World Bank Administrative Tribunal

2023

Decision No. 699

HF, HG, and HH,
Applicants

v.

International Finance Corporation,
Respondent

(Preliminary Objection)

World Bank Administrative Tribunal
Office of the Executive Secretary

HF, HG, and HH,
Applicants

v.

International Finance Corporation,
Respondent

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

2. The Applications were received on 12 May 2023 and 13 May 2023. The Applicants were represented by Ryan E. Griffin of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by David Sullivan, Deputy General Counsel (Institutional Affairs), Legal Vice Presidency. The Applicants' requests for anonymity were granted on 26 October 2023.

3. The Applicants challenge the

> decision communicated to [the] Applicants and other United Kingdom nationals by [the] Manager, Treasury Client Solutions, IFC, on February 7, 2022, stating that "after extensive consultations with relevant units across the WBG [World Bank Group], including the IBRD [International Bank for Reconstruction and Development] compensation unit, Legal, Tax office, and others," "all UK nationals and UK permanent resident staff are liable for their share of the NIC [National Insurance Contribution] and reimbursement on past and current NIC obligations is not possible."

4. On 10 July 2023, the IFC submitted preliminary objections. This judgment addresses the IFC's preliminary objections.

FACTUAL BACKGROUND

5. The Applicants are or were IFC staff members based in the London office and were hired subject to local recruitment. At the time of the contested decisions, Applicants HF, HG, and HH

held the positions of Principal Investment Officer, Grade Level GH; Senior Investment Officer, Grade Level GG2; and Finance Officer, Grade Level GF2, respectively. All the Applicants are U.K. nationals.

6. Applicant HH joined the IFC in February 2003 and became a U.K. national in March 2009. Her Letter of Appointment (LOA) included the following: "Your initial salary will be at a rate of […] net per annum. If you are liable for the payment of national income taxes on the remuneration you receive from the International Finance Corporation, you will receive a tax allowance from the World Bank Group."

7. Applicant HG joined the IFC in June 2000 and became a locally recruited staff in the London office in May 2005. Applicant HG became a U.K. national in April 2008. Her LOA included the following: "Your initial salary will be at the rate of […] per annum. If you are liable for the payment of national income taxes on the remuneration you receive from IFC, you will receive a tax allowance as determined by the Executive Directors."

8. Applicant HF joined the IFC in May 2010 as a U.K. national. His LOA included the following: "Your initial salary will be at the rate of […]. If you are liable for payment of national income taxes on the remuneration you receive from the World Bank Group, you will receive a tax allowance as determined by the Executive Directors of the World Bank Group."

The WBG's tax reimbursement framework

9. Generally, WBG staff members are compensated on a net of tax basis. Where income taxes are paid by a staff member, reimbursement is by means of a tax allowance. However, a distinction is drawn between a staff member's liability for income taxes which are reimbursed by the WBG and a staff member's liability for social security contributions which, save in very specific circumstances, are not. Under Staff Rule 6.04, Tax Allowance, paragraph 2.01, as in force at the relevant time,

> [a] staff member is required by the Bank Group to pay timely all income and social security taxes due from time to time under law on Bank Group compensation,

> including payments of estimated taxes. The payment of such taxes is a condition of the staff member's receiving a payment of tax allowance or social security tax reimbursement.

10. As explained by the IFC and as reflected in Staff Rule 6.04, paragraph 7.01, the IFC

> will only reimburse mandatory social security contributions paid by staff whose compensation is paid net of tax to the extent that the social security contributions exceed the amount that employees in the private sector would pay on the same amount of compensation.

The IFC states that this policy in respect of social security contributions is "a longstanding policy and practice applied by the WBG throughout the years and this provision is applied consistently by the WBG across all countries where staff members are subject to mandatory social security contributions."

U.K. National Insurance Contributions

11. Employees, employers, and self-employed individuals in the U.K. are subject to mandatory NICs, which are assessed on the basis of income. Revenue from NICs funds the U.K. National Insurance system, and a portion of it helps to finance the National Health Service (NHS).

12. The U.K. National Insurance system provides for several benefits to those who contribute, including a State Pension, a Jobseeker's Allowance, an Employment and Support Allowance, a Maternity Allowance, and a Bereavement Support Payment. The benefits provided by this system are largely contribution-based. A designated portion of NICs is used to help finance the NHS. The NHS provides healthcare services to all U.K. citizens irrespective of contributions made.

WBG staff members' liability for U.K. National Insurance Contributions

13. The Applicants contend that prior to 2010 there was a lack of clarity within the WBG and Her (now His) Majesty's Revenue and Customs (HMRC), the U.K. tax authority, as to staff members' NIC obligations. In this regard, they refer to an email of 14 April 2010 later shared with Applicant HH, wherein the WBG's Special Representative for Europe explained the background

of the NIC issue and noted that there was "a lack of clarity on the part of staff as to what obligations they have regarding the payment of [NICs]."

14. On 16 June 2010, Applicants HH and HG each received letters from HMRC seeking confirmation of their annual salary from the WBG for the years "2004/05 to 2008/09," for Applicant HH, and "2004/05 to 2009/10," for Applicant HG, for the purpose of reviewing their NIC liability. The letters stated, "As you are regarded as a locally engaged member of staff of the World Bank, the earnings you receive are liable to Class 1 National Insurance Contributions." The letters concluded with the warning that it was important for the Applicants to keep their NIC accounts completely up to date as any failure to do so could affect their "entitlement to state pension and any other contributory related benefits."

15. On 21 June 2010, Applicants HH and HG received largely identical emails from the WBG Tax Office, which noted that they had been requested to provide information on their WBG salary to the U.K. tax authority for the Class 1 National Insurance. The email confirmed that "Bank Group UK national staff members residing in UK are required to pay Class 1 NIC." The emails also stated:

> As provided under Staff Rule 6.04 "Tax Allowance", section 7.01, the Bank will partially reimburse staff members who are paid on a net-of-tax basis, the social security contributions imposed on them in a compulsory fashion. The reimbursement is calculated as the difference between the social security that staff are required to pay because they are employed by an international organization and the amount that they would be required to pay as employees of private organizations.

The emails further advised that, according to a tax specialist,

> the staff member's contribution payable under this category (Class 1 NIC) is equivalent to the contribution that the individual would have paid had he/she been employed by a private employer. As a result, the UK tax allowance does not include any reimbursement for the NIC because the class 1 NIC is the same as the amount that staff would be required to pay as employees of private organizations.

Finally, the emails noted that it was the WBG's view that non-U.K. nationals were not subject to taxation, including NICs, on their WBG income and the WBG's Tax Office offered to issue a letter to the Applicants explaining their exemption "while not a UK national."

16. On 22 June 2010, Applicant HH replied to the email of 21 June to request the offered letter explaining the U.K. tax exemption as she "only became a British citizen on March 16, 2009." On 30 June 2010, Applicant HG also replied to the email of 21 June and requested the letter "as soon as possible as we need to move forward on [NIC] payment (and need the letter to ensure that we do not get asked to pay [NIC] before the time we got the British Nationality)."

17. On 5 July 2011, Applicants HH and HG emailed the WBG's Special Representative for Europe saying that they had received letters from HMRC requesting payment of NICs from the day they started working, "regardless of [their] respective nationalities." The Applicants further stated that they had taken the initiative of requesting clarity on the NIC issue from the WBG Tax Office and had been "asked to pay Class 1 contributions." The Tax Office had further advised them "that [NIC] payments were not applicable on [their] salaries before the time [they] became British."

18. The email continued that HMRC had reverted, stating that "all Bank Group employees, both British and non-British, are liable to pay Class 1 [NICs] and [that HMRC] sent [them] a schedule of [their] expected contributions for the last 6 years." Applicants HH and HG requested clarity, specifically, on "[c]onfirmation that the [WBG] will reimburse [its] employees for [NICs] before they became British" and on whether the WBG would consider a salary adjustment for staff in the London office.

19. On 12 July 2011, in separate emails to Applicants HH and HG, the WBG Tax Office advised:

> Based on Article VI, section 9b, of the IFC's Articles of Agreement, the World Bank Group believes that staff members who are not UK nationals are immune from the payment of the employees' social security contribution. From the correspondence you sent to us, it appears however that the UK authorities have taken a different view. Considering the consequences that this misunderstanding

> has created in your particular case, the World Bank Group Tax Office is ready to provide you with the necessary funds (the "Funding") in order to pay the Class 1 NIC assessed for the years in which you were not a UK national. If you decide to accept the Funding, please indicate to the UK authorities that the payment of the Class 1 NIC assessed for the years in which you were not a UK national, is made "under protest", and that you will seek reimbursement of any undue payment once the position of the UK authorities vis-a-vis the Class 1 NIC is clarified.

20. In December 2011, Applicants HH and HG began making NICs, both retroactively and continuing forward to the present. Using funds provided by the WBG, they paid the retroactive portions of their NICs which corresponded to the years before they became U.K. nationals and, as advised by the WBG Tax Office, they did so "under protest."

21. On 20 January 2012, Applicant HF received an email from the WBG Tax Office advising him that staff members who were U.K. nationals and residents were required to pay Class 1 NICs. The email stated that, according to the version of Staff Rule 6.04, paragraph 7.01, in force at the relevant time, the WBG would partially reimburse staff members for their social security contributions and that the reimbursement, if any, "[would be] calculated as the difference between the social security that staff are required to pay because they are employed by an international organization and the amount that they would be required to pay as an employee of private organizations." The email further stated:

> [T]he staff member's contribution payable under this category (Class 1 NIC) is equivalent to the contribution that the individual would have paid had he/she been employed by a private employer. As a result, the UK tax allowance does not include any reimbursement for the NIC because [C]lass 1 NIC is the same as the amount that staff would be required to pay as employees of private organizations.

22. Applicant HF began making NICs around this time and continued to do so without receiving any allowance or reimbursement for NICs from the WBG.

23. On 24 June 2015, the IFC Western Europe Director emailed staff members in the London office regarding discussions held with HMRC with respect to the NIC. This email stated, in part:

> The HMRC confirmed that there are six categories into which employees of the World Bank Group (WBG) may fall, with the following broad rules on NIC liability:
>
> 1. Locally recruited employees are liable to Class 1 National Insurance (Primary) Contributions (NIC) in the UK.
>
> 2. UK nationals ordinarily resident in the UK (whether locally recruited or recruited outside the UK) are liable to NIC in the UK.
>
> […]
>
> As we mentioned in the previous email, WBG is seeking an amendment to the IBRD and IFC statutory orders, but such an amendment will take some time to obtain and we do not know yet of the Government's official position on our request for an amendment. Meanwhile, we suggest that staff reach out to the HMRC Embassy Unit representatives and discuss with them their individual cases. As previously advised, because the WBG institutions are immune from contributing the employer share of the NIC, and the HMRC only assesses the employee share of the NIC on WBG staff members, the NIC payment made by the staff of the WBG is not subject to the reimbursement policy of Staff Rule 6.04, Tax Allowance, par. 7.01.

24. On 13 April 2016, the IFC Western Europe Director sent another email to all U.K.-based staff to inform them of discussions undertaken by management regarding the NIC issue. The email stated:

> In summary WBG Senior Management has decided that:
>
> UK national staff, as well as UK permanent residents (as defined below) will be entitled to financial assistance through emergency loans to cover their past NIC liability through April 5, 2017.
>
> For the sake of clarity and at risk of repeating ourselves, we take this opportunity to once again remind all UK national and permanent resident staff that they are deemed liable for the employee share of the NIC and are responsible for paying it directly to the HMRC.
>
> Regarding non-UK national staff, as you may know, we are actively discussing with HMRC and other UK government entities their position that non-UK national staff are liable for the NIC. We disagree with this position and are actively working on addressing it, though it will no doubt be a lengthy process and the outcome remains uncertain. Meanwhile, to the extent non-UK national staff are assessed the NIC,

> over the WBG's protest, the special NIC allowance has been put into place, under the terms outlined below:
>
> All non-UK national/non-permanent resident staff who were hired to work for IFC or IBRD outside of London and who have relocated on either Indefinite, Localization+, or purely local assignments (i.e., with no mobility support) will be treated in similar fashion to non-UK national staff relocating on expatriate/ temporary assignments. It was also agreed that non-UK national/ non-permanent resident telecommuters and local appointees who resided in the UK prior to being hired to the London office would be time-limited in their eligibility for the NIC allowance to tax years ending on or before April 5, 2017.
>
> In all circumstances, the support of special allowance would be for a maximum of ten years of qualifying service for purposes of NIC accrual. If a staff member has accrued ten years of NIC qualifying service in the UK, with WBG or other employer, he or she will independently qualify for the state pension, and therefore, we believe further assistance from the WBG is unnecessary. This vesting of pension rights is in line with management's rationale for not providing the special allowance to the UK national staff and UK permanent residents. We hope that the IBRD and IFC Statutory Orders are amended in the meantime, and therefore, none of our staff will come against the ten-year limit.

25. On 25 November 2016, the IFC Western Europe Director sent another email to U.K.-based staff regarding NIC developments, stating:

> As you all know, WBG is in discussions with the HMRC and DFID [the U.K.'s Department for International Development] regarding amending our statutory orders to clarify non-UK national immunity from NIC. We have also raised with HMRC the issue of past assessments of NIC against non-UK nationals. Until such time as these issues are resolved, however, all staff who are deemed liable by HMRC for contributing into the NIC are expected do so, to avoid penalties and possible enforcement actions by HMRC.

The email also provided information for staff to calculate their NIC liability and referred staff members to resources for internal support.

26. On 31 March 2017, the IFC Regional Director for Western Europe emailed staff members in the London office informing them:

> [A]fter extensive discussions with DFID on the payment of NIC by IFC/WB staff stationed in the UK, UK Social Security Regulations have been amended to expressly exempt IFC staff who are exempt from payment of income tax and who

> are otherwise members of a pension scheme (i.e., SRP [Staff Retirement Plan]) from payment of NIC. The relevant amendment (section 5) is enclosed.
>
> This is great news - there are a few clarifications:
>
> (I) The exemption does not cover UK national staff who pay UK income tax. Such staff will continue to be liable for the employee share of NIC.
>
> (II) This amendment is NOT retrospective. It comes into force April 6th 2017, which coincides with the next UK tax year. All staff continue to be liable for NIC up to April 5th 2017.
>
> (III) Although the amendment expressly addresses IFC staff, we have been assured that this amendment also covers IBRD staff, who will be treated like IFC staff for purposes of NIC liability.

27. The Applicants state that, following the 2017 amendments, they "were optimistic that WBG would likewise find a way to help them in easing 'the burden of NIC payments' that continued to fall on UK nationals who remained subject to Class 1 NICs despite having not been informed of this liability at their times of hire."

28. In December 2019, the Applicants and other U.K. national staff members met with Human Resources (HR) representatives in the London office and asked that the

> WBG rectify the unfairness that had arisen between UK national and non-nationals in the London office as a result of the 2017 amendments. They also pointed out the disparity between UK nationals in the UK and Headquarters-based staff subject to US taxation resulting from the UK National Insurance scheme being only quasi-social security in nature, with a substantial portion of NICs going to fund non-social security programs like the National Health Service.

29. According to the Applicants, the HR representatives "agreed to look into these issues and to consult with relevant entities within WBG about whether anything further could be done for UK nationals."

30. On 20 May 2021, the Chair of the Staff Association emailed HR, having been approached "by a group of 13 WBG UK national staff in London, about a long-standing and complicated compensation issue on the requirement to pay their [NICs] from their own pockets, instead of it

being considered as a 'tax' that's covered by the Bank's tax reimbursement policy." In the email, the Chair stated that "[t]he staff, especially those hired long ago said they were not aware when they were hired that they would have to pay National Insurance payments out of their net salaries." The subsequent obligation to pay NICs, he submitted, was "grossly inequitable as compared to staff in other countries." The email ended by stating, "We would like to meet soon to discuss ways to compensate the staff to address these concerns."

31. The IFC states that an HR Business Partner, "who was new in the London office and had also received similar emails from the UK staff, discussed the matter internally with HR, Legal, and the Tax Office, to first, inform herself on the specifics of the NIC, and to prepare a response to the request from the Staff Association." In email correspondence, the new HR Business Partner indicated that it had been confirmed to her that "all salary scales outside DC HQ are inclusive of social security tax" and that, "[s]ince this has already been communicated to UK Office, [it was] unclear why this issue is being raised again." The new HR Business Partner was informed by email that this was not an issue that the WBG would "reopen" because

> LEGIA [the Institutional Administration Practice Group of the Legal Vice Presidency] had worked on it for two years to obtain a new [agreement] with the UK government to exempt non-UK nationals/PR [permanent residents] on NICs. The UK nationals and PRs must pay for NICs and this has been clearly communicated […]. […] If they do not want to comply, that's their personal decision and [they] will be responsible for any applicable fines imposed by HMRC.
>
> Adjustment to salaries should not be based on the fact that they pay NICs, it should be based on their job responsibilities and performance.
>
> […]
>
> I would caution not to compare between countries as you will be comparing apples to oranges. Benefits funded by social security charges vary greatly in each country due to the benefits provided.

32. Following these email exchanges, HR prepared a one-page briefing note entitled "U.K. National Insurance Contributions Briefing" which provided an "explanation on the treatment of the UK NIC as per Staff Rules 6.04." On 3 February 2022, the new HR Business Partner shared the briefing note with the Manager, Treasury Client Solutions, IFC, stating:

> You, staff in London office and the Staff Association [have] reached out to HR to raise concerns about the UK's National Insurance Contribution scheme and its implications for you.
>
> HR consulted with our IBRD compensation team, Legal, our Tax Office and others within HR.
>
> The outcome of such consultation is summarized in the attached note.

33. On 7 February 2022, the Manager, Treasury Client Solutions, IFC, emailed the Applicants and other U.K. staff stating, "Please note that HR, after extensive consultations with relevant units across the WBG" regarding the NIC, has "now shared the outcome of these consultations which is attached." The briefing note, which was attached to the email, provided in part:

> In April 2017, the U.K. Treasury amended its National Insurance Contributions (NIC) Regulations to prospectively exempt from NIC those IFC staff members who are exempt from UK income tax and who participate in the WB Staff Retirement Plan. This means that all UK nationals and UK permanent resident staff are liable for their share of the NIC and reimbursement on past and current NIC obligations is not possible.
>
> Notwithstanding the regulations which identify only IFC, DFID communicated – informally – that Treasury would grant the same treatment to IBRD staff as it would to IFC staff.
>
> NICs in the UK fund several social security programs such as the national healthcare (NHS), the state pension (basic, additional, and new), unemployment benefits, maternity benefits, etc. Both employer and employee are liable for these contributions. Staff who are liable for NIC are required to pay the employee share of the contributions, about 12% of their pay up to the applicable threshold. WBG is exempt from NICs and staff are not liable to pay the employer share.
>
> Staff Rule 6.04 governs the reimbursement of Social Security taxes and specifies that WBG will only reimburse mandatory Social Security taxes paid by staff in excess of the amount that employees of nonexempt employers are required to pay. In the case of U.S. citizens, they are required to pay both the employer and employee share of social security taxes, and they are reimbursed only the employer's share.
>
> The rationale for not reimbursing the employee's share is based on the principles that staff are, or may become, eligible for future benefits from these programs, and, after any partial reimbursement, they pay the same premium for the future Social Security benefits as individuals who are working for non-exempt employers in the

> local market. This provision is applied consistently in the WBG across all markets where staff are subject to mandatory Social Security taxes.

34. On or around 2 June 2022, each of the Applicants submitted substantially similar Requests for Review with Peer Review Services (PRS) "challenging the policy determination articulated in [the] February 7, 2022, email and attached Briefing."

35. On 11 November 2022, the Peer Review Chair dismissed each Applicant's Request for Review. In materially identical decisions, the Peer Review Chair found that the Applicants' claims were untimely as they arose when each Applicant first received written notice from the WBG Tax Office (on 21 June 2010 for Applicants HH and HG, and on 20 January 2012 for Applicant HF) that their NICs would not be reimbursed. The Peer Review Chair noted that "[the Manager's] email of February 7, 2022, did not constitute a separate administrative decision," but "[r]ather, it reconfirmed the previous administrative decision[s]."

The present Applications

36. Following an extension granted by the Tribunal, Applicants HH and HG submitted their Applications to the Tribunal on 12 May 2023. An Application was submitted on behalf of Applicant HF on 13 May 2023 in accordance with Article II(3) of the Statute of the Tribunal.

37. Upon the request by the Applicants and with no objection by the IFC, on 6 June 2023, the Tribunal decided to consolidate the Applications.

38. The Applicants challenge the

> decision communicated to [the] Applicants and other United Kingdom nationals by [the] Manager, Treasury Client Solutions, IFC, on February 7, 2022, stating that "after extensive consultations with relevant units across the WBG, including the IBRD compensation unit, Legal, Tax office, and others," "all UK nationals and UK permanent resident staff are liable for their share of the NIC and reimbursement on past and current NIC obligations is not possible."

39. The Applicants request the following relief:

(i) Prospective (from February 7, 2022, the date on which [the] Applicants received notice of the decision they timely challenge herein) adjustment to tax allowances to include the portion of NICs reasonably characterized as an income tax rather than a non-reimbursable social security tax;

(ii) Retroactive adjustment to tax allowances, including interest as appropriate, on the same basis and payment of all amounts improperly excluded as the result of being misclassified as a social security tax;

(iii) Prospective (from February 7, 2022, the date on which [the] Applicants received notice of the decision they timely challenge herein) salary adjustments to fairly account for the effect on current salary of [the] IFC's failure to notify [the] Applicants of future NIC liability at the time of hire; and

(iv) Retroactive salary adjustments, including interest as appropriate, on the same basis.

The Applicants further request, "[i]n addition to any amounts awarded appurtenant to the Specific Performance requested […], an amount deemed by the Tribunal to be just and reasonable compensation for the unfair and discriminatory pay practices to which the Applicants were subjected."

40. The Applicants claim legal fees and costs in the amount of $30,370.00.

41. On 10 July 2023, the IFC submitted preliminary objections and requested that the Applications be dismissed.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The IFC's Main Contentions

The Applicants' claims are untimely, the Applicants failed to exhaust internal remedies, and the Applicants' claims are not cognizable before the Tribunal

42. The IFC contends that the *dies a quo* for the Applicants' claims began to run in 2010 for Applicants HH and HG and 2012 for Applicant HF. The IFC notes that, "by their own admission," the Applicants acknowledge that they were made "explicitly aware" as early as 21 June 2010 (or

20 January 2012 for Applicant HF) through emails sent by the WBG Tax Office that U.K. national staff members were required to pay Class 1 NICs. The IFC submits that these emails specifically refer to the relevant Staff Rule and state without ambiguity that the U.K. tax allowance did not include any reimbursement for NICs.

43. The IFC avers that the Applicants "cannot credibly claim that they were not aware of [the IFC's] position before receiving the February 7, 2022, email from the Manager." The IFC notes that, "[o]f crucial importance is the fact that, in all of its communications with staff members, the WBG tax office and senior management were clear that the only aspect of NIC liability they were challenging the HMRC on was its application to ***non-UK national staff***." (Emphasis in original.) The IFC states that, "since 2010 (or 2012, for Applicant [HF]), [the] Applicants received at least four (4) additional confirmations of the NIC Decision, each as explicitly clear as the first," referencing the emails of 24 June 2015, 13 April 2016, 25 November 2016, and 31 March 2017. In this regard, the IFC stresses that

> every communication [the] Applicants received from the WBG's tax office and senior management consistently promulgated the same position—namely, (1) that the WBG's UK tax allowance does not include any reimbursement for the NIC because Class 1 NIC is the same amount that staff would be required to pay as employees of private sector organizations (non-exempt employers); and (2) that (only) non-UK national staff are not liable for the NIC.

44. In the IFC's view, the 2017 amendments are immaterial to the determination of the *dies a quo* for the Applicants' claims because there "were no changes in the UK NIC regulation applicable to UK nationals residing in the UK." Moreover, the IFC submits that, "[e]ven if the limitation period for [the] Applicants' claims could be considered to have begun to run in 2017, the Applications would still [be] untimely since [the] Applicants only submitted their claims five (5) years after the fact and well beyond the 120-day limitation period."

45. The IFC further submits that the Applicants' "theory of 'continuing violation' and 'forward-looking jurisdiction' is not supported by any authority and contradicted by the facts of this case." The IFC cites Tribunal precedent as well as jurisprudence of the Administrative Tribunal of the International Labour Organization (ILOAT) in contending that neither tribunal has

recognized a theory of "continuing violation" or "forward-looking jurisdiction" and that both have "issued decisions resisting to give effect to this theory." The IFC submits that the "recognition of such a theory would impact the stability of the parties' position in law and, consequently, provide instability to the legal system."

46. In the view of the IFC, a

> "rolling" prescriptive period cannot apply at bar, since the quantum of [the] Applicants' quarterly tax allowances cannot themselves constitute the disputed employment matter. This is fundamentally because a dispute *vis-à-vis* the quantum of [the] Applicants' quarterly tax allowances is predicated upon disputing the NIC Decision *per se*. In other words, if the NIC Decision is defensible, then [the] Applicants cannot possibly dispute the quantum of their quarterly tax allowances.

To the IFC, "it is only the NIC Decision that can constitute a disputed employment matter and thus give rise to a limitation period." Thus, a "'rolling' prescriptive period of any sort—let alone one running from the date of each quarterly tax allowance—has no application at bar."

47. The IFC next contends that the Applicants' claims are further inadmissible as the Applicants have not exhausted internal remedies. The IFC submits that a staff member who wishes to submit a Request for Review must submit such Request "within 120 calendar days of receiving notice of the disputed employment matter." In the IFC's view, while the Applicants' claims are within the subject matter jurisdiction of PRS, the Applicants failed to submit their Requests for Review within 120 days of receiving the requisite notice. The IFC avers that, per the Tribunal's jurisprudence, failure to observe time limits for the submission of an internal complaint or appeal constitutes a failure to exhaust internal remedies.

48. The IFC finally submits that the Applicants

> do not contest a *violation* of a policy, a *wrongful application* of a policy, or even a violation of Staff Rule 6.04. Instead, what [the] Applicants challenge is the <u>policy itself</u> […] as reflected in Staff Rule 6.04, para 7.01—of classifying NICs as a social security contribution and, thus, ineligible for a tax allowance. (Emphasis in original.)

49. In this respect, the IFC submits that it is "well-established case law that the Tribunal's role in the review of Bank policies is very much restricted." To the IFC, "the Tribunal's jurisprudence makes manifest that the Tribunal has no authority to make or review policy established by the WBG or to supersede such policy and substitute it with its own convictions." It is therefore the IFC's position that the Applicants' claims, as challenges to a policy, are not cognizable before the Tribunal.

The Applicants' Response

The Applicants' claims are timely, the Applicants timely sought PRS review, and the Applicants' claims fall under the Tribunal's subject matter jurisdiction

50. The Applicants contend that they timely sought review of the 7 February 2022 decision by the Manager, Treasury Client Solutions, IFC, denying reimbursement for NIC obligations. To the Applicants, the *dies a quo* for their claims could not be in 2010 or 2012 because the 7 February 2022 communication "clearly" indicated that "a new decision" was taken by IFC and/or WBG management. Further, the Applicants submit that in 2010 and 2012 "there was no certainty within WBG as to either what its policy was or the state of UK tax regulations affecting that policy." To the Applicants, the "pertinent communications to staff were far from unequivocal; rather, they repeatedly informed staff that discussions with UK tax authorities were ongoing and strongly suggested that, as a result, WBG's internal policies remained in flux." In the Applicants' view, then, the IFC's "assertion that a sufficiently final and definite policy existed prior to [2017] for purposes of triggering 'notice' under Staff Rule 9.03, paragraph 8.02, is simply implausible."

51. The Applicants next submit that the IFC's 2010/2012 *dies a quo* theory

> ignores that the relevant factual landscape changed markedly in March 2017 when amendments to UK tax regulations both changed the NIC liability rules applicable to non-UK nationals and clearly indicated, by implication, that no further changes would be forthcoming with respect to NIC liability for UK taxpayers.

Thus, in the Applicants' view,

> even if there had been a final, definite decision on the latter issue prior to 2017—as opposed to the contingent state of affairs that actually existed—[the] Applicants

contend that a new decision was required to address the changed circumstances that arose from the 2017 amendments.

52. In this respect, the Applicants submit that they are challenging management's failure "to act to address compensation disparities between UK nationals and other staff" which arose from the 2017 amendments. The Applicants aver that management's inaction began in 2017 and "continued after December 2019 despite HR's assurances that the issues raised by UK staff would be considered through appropriate channels." To the Applicants, this managerial inaction became actionable for purposes of PRS review, and ultimately Tribunal review, "only when it became reasonably clear that it was final," which, the Applicants submit, was when they received the 7 February 2022 communication.

53. The Applicants next contend, in the alternative, that, even if their claims arose prior to 7 February 2022, the Tribunal "should nevertheless recognize jurisdiction to address ongoing violations of applicable compensation rules on a forward-looking basis." The Applicants submit that, "in the specific context of a compensation-related rules violation that repeats periodically and indefinitely, the limitations period should be understood to play a remedy-limiting function with respect to past violations rather than foreclosing jurisdiction over 'new' violations going forward." The Applicants aver that such an approach is a well-established feature in other legal regimes such as the statutory overtime and wage discrimination frameworks in the United States.

54. The Applicants next submit that the IFC's contention with respect to exhaustion of internal remedies is "merely the [IFC's] timeliness argument, repackaged." The Applicants contend that the Tribunal has the authority to review PRS's timeliness findings *de novo*. Further, the Applicants submit that, "where the Tribunal concludes a PRS filing was timely, […] it may proceed to adjudicate the merits *de novo* regardless of whether PRS erroneously dismissed without addressing the substance of the case." In the Applicants' view, they satisfied the Tribunal's exhaustion requirement by going to PRS and they have already contended that they did so in a timely manner.

55. Finally, the Applicants contend that the Tribunal has subject matter jurisdiction over their claims because they are challenging the "IFC's application of WBG's tax allowance policy to the NIC liabilities to which they are subject as UK nationals working in the UK as inconsistent with

Staff Rule 6.04." The Applicants submit that they are not disputing the validity of the WBG's tax allowance framework or questioning the WBG's discretion to adopt it; rather, they are challenging how the WBG has applied the tax allowance policy to their circumstances with respect to NIC reimbursement. The Applicants contend that it is within the Tribunal's jurisdiction to determine whether this application violates the requirements of the tax allowance policy as reflected in the Staff Rules.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

56. Given the relatively complex nature of the underlying facts, the Tribunal considers it appropriate to begin its analysis by providing an overview of certain settled issues. The WBG's compensation scheme is such that, generally, WBG staff members receive a salary net of taxes. Staff members remain liable to pay their respective national income and social security taxes, but they receive reimbursement for the former from the WBG in the form of a "tax allowance." However, with respect to social security tax payments, staff members are themselves liable for payment of the employee's contribution thereto and the WBG will reimburse them only to the extent that the social security payments exceed the amount that a private sector employee would pay on the same salary. The WBG explains that

> [t]he rationale for not reimbursing the employee's share [of social security tax] is based on the principles that staff are, or may become, eligible for future benefits from these programs, and, after any partial reimbursement, they pay the same premium for the future Social Security benefits as individuals who are working for non-exempt employers in the local market.

57. In the U.K., NICs are deemed to be social security payments rather than income tax. Further, U.K. national staff members are liable only for the employee share of NICs, meaning they pay the same amount in NICs as private sector employees. Accordingly, the WBG does not reimburse U.K. nationals for their payment of NICs. As with other social security schemes, the WBG's rationale is that those who pay NICs are entitled to the benefits accruing on foot of such payments. In this respect, the Tribunal observes that how a state chooses to distribute the revenue it receives from its respective social security receipts is beyond the control of the WBG.

58. At present, non-U.K. nationals are exempt from payment of NICs. Prior to 2017, there was some incongruence on the respective positions adopted by the WBG and the HMRC on this point. The resolution of this issue in respect of non-U.K. nationals is the only change of policy which occurred since 2010. In this respect, the Tribunal notes that two of the three Applicants (HH and HG) were charged NICs at a time when they were non-U.K. nationals and, in accordance with the WBG's position, were reimbursed by the WBG for such payments. As Applicant HF was a U.K. national at all times of his employment, this aspect of the case does not apply to him. Thus, at all times relevant to the issues in this case, the three Applicants were U.K. nationals residing in the U.K and thus were liable to pay NICs.

WHETHER THE APPLICATIONS ARE TIMELY

59. Article II(2) of the Tribunal's Statute sets out the requirements for admissibility of applications to the Tribunal. It states:

> No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:
>
> (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and
>
> (ii) the application is filed within one hundred and twenty days after the latest of the following:
>
> (a) the occurrence of the event giving rise to the application;
>
> (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or
>
> (c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.

60. In its jurisprudence, the Tribunal has emphasized the importance of the time limits prescribed by Article II(2)(ii). In *Agerschou*, Decision No. 114 [1992], para. 42, the Tribunal explained that the prescribed time limits are "important for a smooth functioning of both the Bank

and the Tribunal." *See also Tanner*, Decision No. 478 [2013], para. 45. The Tribunal has also observed that the "long-delayed resolution of staff claims could be seriously complicated by the absence of important witnesses or documents, and would in any event result in instability and unpredictability in the ongoing employment relationships between staff members and the Bank." *Mitra*, Decision No. 230 [2000], para. 11. *See also GU (Preliminary Objection)*, Decision No. 675 [2022], para. 20; *GT (Preliminary Objection)*, Decision No. 674 [2022], para. 26; *GL (Preliminary Objection)*, Decision No. 666 [2021], para. 43.

61. Pursuant to Article II of the Tribunal's Statute, the Applicants had 120 days from the *dies a quo* to file their Applications with the Tribunal.

62. The Applicants contend that the *dies a quo* for their claims is not a date in 2010 or 2012 because, in their view, the 7 February 2022 communication "clearly" indicated that a new decision was taken by IFC and/or WBG management. Further, the Applicants submit that in 2010 and 2012 "there was no certainty within WBG as to either what its policy was or the state of UK tax regulations affecting that policy," and, in this regard, they refer to the 14 April 2010 email from the WBG's Special Representative for Europe.

63. The record shows that on 21 June 2010, a few months after the 14 April 2010 email on which the Applicants rely, the WBG Tax Office emailed Applicants HH and HG to confirm that, as U.K. nationals residing in the U.K., they were liable for NICs and that the WBG would not provide any reimbursement for their payments in this regard. These emails also confirmed the WBG's position that non-U.K. nationals were not liable for NICs. Accordingly, in 2011 both Applicants HH and HG were reimbursed by the WBG for the NICs they had paid for the years prior to their becoming U.K. nationals. With respect to Applicant HF, the record shows that the WBG Tax Office emailed him on 20 January 2012 to confirm that, as he was a U.K. national, he was liable for NICs and that the WBG would not provide any reimbursement for the payment thereof. Following these respective email confirmations, the Applicants made their NICs in accordance with U.K. national requirements and WBG policy and practice.

64. The Tribunal observes that all communications to the Applicants between June 2010 and 2017 reflect a consistent WBG position with respect to U.K. nationals and their liability for NICs. This position is evidenced in the emails of 21 June 2010, 20 January 2012, 24 June 2015, and 13 April 2016, each of which confirmed that the Applicants, as U.K. nationals residing in the U.K., were responsible for the payment of NICs. The only caveat ever mentioned in the correspondence was that the WBG was working with the HMRC to resolve their differing positions regarding the liability of *non*-U.K. nationals for the payment of NICs. Nowhere in these communications did the WBG suggest that it was seeking or would seek any amendments to U.K. law with respect to the liability of U.K. nationals residing in the U.K. for the payment of NICs, nor was there any suggestion or intimation that the Applicants' liability in this regard was other than final.

65. In 2017, the U.K. amended its Social Security Regulations and the issue of the exemption from liability of *non*-U.K. nationals for the payment of NICs was resolved. These amendments did not affect the Applicants' NIC liabilities, and the 31 March 2017 email from the IFC Regional Director for Western Europe to London-based staff members communicating the amendments was clear. It stated in unequivocal terms that "[t]he exemption does not cover UK national staff who pay UK income tax. Such staff will continue to be liable for the employee share of NIC." Thus, there was no change with respect to the Applicants' liability as U.K. nationals residing in the U.K. for the payment of NICs.

66. The Tribunal is satisfied that the record shows that the Applicants were aware as of June 2010 (and January 2012 for Applicant HF) that they were liable, as U.K. nationals residing in the U.K., for the payment of NICs and that the WBG does not provide reimbursement for the discharging of such obligations. It is satisfied that from 21 June 2010 the WBG's position was clear and that there was no lack of clarity concerning the WBG's policy with respect to U.K. nationals residing in the U.K.

67. The Tribunal therefore concludes that the *dies a quo* for the Applicants' claims was the first email from the WBG Tax Office (on 21 June 2010 for Applicants HH and HG, and on 20 January 2012 for Applicant HF) informing them expressly that, as U.K. nationals residing in the U.K., they were liable for the payment of NICs and that there would be no reimbursement from

the WBG in this regard. The Applicants then had 120 days from those respective emails to raise any challenges to the WBG's policy concerning the payment of social security contributions as it applied to them. The Applicants did not do so within that period.

68. Even if the Tribunal were to consider that the 2017 changes in the U.K. regulations constituted a new policy applicable to the Applicants, the Applicants would still be out of time as their challenge came some five years after they were notified of these amendments. The Tribunal recalls its ruling in *Levin*, Decision No. 237 [2000], para. 21, where it held that

> it was the [a]pplicant's obligation to keep himself apprised of his rights and to submit his request for administrative review in good time. […] Having worked at the Bank for more than five years, the [a]pplicant was in a position to know of the time limits for making a request for administrative review. At the very least, he could have made a prompt attempt to assert his rights by contacting the obvious sources within the Bank, such as the Staff Association, the Office of the Ombudsman or the Ethics Office.

69. The Tribunal finds that nothing in the record demonstrates that the Applicants took any action to assert, promptly or in a timely fashion, their rights following the 2017 amendments. In this regard, the Tribunal recalls the Applicants' statement, following the 2017 amendments, to the effect that they "were optimistic that WBG would likewise find a way to help them in easing 'the burden of NIC payments' that continued to fall on UK nationals." Notwithstanding such optimism, however, it was not until December 2019, two years after the 2017 amendments, that the Applicants contend that they met with HR to discuss the alleged "unfairness that has arisen."

70. The Tribunal notes the Applicants' position that they are challenging the inaction by management in responding to the alleged inequities arising from the 2017 amendments which, they say, became final only on 7 February 2022 when they received the briefing note summarizing the WBG's position. The Tribunal is not persuaded that the 7 February 2022 communication constituted a new decision. That the HR Business Partner who was new to the office in London consulted with other relevant units, including the Legal Vice Presidency and Tax Office, for the purpose of informing herself on the specifics of the NIC issue and for preparing a response to staff inquiries, does not prove, as the Applicants contend, that a new administrative decision was taken.

71. Rather, it is clear from the record of her "consultations" that there was no reconsideration of the WBG's position with respect to NIC liability. The prepared briefing note did no more than reaffirm the rationale for not reimbursing the NIC contributions made by staff members who are U.K. nationals residing in the U.K., namely, that such staff are or may become eligible for future benefits and that they pay the same amount as individuals who work in the private sector. The briefing note reiterated the WBG's position that staff members who are U.K. nationals residing in the U.K. are required to pay their NICs—a position that was first communicated to the Applicants in 2010 and 2012.

72. The Applicants contend, in the alternative, that, even if their claims arose prior to 7 February 2022, the Tribunal "should nevertheless recognize jurisdiction to address ongoing violations of applicable compensation rules on a forward-looking basis." They propose that, for "a compensation-related rules violation that repeats periodically and indefinitely, the limitations period should be understood to play a remedy-limiting function with respect to past violations rather than foreclosing jurisdiction over 'new' violations going forward."

73. The Tribunal recalls *Taborga (No. 2)*, Decision No. 324 [2004], para. 22, where it stated:

> [T]here is no room under the Staff Rules or the [Staff Retirement Plan] to argue that a right is of a continuing nature, or so is the breach and the harm done, as the [a]pplicant has argued in the instant dispute. There is a clearly established statute of limitations precisely so as to prevent claims being made indefinitely into the future.

74. While in that case the Tribunal was concerned with the three-year statute of limitations prescribed for claims made under Staff Rule 11.01, the Tribunal finds that its ruling in *Taborga (No. 2)* [2004] is equally applicable to the 120-day time limit provided for in its Statute. The Tribunal has already noted the importance of prescribed time limits and observed that the "long-delayed resolution of staff claims," as the Applicants here propose, would "result in instability and unpredictability in the ongoing employment relationships between staff members and the Bank." *Mitra* [2000], para. 11.

75. The Tribunal also has regard to the findings of the ILOAT in *In re Germano*, ILOAT Judgment No. 753 (1986). In that case, the ILOAT determined that the applicant could not bypass the time limit for challenging a decision allocating him to a particular pay grade by challenging subsequent payments of his monthly salary. The ILOAT determined that the applicant could challenge only "the earliest decision on his pay," for which he was out of time, and that later monthly payments "set off no new time limit for internal appeal." *Id*., para. 2.

76. The Tribunal is satisfied that the Applicants are challenging an administrative decision communicated to them by the WBG on 21 June 2010 (20 January 2012 for Applicant HF), which confirmed that U.K. national staff members residing in the U.K. are liable for the payment of Class 1 NICs and that no reimbursement for such NIC payments is provided by the WBG. It is further satisfied that several subsequent communications, in clear and unambiguous terms, confirmed the original administrative decision. In a fashion similar to the approach adopted by the ILOAT, the Tribunal does not accept the Applicants' contention that all quarterly tax reimbursements issued to them constitute new and ongoing violations, with each tax reimbursement setting off a new time limit for the Applicants' claims. Accordingly, the Tribunal declines the Applicants' request to recognize jurisdiction based on a theory of an ongoing violation.

77. As the Applicants raised their claims well over a decade after the date of "the occurrence of the event giving rise to the application," and as no exceptional circumstances exist to excuse the late filing of their Applications, the Tribunal finds that the Applications are untimely.

REMAINING OBJECTIONS

78. The Tribunal finds that, as the Applications are untimely, that untimeliness obviates the necessity of considering the IFC's remaining objections.

DECISION

The Applications are dismissed.

/S/Mahnoush H. Arsanjani
Mahnoush H. Arsanjani
President

/S/ Zakir Hafez
Zakir Hafez
Executive Secretary

At Washington, D.C., 10 November 2023