) [that have] been rejected and have been asked to stay to continue to contribute to the business. For me personally, it was important to hear it confirmed that you supported my VS application (along with the others), and that it was approved by your VPU-level committee – even if this decision was subsequently overruled – landing us in the messy situation we are now in.

As I agreed when we spoke just now, I will give some thought to the possibility of having a meeting with [the IFC CEO] jointly with you.

The AMC CEO responded to this email by expressing his agreement for the two of them to meet with the IFC CEO to discuss his application for VS.

27. According to the Applicant,

On January 11, 2019, [he] attended an AMC VPU Leadership Team meeting chaired by [the AMC CEO]. During a discussion of the VS application process, [the AMC CEO] confirmed that he and his VPU-level committee approved all seven of the VS applications received from across the AMC VPU (including [the Applicant’s]), and indicated that a decision not to accept three of them (including [the Applicant’s]) was not made by him. He referenced a committee set up by [the] IFC’s CEO which made the final decision that was handed down to [the Applicant] and others.

28. According to the Applicant, no solution was reached regarding the reevaluation of his VS application. The Applicant retired on 30 October 2020.



*Peer Review Services*

29. On 4 March 2019, the Applicant filed a Request for Review with Peer Review Services (PRS) disputing the rejection of his VS application under the IFC's WFP exercise and contending that the IFC did not properly follow the Staff Rules or its own procedures for VS as laid out in various communications to staff.

30. The PRS Panel summarized the testimony of the AMC Deputy CEO and COO, provided during the course of the PRS proceedings, in which she explained that the IFC CEO's email of 19 September 2018 announcing the IFC's goal to initiate the WFP and VS program "authorized each VPU to make its own decisions on VS based on its specific business needs."

31. According to the AMC Deputy CEO and COO, the AMC VPU Committee reviewed the seven VS applications on 7 December 2018 against the following criteria:

- i) Is the fund still in its investment period?
- ii) Is the team planning on raising a new fund during calendar year 2019 or 2020?
- iii) Is the staff member considered a "key person" under that clause in the fund's limited partnership agreement?
- iv) If the answer to all 3 questions above is "no", is there a way to replace that person in the very near term in a way that the fund's investors will be comfortable with?

32. According to the AMC Deputy CEO and COO, after reviewing the VS applications, the AMC VPU Committee agreed not to finalize its VS decisions until after the AMC Board meeting on 18 December 2018. The AMC Board subsequently added a fifth criterion: "[T]he market signal about AMC should several senior staff depart AMC within a short period of time."

33. According to the AMC Deputy CEO and COO, the AMC VPU Committee applied the five criteria to the Applicant's VS application and determined that

AMC could not afford to lose [the Applicant]. [The Applicant] is the Head of the AMC Fund of Funds business which manages two funds [...]. In addition, on March 15, 2019, [the Applicant] presented to the AMC Board a new Fund of Funds which the team proposed raising. This fund is a successor fund to the existing funds. The AMC Board approved the marketing of this new fund at the March 2019 meeting. As the Head of the Fund of Funds business, [the Applicant] is a “key person” for the [...] Fund whose investment period expired on June 29, 2019 and is a critical link for investors to the business and, therefore in the fundraising for the new fund. [...] Because the Fund of Funds business is working to raise a new fund which [the Applicant] has strongly advocated for, the business could not support his application.

34. By way of explanation for the acceptance of the three other fund head’s VS applications, the AMC Deputy CEO and COO stated:

The 3 accepted include the 2 co-heads of [an] Infrastructure Fund and the head of [a] Capitalization Fund. In the case of the [...] Infrastructure Fund, the investment period ended on March 15, 2019, there are no fundraising plans and there is a clear succession plan from within the fund. For the [...] Capitalization Fund, the fund life (several years beyond the investment period) was ending in August 2019. In addition, the head of the [...] Capitalization Fund (who was accepted) was no longer able to fulfill his business function because of his inability to travel.

35. In his testimony before the PRS Panel, the AMC CEO indicated that “performance evaluations, specifically namely Salary Review [Increase] ratings (SRI) and Talent Review results, were used as additional criteria to review applications for VS.”

36. According to the AMC CEO, the VS decision was made in a “committee type approach” and was made by the AMC VPU Committee in consultation with the AMC Board. The AMC CEO further testified that he was “supportive of [the Applicant’s] [VS] application until the AMC Board meeting.”

37. According to the AMC Deputy CEO and COO, the discussions around individual applications and the process were all verbal because, “as a U.S. company subject to lawsuits before U.S. domestic courts, [AMC] did not keep record of the AMC Board meetings when the Board discusse[d] HR issues, due to the risk of being used in legal proceedings before U.S. domestic courts.”

38. On 30 June 2020, the PRS Panel issued its Report and sent its recommendation to management. The PRS Panel determined that management provided a reasonable and observable basis for the VS decision and that there was no evidence of bad faith in making the VS decision. However, the PRS Panel concluded that the VS decision did not follow a fair and proper process. Specifically, the PRS Panel found that “the lack of proper documentation and communication about the role of the AMC Board in the development of the selection criteria and ultimate selection of VS applications was not transparent.” It therefore recommended that the IFC provide monetary compensation to the Applicant in the amount of “one (1) pay cycle gross salary, based on his salary at the time the Voluntary Separation Decision was made.”

39. On 9 July 2020, management informed the Applicant via letter that it had accepted the PRS Panel’s recommendation.

40. On 17 December 2020, the IFC paid the Applicant the amount recommended by the PRS Panel.

*The present Application and remedies sought*

41. On 8 December 2020, the Applicant filed this Application with the Tribunal.

42. The Applicant seeks as remedy the rescission of the VS decision and specific performance in the form of acceptance of his VS application. Alternatively, the Applicant requests restitution “in the amount that is reasonably necessary to compensate the Applicant for the actual damages suffered.” The Applicant further seeks legal fees and costs in the amount of £8,591.25.

## SUMMARY OF THE CONTENTIONS OF THE PARTIES

*The Applicant's Contention No. 1**The IFC failed to follow a fair and proper VS application review process*

43. To the Applicant, the IFC did not follow a fair and proper process because no selection criteria were published during the process and, even if the selection criteria existed contemporaneously with the process, the selection criteria were uncertain and too vague; no rationale for the VS decision was contemporaneously recorded; and “decision-makers were unreasonably added to the process without warning.”

Selection criteria

44. The Applicant maintains that no selection criteria were published or even acknowledged in the VS selection process. To the Applicant, this lack of transparency harmed him because he was unable to assess the likelihood that his VS application would be accepted and was not permitted the opportunity to explain in his VS application the irrelevancy of his team's planning to raise a new fund.

45. In the Applicant's view, even if the selection criteria were developed before the PRS process, the selection criteria were developed too late to be fair because the criteria were not created until the AMC VPU Committee was in receipt of all VS applications, and at that point the AMC VPU Committee would have known who would be excluded as a result of the criteria chosen.

46. The Applicant further contends that the absence of any contemporaneous documentation of the selection criteria applied demonstrates that the criteria were invented ex post facto.

47. Moreover, according to the Applicant, even if the criteria existed contemporaneously, the criteria were unclear even to the AMC VPU Committee. To the Applicant, this is evidenced by the suggestion during the PRS hearing that performance evaluations were used as a criterion, even

though performance evaluations were not mentioned in the five criteria allegedly applied to the VS applications. According to the Applicant, this demonstrates that even the AMC VPU Committee was unclear on the criteria being applied to the VS applications.

#### Contemporaneous documentation of rationales for VS application decisions

48. According to the Applicant, the IFC failed to follow a proper process because no rationales for the VS selection decisions were recorded. In the Applicant's view, failure to document the outcome of the VS application review process violates the spirit of Principle 7.1(b) of the Principles of Staff Employment, which states that "staff members separated at the initiative of the Organizations have the right to be notified in writing of the decision and the reason for it."

#### Decision-makers

49. In the Applicant's view, two decision-makers were unreasonably added to the VS application review process without warning to the VS applicants – the AMC Board and the IFC CEO.

50. First, the Applicant contends, the AMC Board was inappropriately given a decision-making role and had a "fundamental effect" on what should have been an IFC VPU-level decision. The Applicant maintains that reviewing VS applications submitted by IFC staff members should have been an internal IFC process in compliance with IFC Staff Rules. In the Applicant's view, it was therefore inappropriate to involve the board of a U.S. company in the process. According to the Applicant, because a U.S. company was involved in the decision-making process, U.S. company policies were inappropriately followed. As an example, the Applicant points out that HR decisions were not documented in order to avoid suits in U.S. courts, including the VS application review process. Moreover, in the Applicant's view, if the AMC Board's involvement was necessary, it should have been made clear at the outset of the VS program.

51. Second, the Applicant contends that the IFC CEO was inappropriately deferred to in the decision to deny the Applicant VS. To the Applicant, the IFC CEO's involvement was

inappropriate because communications from management, the IFC Workforce Planning FAQs, and Staff Rule 7.01 all clearly explained that the separation decisions would be made at the VPU level. To further bolster his argument that the IFC CEO's involvement was improper, the Applicant also points to the fact that there was no record of information communicated from the AMC VPU to the IFC CEO on which the IFC CEO could have formed a basis for his decision.

52. Based on (i) Staff Rule 7.01, which provides that “[a] mutually agreed separation must be approved by the Vice President responsible for the position,” (ii) the IFC CEO's announcement of the VS program, which states that the “decision to accept or reject applications will be left to Management discretion based on specific criteria aligned with each VPU's business needs,” and (iii) the IFC Workforce Planning FAQs that were circulated, the Applicant contends that the communicated process specifies that the decision should have been made at the VPU level. The Applicant concludes that, due to the unreasonable addition of the AMC Board and the IFC CEO's office as decision-makers, the VS application review process was unfair and improper.

53. For the above-mentioned reasons, the Applicant maintains that the IFC committed serious procedural due process violations.

### ***The IFC's Response***

*The decision to reject the Applicant's VS application was not vitiated by improper process*

54. The IFC rejects the Applicant's contention that the VS review process was improper.

55. To support its contention that the VS review process was clearly communicated to VS applicants, the IFC first points to the IFC Workforce Planning FAQs, which states:

[T]he decision to accept or reject applications will be left to managerial discretion of each VPU. There will be a committee established within each VPU composed by the VP, VPU Leadership team and HR to review the applications and recommend decisions to either accept or decline a volunteer's request based on business needs [...]. The decision to accept or reject an application will be based on business needs. The VPU Committee is not obliged to accept every application. If an application is not accepted, it will be based on a business need to retain staff whose skills are needed to deliver on IFC 3.0.

56. To the IFC, this communication to staff clearly articulated the process to be followed and applied to the VS program, and, in the IFC's view, the described process was in fact followed.

57. To the IFC, the VS selection criteria were "not intended to be disseminated to candidates for them to assess or argue their eligibility for the [VS program]." In the IFC's view, whether or not the criteria were shared is not relevant, because "[w]hat matters is that the criteria were applied equally to all applicants."

58. The IFC further contends that, because of the nature of AMC and the fiduciary duty to its investors, it was appropriate for the AMC VPU Committee to seek the input of the AMC Board in the VS process. The IFC maintains that the decision on the VS applications was not taken by the AMC Board but rather was taken by IFC management.

59. The IFC maintains that it is "commonplace that the IFC CEO is the ultimate decisionmaker and that the final decisions on the AMC VPU would be endorsed by him." In any event, the IFC maintains that the Applicant's VS application had already been rejected by the AMC VPU Committee and was not included on the list of those recommended for VS and sent to the IFC CEO.

### ***The Applicant's Contention No. 2***

*The decision to reject the Applicant's VS application should be rescinded because the IFC did not have a reasonable and observable basis for its decision and acted in bad faith*

60. The Applicant contends that the IFC "did not have a reasonable and observable basis not to grant the Applicant's application for VS" and "discriminated, or otherwise acted in bad faith, against the Applicant."

61. First, the Applicant contends that, without contemporaneous documentation, there is no observable basis for the decision to reject his VS application. To the Applicant, the "criteria have been invented to justify a bad-faith decision" and did not exist until he submitted a PRS Request for Review.

62. Next, the Applicant maintains that, because he “was explicitly told that the VPU committee supported his application for VS” and because his VS application was rejected, the decision was unreasonable.

63. According to the Applicant, the IFC’s decision was made in bad faith because it contradicted the Applicant’s legitimate expectation that his application would be accepted, “having been told that the decision was for [the AMC CEO] and having had his application supported by [the AMC CEO].”

64. In the Applicant’s view, the process also included unjustified differentiation because three other fund heads’ VS applications were accepted in circumstances materially the same as the Applicant’s. The Applicant points out that two of the fund heads were also key persons at the time of the VS decision but ceased to be key persons in March 2019 and that, likewise, he would have ceased to be a key person in June 2019.

65. In response to the IFC Deputy CEO and COO’s business justification, namely because the Applicant’s team had been approved to raise new funds, the Applicant explains that, “in late 2018, AMC was informed by the U.S. Securities and Exchange Commission (SEC) that given AMC’s structure as wholly owned by [the] IFC and yet managing investor money in the U.S., AMC could not continue without being regulated by the SEC.” The Applicant maintains that, because of this, AMC could not raise funds until either the completion of its merger with the IFC or privatization. In the Applicant’s view, this demonstrates that the approval for his team to raise new funds was irrelevant to the VS process, because AMC was not authorized to raise new funds. Furthermore, AMC’s approval for the Applicant’s team to raise the new funds occurred in March 2019, several months after the VS decision had been taken. To the Applicant, this demonstrates that the IFC, in its pleadings, purports to have considered a factor that did not even exist at the time of the decision.

66. In sum, the Applicant contends that the reasons justifying the rejection of his VS application were created after the fact and at the time of his PRS Request for Review, and that the decision is an abuse of discretion because it is not reasonable and observable.



***The IFC's Response***

*The decision on the Applicant's VS application had a reasonable and observable basis and was not vitiated by other extraneous factors*

67. The IFC maintains that the discretionary decision to reject the Applicant's VS application had a reasonable and observable basis and was not vitiated by other extraneous factors.

68. According to the IFC, AMC could not afford to accept the Applicant's VS application because

- i) [The] Applicant was the Head of the AMC Fund of Funds business, which managed two funds;
- ii) One of the Fund's investment periods was ending in June 2019 and [the Applicant] was a key person for this fund;
- iii) In addition, [the] Applicant and his team were very keen to fundraise for a new fund of funds and on March 15, 2019, he and his team presented a new Fund of Funds to the AMC Board, which endorsed the marketing of this new fund; [and]
- iv) [The] Applicant, as the head of the prior two funds, was a key link for investors in committing to a new fund. Turnover at the Fund Head level would have been very detrimental to the fundraising of the new fund.

69. To explain the importance of investment periods and the role of the fund head, the IFC explains:

Throughout [the investment] period, the [fund head/manager] is sourcing new investments and calling on capital from investors as needed on a deal-by-deal basis to fund each new investment. This is the only period of the fund during which the fund manager can freely enter into new investments on behalf of the fund. The limited investment period typically lasts for 4 to 6 years [and] is the most important time for the fund and its relationship with investors as it is these investments which determine the ultimate success of the fund. [...] Fund heads are the external faces of funds to the investor universe. Continuity in leadership is key for attracting investors to new funds.

70. The IFC contends that losing the Applicant would have sent “a very negative signal to the third-party investor universe that AMC serves” and that, based on the specific circumstances of the Applicant’s role, the IFC determined that his departure via VS was untenable.

71. The IFC maintains that the Applicant has not shown he was treated differently than similarly situated staff. According to the IFC, all of the VS applications received by the AMC VPU Committee were submitted by staff members who were fund heads like the Applicant, and three of the five VS applications submitted by IFC staff members were accepted. The IFC maintains that the three VS applications which were accepted were submitted by fund heads whose fund investment periods ended or would be ending shortly. Additionally, the IFC maintains that one of the staff members whose VS application was accepted was unable to fulfill his business function due to an inability to travel.

72. The IFC points out that, in contrast with the circumstances of the three staff members whose VS applications were accepted, the Applicant headed two funds, one of which had “several years remaining in its investment period.” The IFC maintains that the Applicant and his team proposed raising a new Fund of Funds, of which the AMC Board approved the marketing. In the IFC’s view, the Applicant was a “critical link for investors to the business” and, therefore, critical to the success of fundraising for the new fund he and his team proposed. To the IFC, these factors plainly differentiate the Applicant’s circumstances from those of the three AMC VPU staff members whose VS applications were accepted and support the IFC’s position that the Applicant was not discriminated against.

### ***The Staff Association’s Amicus Curiae Brief***

73. The Tribunal granted the Staff Association’s request to act as *amicus curiae* and accepted its submission of a brief in support of the Application.

74. The Staff Association agrees with the Applicant that “no clear, transparent, credible reason has been advanced for [the Applicant] being treated differently than the fellow Fund Heads whose applications were accepted.”

75. To the Staff Association, the IFC further failed to establish guidelines as to what criteria would be used or what process would be applied to ensure that VS decisions were made in a manner that was fair. In the Staff Association's view, simply declaring at the outset that VS decisions would be made on a case-by-case basis based on business needs does not give the IFC unlimited discretion. The Staff Association maintains that the IFC "utterly failed to articulate" the decision-makers' criteria for deciding whether to keep staff or to let them go.

76. The Staff Association contends that, in addition to the failure to devise and communicate selection criteria, the VS decision-making process was unclear, because the involvement of the IFC CEO and AMC Board was in contrast with the original announcement which indicated that VS decisions would be made at the VPU level.

77. In the Staff Association's view, although the IFC has been through strategic staffing exercises before, it is "remarkable that [the] IFC nevertheless treats each such exercise as if it were the first, where they appear to make up the rules and the process as they go along." According to the Staff Association, "discretionary decisions based on business needs does not mean that [the] IFC cannot and should not apply the same degree of clarity and care in establishing and implementing the process as it is required to do with regard to other discretionary decisions based on business needs."

78. The Staff Association requests the Tribunal to award the remedies sought by the Applicant.

## THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

### SCOPE OF THE TRIBUNAL'S REVIEW OF DISCRETIONARY DECISIONS

79. The parties agree that decisions regarding VS applications are discretionary. The Tribunal has consistently held 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, constitute[d] an abuse of discretion, and therefore a violation of a staff member's contract

of employment or terms of appointment.” *AK*, Decision No. 408 [2009], para. 41, citing *Desthuis-Francis*, Decision No. 315 [2004], para. 19; *Marshall*, Decision No. 226 [2000], para. 21; *de Raet*, Decision No. 85 [1989], para. 67.

80. The Tribunal has recognized in *DD*, Decision No. 526 [2015], para. 40, that it may be “‘exceedingly difficult’ for staff to substantiate an allegation of arbitrariness or lack of fairness amounting to an abuse of discretion.” It is, therefore, incumbent on the Tribunal to require the strictest observance of fair and transparent procedures in implementing the Staff Rules, otherwise,

ill-motivated managers would too often be able to pay lip service to the required standards of fairness, while disregarding the principle that their prerogatives of discretion must be exercised exclusively for legitimate and genuine managerial considerations in “the interests of efficient administration.”

*Yoon (No. 2)*, Decision No. 248 [2001], para. 28. *See also EY*, Decision No. 600 [2019], para. 81; *Fidel*, Decision No. 302 [2003], para. 24; *Husain*, Decision No. 266 [2002], para. 50.

81. The Tribunal is mindful that, unlike the applicant in *Yoon (No. 2)* [2001] in which the applicant contested a redundancy decision, here, the Applicant’s appointment has not been terminated. At issue in this case is the benefit of the separation package that the Applicant would have received had his VS application been accepted under the terms of the WFP exercise and his allegation that the selection process was unfair. The Tribunal is cognizant that the gravity and nature of the claim differ from claims which address an involuntary separation from the World Bank Group (WBG). Nevertheless, the Applicant is entitled to the standard of treatment enshrined in Principle 2.1 of the Principles of Staff Employment: “The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members.” Moreover, such standard of treatment must be consistent with the Tribunal’s jurisprudence with respect to due process rights.

82. A similar circumstance of a VS program was addressed by the International Monetary Fund Administrative Tribunal (IMFAT) in *Mr. S. Negrete, Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 2012-2 (September 11, 2012), in which the applicant contested the decision to reject his VS request. In *Negrete* [2012], that tribunal acknowledged that “in some

circumstances a violation of fair and reasonable procedures may result in the rescission of an individual decision.” *Id.*, para. 140. In such cases, the IMFAT considers that the burden is on the applicant to establish on the facts of the case “what the outcome [...] would have been in the absence of procedural irregularities.” *Id.*, paras. 140, 147. But the IMFAT acknowledged that, even if an applicant is unsuccessful in demonstrating what the outcome would have been absent procedural irregularities, the IMFAT had the remedial powers to determine “the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision.” *Id.*, para. 140, quoting *Ms. “C,” Applicant v. International Monetary Fund, Respondent*, IMFAT Judgment No. 1997-1 (August 22, 1997), para. 44.

83. In line with the above jurisprudence, the Tribunal considers that it may overturn a discretionary decision if it finds that the decision was “carried out in violation of a fair and reasonable procedure” (*de Raet* [1989], para. 56) such that, absent any procedural irregularities found, a different outcome would have been reached (*Negrete* [2012], para. 147).

84. The present case will be reviewed in light of these standards.

#### WHETHER THERE WERE PROCEDURAL IRREGULARITIES

##### *The VS selection criteria*

85. Staff of the IFC including those seconded to AMC were informed that selection for VS would be based on the “business needs” of their VPU, and AMC VPU staff members were provided with no further criteria for the evaluation of VS applications. The Applicant contends that “business needs” are too vague and general to serve as reviewable criteria.

86. In *Apergis*, Decision No. 83 [1989], the applicant contested his non-selection for VS during a WFP exercise, claiming, among other contentions, that the criteria for VS were ambiguous. At that time, the WBG had in place an applicable Staff Rule for implementing the WFP VS process, which stated:

Applications for voluntary separation may be denied if

(a) the staff member has been offered a position and his skills are determined by the Vice President, Personnel, to be essential to the effective functioning of the Bank, or

(b) approval of the application would cause the number of voluntary separations added to the expected number of separations under the Enhanced Separation Package to exceed the aggregate budgetary provision for such separations or the related number of such separations.

Should it appear that approval of all applications may result in exceeding the budgetary provision or the related number of separations, the Vice President, Personnel shall give priority to applications by staff who have not been offered a position and shall also consider the relative supply of and demand of the staff member's skills in the staff member's occupational stream, the staff member's performance, and the impact on the nationality and gender mix. [*Id.*, para. 8.]

87. The Tribunal found that the criteria identified in the above Staff Rule were unambiguous. *See id.*, para. 40. Based on the criteria provided in the Staff Rule, the Tribunal was able to review the decision and determine that the applicant clearly did not fit the criteria for VS as identified under the Staff Rule's sections (a) and (b) because (i) the applicant had been offered and declined to accept two positions at his grade level, and (ii) VS packages were provided to staff who were not offered positions, and the budget for the separation packages had been exhausted. *See id.*, paras. 45–50.

88. While the Staff Rule referred to in *Apergis* [1989] and other cases arising from that same WFP exercise is no longer in effect, it serves as an example of what the Tribunal has previously accepted as unambiguous. The criteria set out in the Staff Rule were broad; however, the Tribunal was able to review and observe how the criteria were applied to staff members seeking VS.

89. In contrast with *Apergis* [1989], here, the Applicant was informed only that selections would be based on the "business needs" of his VPU, without any indication of what the VPU's business needs would be moving forward.

90. The IFC seems to accept that referring to "business needs" alone is not enough. According to the IFC, more specific VS selection criteria were developed for the purposes of internal review

of the VS candidates by every IFC VPU. There is, however, no record of a precise date on which the AMC VPU Committee formulated its selection criteria.

91. During the course of the PRS process, the AMC Deputy CEO and COO stated that the criteria applied to evaluate and select VS applications were as follows:

- i) Is the fund still in its investment period?
- ii) Is the team planning on raising a new fund during calendar 2019 or 2020?
- iii) Is the staff member considered a “key person” under that clause in the fund’s limited partnership agreement?
- iv) If the answer to all 3 questions above is “no”, is there a way to replace that person in the very near term in a way that the fund’s investors will be comfortable with?
- v) The market signal about AMC should several senior staff depart AMC within a short period of time.

92. It is uncontested by the parties that the above criteria were not shared with VS candidates, nor were they contemporaneously recorded at the point of their creation or application to evaluate VS candidates. To the IFC, the VS selection criteria were “not intended to be disseminated to candidates for them to assess or argue their eligibility for the [VS program].” In sum, the IFC is contending that the selection criteria were purposely not communicated to staff so as to prevent staff members from “argu[ing] their eligibility” or, in other words, contesting the decision on VS.

93. In the Applicant’s view, if more specific VS selection criteria were created later, the IFC was not transparent in communicating the selection criteria and he was harmed by this because he was unable to address in his VS application certain factors that were, unbeknownst to him, considered in the evaluation of his VS.

94. The Tribunal has previously emphasized the importance of a transparent and fair assessment of candidates against the advertised criteria. In *DO*, Decision No. 546 [2016], para. 56, the Tribunal found that the assessment criteria used to evaluate the applicant’s candidacy “did not conform to the advertised criteria” and rescinded the non-selection decision. In coming to this

holding, the Tribunal reviewed the criteria as set out in the advertised vacancy announcement and compared them to the comments made by the Vice President explaining his non-selection decision. *See id.*, paras. 52–53. The Tribunal observed that, in line with the interview panel’s assessment and the hiring manager’s view, the applicant met the advertised criteria. *See id.*, para. 54.

95. It is axiomatic that every action of the IFC is taken for “business needs.” To operate otherwise, for example for the IFC to undertake actions to advance personal or private needs, would violate its mission and core values. In the absence of more unambiguous criteria, it is not possible for the Tribunal to conduct an independent and impartial judicial review of the application of criteria and, thus, of the fairness of a selection process. This makes it impossible for staff to have confidence that they have been treated fairly.

96. The criteria of “business needs” are so broad that they clearly include the actual criteria that the IFC asserts were used by the AMC VPU Committee to review VS applications. But “business needs” could have also included many other criteria. The point of emphasis is that the criteria “business needs” alone do not provide any guidance as to what those words entail either to the candidates who wish to participate in VS or to the Tribunal in evaluating their application where there is a dispute. The Tribunal is aware that, in reorganization of the IFC, actual criteria of “business needs” may differ from department to department or unit to unit. Hence it may not be possible for the IFC to have more detailed criteria applicable to all departments or units. But it was possible for different departments or units to communicate the actual criteria of “business needs” of their own departments or units to their own staff before their staff applied for VS.

97. The Tribunal notes that, as there was no description communicated of what “business needs” entailed, the Tribunal is unable to determine whether the criteria allegedly used matched such description.

98. The Tribunal recognizes that, while management is not expected to produce overly detailed or exhaustive criteria and that staffing decisions will always import judgment by the individual decision-maker involved, the criteria and decisions must be fair and transparent, and the decisions based thereon amenable to judicial review. In the circumstances of the present case, the Tribunal



finds the advertised selection criteria for the VS program lacked transparency. In such circumstances, it is not possible for the Tribunal to judicially review how, if at all, they were applied in this case and thus to evaluate whether the overall process was a fair one.

99. The impartiality and fairness of the selection criteria are also called into question by the Applicant. The Applicant contends that the IFC's belated timing of creating its alleged VS selection criteria was improper as "it is impossible to create fair and impartial criteria when one knows the individuals to whom [they are] being applied."

100. The Tribunal observes that the deadline to submit VS applications was 30 November 2018. According to the AMC Deputy CEO and COO, the AMC VPU Committee met to discuss the VS candidates on 7 December 2018. Also according to the AMC Deputy CEO and COO, the VS selection criteria were not finalized until 18 December 2018, the date of the AMC Board meeting, and after the VS candidates were known to the AMC VPU Committee.

101. Principle 2.1 of the Principles of Staff Employment sets out the obligation that "[t]he Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members."

102. In light of this obligation and considering the absence of any record demonstrating when the selection criteria were finalized, the Tribunal concludes that the IFC failed to act with fairness and impartiality, and failed to follow a proper process in conducting the VS program.

103. Moreover, the Tribunal finds that, even accepting the AMC Deputy CEO and COO's testimony that the criteria were finalized on 18 December 2018, that date is 11 days after the AMC VPU Committee's 7 December 2018 discussion on the seven VS candidates had already taken place. This timing may lead to an inference that the criteria may have been developed based on the AMC VPU Committee's knowledge of the candidates and their profiles.

104. Finally, the Tribunal is deeply concerned by the IFC's statement that the selection criteria were intentionally not communicated to staff so as to prevent staff from "argu[ing] their eligibility"

or in other words contesting the decision on VS. A decision to use overly broad selection criteria for the purpose of shortening the management decision-making process or shielding management from having to deal with staff competition for positions, coupled with a decision to not keep records that show how the selection criteria were applied, demonstrates a regrettable want of procedural fairness. Attempting to insulate managerial decisions from review is unacceptable. Staff should have the possibility to reasonably advocate for their own eligibility to benefit from the options made available by managerial decisions. In addition, judicial review is a fundamental right of staff who wish to challenge managerial decisions that have an impact upon their legitimate interests. This is also vital to the proper operation of the WBG. In the Tribunal's first judgment, *de Merode*, Decision No. 1 [1981], para. 21, the Tribunal confirmed that

the decision of the Board of Governors to establish this Tribunal introduced into the conditions of employment of Bank staff the right of recourse to this Tribunal, in accordance with the conditions laid down in the Statute. This right forms an integral part of the legal relationship between the Bank and its staff members.

105. In sum, the Tribunal finds that the IFC's failure with respect to the advertised criteria, the timing of the alleged finalization of selection criteria, and the overall communication to staff on the VS criteria violate the IFC's obligations of fairness, impartiality, and transparency.

#### *Documentation of VS decisions*

106. The Tribunal notes that there is no contemporaneous documentation of the AMC VPU Committee's rejection or acceptance of VS applications. According to the AMC Deputy CEO and COO, the absence of documentation was a conscious decision made by AMC management because, as a U.S. company, AMC is "subject to lawsuits before U.S. domestic courts." The AMC VPU Committee reviewed VS applications submitted by both AMC direct hire staff and IFC staff seconded to AMC. Although the staff seconded to AMC held employment contracts with the IFC, and not AMC, and were subject to the Staff Rules, there is no documentation on the deliberation of or decision on their VS applications.

107. While it may have been advantageous and strategic for AMC, a Delaware company subject to domestic lawsuits, to not document its employment processes and decisions, the Tribunal

observes that the contested decision pertains to an employment dispute between the IFC and its staff.

108. The Tribunal has previously commented on the importance of documenting decisions to ensure transparency and avoid the appearance of unfairness. In *Moussavi (No. 2)*, Decision No. 372 [2007], the Tribunal stated at para. 47:

While the Bank consulted with HR, it did so only after it had identified the [a]pplicant for redundancy, giving at least the appearance that the decision had been made first and the justifications were determined later. It is of the utmost importance for the Bank to follow established procedures closely so as to ensure transparency and avoid the appearance of unfairness.

109. In *Iqbal*, Decision No. 485 [2013], the Tribunal considered that, while a “manager’s discretion to select one suitable candidate over another will not normally be questioned, the lack of transparency surrounding the decision and the absence of contemporaneous documentation of the basis of that decision is problematic,” further stating that “the record before the Tribunal does not shed any light regarding the basis of the decision.” *Id.*, paras. 56–57.

110. The importance of documenting selection decisions was also highlighted in *Perea*, Decision No. 326 [2004], para. 57, in which the Tribunal stated that it was

unable to determine how comparisons were made to select candidates on a competitive basis for reassignment, whether and, if so, how performance assessments were considered, or how the [IFC] met the guidelines it had established for the process. In this regard, the Tribunal consider[ed] that there was a lack of coherence and transparency in regard to the selection process [and determined that the IFC] failed to provide a fair procedure.

The Tribunal further stated that the “significant disregard of the advertised criteria, and the lack of any written evaluation of the skills of each candidate, [led] the Tribunal to conclude that the selection process was lacking in transparency, and was arbitrary and an abuse of discretion.” *Id.*, para. 74.

111. Although *Perea* [2004] addresses the selection process for a reassignment and not for VS, the discussion in that case on the requirements for the WBG to provide a fair and transparent

selection process that is reviewable is relevant in the present case. In the absence of relevant contemporaneous documentation, the Tribunal here is likewise “unable to determine how comparisons were made to select candidates” or how the result of the AMC VPU Committee’s assessment of the Applicant for VS was reached. All that is available are oral statements by the AMC VPU Committee made during the PRS process when the decision was contested. The IFC asks this Tribunal to simply accept management’s ex post facto non-selection explanations at face value.

112. In the present case, the IFC admits that it purposely did not document its VS selection process.

113. The Tribunal cannot but reemphasize the importance of relevant contemporaneous documentation of the basis of managerial actions affecting a staff member. Contemporaneous documents are generally more reliable records of the decision-making process and tend to be more valuable when a decision is challenged. Of course, the IFC can explain during the course of proceedings its reasoning for a decision. But by then the decision-makers may have left the institution or moved on to other departments. Even if they are still there, memories fade, and their belated explanations may be subject to reinterpretation in light of subsequent knowledge or facts. Therefore, later explanations cannot command the same weight as contemporaneous documentation. The Tribunal understands that it could be burdensome to require detailed documentation for every action of management. Still, without any relevant contemporaneous documentation, however minimal, it is difficult to ascertain whether managerial discretion was exercised fairly and transparently.

114. Given the absence of relevant contemporaneous documentation of the VS decisions, and the evidence that suggests the criteria were established after all the VS candidates, including the Applicant, were known to the decision-makers, the Tribunal finds the IFC failed to act with fairness and transparency.

*The IFC CEO's involvement in the VS application review process*

115. The Applicant contends that the IFC CEO's involvement was improper because it departed from the process communicated to VS candidates, namely that VPU management would be the decision-maker on VS applications.

116. While the Tribunal has recognized "the importance of flexibility in decision-making," it has also emphasized that "established guidelines cannot be rendered purposeless by awarding managers unfettered discretion to stray from them as they see fit." *DO* [2016], para. 46.

117. In reviewing this claim, the Tribunal refers to its jurisprudence on the WBG's framework of best practices in decision-making discussed in *DO* [2016].

118. In *DO* [2016], the Tribunal observed that, according to the WBG Accountability and Decision-Making Policy (ADM) and the 2013 Guidance on its application, when delegating, "a manager assigns responsibility, establishes accountability, and transfers authority to a direct-report for functions and decisions." *Id.*, para. 38. However, "[b]oth the manager and the direct-report remain accountable for quality, risk management and results to their respective managers." *Id.* The ADM provides for the delegation of certain roles in the decision-making process, which includes a "decision role," and clarifies that "[a] person performing this role is responsible for considering the entire proposal and making a decision." *Id.* The ADM further clarifies that corporate units have the authority to issue procedures that "prescribe roles in business decisions." *Id.* In delegating roles and functions, managers are required to "adhere to such rules and procedures." *Id.* Finally, the ADM provides that "a manager who has delegated authority is not divested of that authority and has the right to exercise it concurrently, or withdraw it at any time." *Id.* Of importance, the ADM further adds that, "to maintain predictability, a manager shall endeavor to maintain established delegations and exercise this right only in exceptional circumstances." *Id.*

119. In *DO* [2016], the Bank acknowledged that, even outside of operations, the ADM "provides a framework of best practices in decision making based upon generally applicable legal concepts, in order to provide clarity on the delegation of authority." *Id.*, para. 45.

120. In the present case, the decision-making procedure communicated to staff, and noted in this judgment at paragraph 12, was that there would be a review and decision on the VS applications by the VPU management. The Tribunal notes the IFC Workforce Planning FAQs circulated to all IFC staff, which states in relation to VS applications that “the decision to accept or reject applications will be left to managerial discretion of each VPU.”

121. The record demonstrates that the first mention of a “two-tiered” decision process (the first tier being the VPU Committee, and the second tier being the IFC CEO or “corporate level”) was in a mass email to all IFC staff announcing the overall results of the VS program. By the time candidates were aware of this added level of review, the VS process had concluded, and decisions had been announced.

122. The IFC asserts that it is “commonplace that the IFC CEO is the ultimate decisionmaker” and offers no explanation as to why the IFC departed from the published process by implementing a two-tiered review process.

123. In *Negrete* [2012], the IMF clearly identified and explained the roles of department directors and the Institutional Panel (panel) in its VS review process through the issuance of published bulletins. According to the facts set out in that judgment, the department directors departed from their obligation to provide a certain number of VS requests to the panel. *See id.*, para. 82. The IMFAT found that a procedural failure occurred when the panel did not request the department directors to provide the “necessary number” of VS requests and instead undertook its own review of the group to come up with the “necessary number,” in contrast with its communicated role. *Id.*, paras. 100–104. The IMFAT stated that the panel “improvised a role for itself more far-reaching than that contemplated by [the] Staff Bulletin” and found that the panel should have required the department to revise its recommendations. *Id.*, paras. 103, 113.

124. As in *Negrete* [2012], here, the IFC CEO’s office undertook a role that was not previously communicated as being part of the VS process.

125. The Tribunal observes that the IFC CEO delegated the decisional role to VPU management and, in doing so, was required to adhere to that procedure. While it is acknowledged that the IFC CEO remains accountable for the decisions reached and may exercise authority to review the VS decisions, in the interest of predictability in decision-making processes, and in accordance with best practices as described in the ADM, this authority should be exercised only for compelling reasons or only in exceptional circumstances, which the IFC has not provided in its pleadings.

126. Based on the IFC CEO's involvement in the review of VS applications, without any explanation to warrant departing from the communicated decision-making authority given to VPU management, the Tribunal views the involvement as a procedural irregularity.

*AMC's involvement in the VS application review process*

127. A further issue to address is whether AMC, as a Delaware company, should have had any role in the VS application selection process of IFC staff.

128. According to the record, AMC had its own VS program for AMC direct hire staff. The AMC Deputy CEO and COO invited only principal-level AMC direct hires to apply for VS. The Applicant, as an IFC staff member, submitted his VS application in response to the IFC's invitation for VS.

129. The AMC Board was consulted regarding the received VS applications during a Board meeting, and the Board was, during that meeting, permitted to add one selection criterion which the AMC VPU Committee later applied to the evaluation of VS applications submitted by IFC staff. The parties agree that there were no communications to VS candidates informing them of the AMC Board's expected or actual involvement.

130. The IFC contends that, based on its fiduciary duties, it was appropriate for the AMC Board to be consulted.

131. There is no known precedent of this Tribunal, or tribunals of other international organizations, addressing whether a wholly owned subsidiary, subject to domestic law of a Member State, may appropriately be involved in the selection process of an international organization's WFP exercise. Cognizant of the unique circumstances of the relationship between AMC and the IFC, the Tribunal finds it unnecessary to comment on the appropriateness of the decision to consult with the AMC Board.

132. However, the lack of proper documentation and communication about the role of the AMC Board in the development of the selection criteria and ultimate selection of IFC VS applications meant that the process was not transparent.

WHETHER A DIFFERENT OUTCOME WOULD HAVE BEEN REACHED ABSENT ANY PROCEDURAL  
IRREGULARITIES

133. Having found that the creation and timing of the selection criteria, absence of relevant contemporaneous documentation, and involvement of the IFC CEO in the VS decision amount to procedural irregularities, the Tribunal will now assess whether a different outcome would have been reached absent those procedural irregularities.

134. Without a relevant contemporaneous record of the AMC VPU's business needs, the selection criteria used, or documentation of the VS application assessments, it is difficult to determine whether the Applicant's VS application would have been accepted absent these procedural irregularities.

135. During the exchange of pleadings, the IFC put forward its explanation for rejecting the Applicant's VS application. According to the IFC, the AMC VPU could not afford to accept the Applicant's VS application because

- i) [The] Applicant was the Head of the AMC Fund of Funds business, which managed two funds;
- ii) One of the Fund's investment periods was ending in June 2019 and [the Applicant] was a key person for this fund;



- iii) In addition, [the] Applicant and his team were very keen to fundraise for a new fund of funds and on March 15, 2019, he and his team presented a new Fund of Funds to the AMC Board, which endorsed the marketing of this new fund; [and]
- iv) [The] Applicant, as the head of the prior two funds, was a key link for investors in committing to a new fund. Turnover at the Fund Head level would have been very detrimental to the fundraising of the new fund.

136. The IFC maintains that, although the VS applications of other fund heads and key persons were accepted, those staff members' situations are easily discernible from the Applicant's. The IFC explains that the Applicant headed two funds, one of which had several years remaining in its investment period, whereas the other fund heads whose VS applications were accepted headed funds with investment periods that had already ended or would be ending shortly. Furthermore, according to the IFC, based on the Applicant's team's interest in fundraising for a new fund, the Applicant was uniquely viewed as a critical link for investors for the potential new fund of funds, which was eventually granted in March 2019.

137. It appears that, had the alleged selection criteria been timely created, applied, and documented, these reasons could have supported the decision to reject the Applicant's VS application.

138. According to the Applicant, he received verbal confirmation that the Chair of the AMC VPU Committee supported the Applicant's VS from the IFC and therefore concludes that the IFC CEO improperly influenced the VS decision. To support his contention, the Applicant points to email exchanges between him and the AMC CEO in which the Applicant expressed appreciation "for all the efforts you are making to try to find an appropriate resolution of the [VS decision] matter" and the AMC CEO responded that he "will have serious conversations with [the IFC CEO]" about the Applicant's VS. To the Applicant, these exchanges demonstrate that, from the AMC VPU side of things, VPU management was willing to accept the Applicant's VS application but that the IFC CEO intervened to reject the VS application.

139. The Tribunal observes that there is no record of the AMC VPU Committee sending its decision to the IFC CEO's office for the second-tier review, so it is not possible to determine

whether the IFC CEO's involvement affected the outcome of the VS decision. While the email exchanges show a willingness on the part of the AMC CEO to find a solution for the Applicant to separate in some fashion, they do not necessarily demonstrate that the AMC VPU Committee's decision would have been different absent the IFC CEO's involvement.

140. According to the PRS testimony of the AMC CEO, the AMC CEO and Chair of the AMC VPU Committee was originally amenable to accepting the Applicant's VS application until the AMC Board meeting. To the Applicant, the AMC Board therefore unfairly influenced the decision on his VS application. The Tribunal has found that the AMC Board's involvement lacked transparency; however, the Tribunal is not convinced that had the IFC been transparent about the Board's participation a different outcome would have been reached.

141. In *King*, Decision No. 131 [1993], para. 59, the Tribunal stated that, while it "[could not] be sure that if the requirements of procedural due process had been followed, the result [...] would have been the same," in the demonstration of whether an applicant has been harmed, "[i]t is enough that there has been a serious departure from the requirements of due process." Further, as the Tribunal stated in *Medlin*, Decision No. 319 [2004], para. 34, "due process is an inherent requirement in the employment relationship, and therefore it may be appropriate to penalize procedural irregularities even if they did not ultimately lead to a different substantive outcome."

142. Here, given the deficiencies in the VS process, as well as the other circumstances in this case, and even though the Applicant has not met the burden of establishing that he would have been selected for VS but for those deficiencies, the Tribunal finds that an award of compensation to the Applicant is warranted.

#### REMEDIES

143. On balance, the Tribunal is not satisfied that the principles ensuring a transparent and fair selection process established in its jurisprudence have been observed in this case. Moreover, the IFC did not furnish sufficient evidence to permit the Tribunal to independently and impartially

determine whether a fair assessment of the VS candidates was conducted during the selection process.

144. In *Sisler*, Decision No. 491 [2014], para. 87, the Tribunal stressed:

The importance of transparency in the relationship between the Bank and its staff cannot be overstated given that the haphazard disclosure of information can result in prejudice to staff. The Bank is required, by virtue of Staff Principle 2.1, to follow proper process in its relations with staff members and such a process includes transparency.

145. In *Iqbal* [2013], where a lack of documentation of the assessment of candidates was found to be a procedural irregularity, the Tribunal ordered that the applicant be awarded “compensation in the amount of seven months’ salary net of taxes for the irregularities in the selection process” and that the Bank pay the applicant’s legal fees and costs.

146. Likewise, in *ET*, Decision No. 592 [2018], the applicant challenged his non-selection for certain positions. The Bank was ordered to pay the applicant compensation in the amount of one year’s salary for the Bank’s lack of transparency in the selection processes.

147. In *CK*, Decision No. 498 [2014], para. 101, the Tribunal explained, “In assessing compensation the Tribunal considers the gravity of the irregularity, the impact it has had on an applicant and all other relevant circumstances in the particular case.”

148. The Tribunal is cognizant that the applicants in *Iqbal* [2013] and *ET* [2018] were contesting non-selection decisions with respect to new appointments, whereas, here, the Applicant is contesting the non-selection for VS.

149. Nevertheless, the Tribunal finds the gravity of the irregularities to be comparable. In *Iqbal* [2013], the applicant was not facing a loss of employment following the non-selection; rather, the applicant maintained her position and contested the selection decision to a position that would have been a promotion. Likewise, the applicant in *ET* [2018] sought several new positions. The

Tribunal noted in both judgments, citing *Riddell*, Decision No. 255 [2001], para. 23, that “no staff member has a right to be selected to a particular position.”

150. Similarly, the Applicant in the present case was not entitled to VS, and he suffered no grave consequence of involuntary separation. Yet, in accordance with Principle 2.1 of the Principles of Staff Employment, and as the Tribunal found in *Iqbal* [2013] and *ET* [2018], procedural irregularities warrant compensation.

151. 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.” Here, the Applicant was awarded the amount of one pay cycle, or the equivalent of two weeks’ salary, as a result of the IFC’s acceptance of the PRS Panel’s recommendation. The Tribunal observes that this amount was paid to the Applicant on 17 December 2020. Accordingly, the Tribunal considers that the award received by the Applicant will be considered in the quantum of compensation.

#### DECISION

- (1) The IFC shall pay compensation to the Applicant in an amount of six months’ salary net of taxes based on the last salary drawn by the Applicant, for the procedural irregularities in the VS selection process, less the amount already paid to the Applicant resulting from the PRS process;
- (2) The IFC shall pay the Applicant’s legal fees and costs in the amount of £8,591.25; and
- (3) All other claims are dismissed.

/S/ Andrew Burgess  
Andrew Burgess  
President

/S/ Zakir Hafez  
Zakir Hafez  
Executive Secretary

At Washington, D.C.,\* 8 November 2021

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\* 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.