



World Bank Administrative Tribunal

2021

Decision No. 653

**FZ,
Applicant**

v.

**International Finance Corporation,
Respondent**

(Preliminary Objection)

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

**FZ,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal’s Statute, and with the participation of Judges Mahnoush H. Arsanjani (Vice-President), Janice Bellace, Seward Cooper, and Lynne Charbonneau.
2. The Application was received on 14 August 2020. The Applicant was represented by Henry M. Onger, Diaspora Lawyers, The Transatlantic Law Firm, PLLC. The International Finance Corporation (IFC) was represented by David Sullivan, Deputy General Counsel (Institutional Administration), Legal Vice Presidency. The Applicant’s request for anonymity was granted on 24 May 2021.
3. The Applicant is challenging the validity of the Mediation Agreement signed by her on 19 February 2017, and the non-renewal of her term contract with the IFC.
4. The IFC filed preliminary objections to the Application on 16 October 2020. This judgment addresses the IFC’s preliminary objections.

FACTUAL BACKGROUND

5. The Applicant joined the IFC in 2006 as an Investment Officer in South Africa under a two-year Fixed-Term Appointment. Her appointment with the IFC was extended multiple times during the course of her employment. The Applicant states that she worked in the New Business Development team in the “Financial Institutions Group (FIG) sub Saharan Africa (CF3S6) also known as (CAF-FIG)” from 2006, and notes that she was promoted to Senior Investment Officer (SIO) in 2011.

6. On 1 April 2015, the Applicant's Fixed-Term Appointment was extended for a two-year term, with the ending date as 1 April 2017.

7. According to the Applicant, on 15 September 2015, her manager at the time informed her that her contract would not be renewed past April 2017. The Applicant states that she was told the decision not to extend her contract was due to "performance reasons."

8. Further, on 9 November 2016, the Applicant's manager at the time informed the Applicant that her contract would not be extended past 1 April 2017. The Applicant states that she was told that this was due to "business reasons."

9. On 10 November 2016 and again on 20 November 2016, the Applicant emailed the Senior Advisor to the Executive Vice President and Chief Executive Officer (CEO) of the IFC (Senior Advisor) seeking help and advice with respect to her contract, and noting that her "wish is to continue work for at least 3 or 4 years." The Applicant stated that she felt the decision to end her contract was unfair. She noted that there was a discrepancy in the reason given for the non-renewal of her contract – specifically, that it changed from performance to business reasons. The Applicant stated that she felt the "business needs" rationale "is an excuse that is being used to let me go – because since I am a term contract employee – Manager has discretion not to renew my contract due to 'Business Needs.'" The Applicant also stated, "I am disappointed and hurt that the end of my career at IFC will be in this way – letting me feel that I was not treated in a just manner."

10. In the emails to the Senior Advisor, the Applicant also outlined her accomplishments and performance rating at the IFC. She stated, "It appears that there is an intent to make me redundant while my work tells that I am productive." The Applicant further stated:

I am aware (informally) that the intention is to bring other people to be working in the [Johannesburg] office, in fact hiring of Principal IOs and Senior IOs to be based in [Johannesburg] was done during the year. I could not help thinking we have already 3 Principals, 1 Senior (myself) and 3 IOs and 2 Analysts – so why would we need other Principal IOs (not one, but 2) and IOs? My thinking is that perhaps – for the office to absorb so many senior and principal officers – some of us must be let go.

In fact, from a team that was hired, nurtured by previous Managers (including our now VP for Risk & [F]inance Stability) – 4 all Africans were let go and I will be the 5th one (in the last 3 to 4 years).

New staff members include colleagues from Germany, Austria, France, Brazil, Nigeria and Zimbabwe (these 2 with specialized skills – as equity specialists).

To me the above is a disturbing trend, which everyone sees and talks about it in the background – but we cannot do anything about it.

11. On 15 December 2016, the Applicant received an email from an IFC Human Resources Business Partner (HR Business Partner), following up on a conversation with the Applicant. The email included the following:

As discussed, upon further consultation with different stakeholders, the following has been decided:

- Your contract will be extended for two years till 04/01/2019.
- On this date, should all conditions remain the same, your contract will end and will not be extended further.
- To ensure we have a binding agreement, we will need to go to Mediation to sign a Memorandum of Understanding [MOU]. It will not be a long process, just one in which we can put together and sign the MOU.
- The details of the MOU will be agreed between both yourself and Management.

12. The Applicant includes with her Application a 15 January 2017 email from her then-manager, Mr. L, to the Regional Industry Head, with the subject line “HR issues.” The email states with respect to “Personnel actions” the following: “[The Applicant] – understand the decision is to prolong two years and then pre-agree the exit. [A Director] wants her to work in CAF FIG but on portfolio and said he would instruct [the Applicant’s manager] accordingly.”

13. A Mediation Agreement (MOU or MA) was signed by the Director, Global Industry, Financial Markets (Director), on behalf of the IFC on 16 February 2017 and by the Applicant on 19 February 2017. The IFC was represented by the HR Business Partner in the mediation process.

14. The MOU states, “This *Agreement* voluntarily resolves the following issues between the parties and all World Bank [G]roup organizations.” (Emphasis in original.) The “Issue” was stated as “The finalization of the agreement between parties concerning the renewal of [the Applicant’s] contract of employment for a fixed term of two years.”

15. The “Terms” of the MOU were stated as follows:

The parties agree to the following terms:

1. The contract will be renewed for a period of two years with effect from 2 April 2017.
2. The contract will terminate on 1 April 2019.
3. [The Applicant] will move to the Portfolio team with effect from 2 April 2017.
4. Subject to satisfactory performance in the Portfolio team, the said contract may be renewed in accordance with the Staff Rules.
5. [The Director] will provide the budget for coaching services for [the Applicant] to a maximum of five (5) hours. The arrangements for the initiation of coaching will be made on signing of this *Agreement*, and in accordance with the IFC coaching processes. (Emphasis in original.)

16. The MOU contained a section on “Release” in the “Additional Terms” section (Release Clause). It stated:

This Agreement constitutes a complete and final settlement of all issues described above. The parties agree to release all claims related to those issues which occurred on or before the date of this *Agreement*. The parties agree to refrain from any future legal or administrative actions regarding events related to the issues resolved here, except for purposes of enforcing the terms of this *Agreement*. [The Applicant] agrees to withdraw any related claim, request or case pending at PRS [Peer Review Services] or WBAT [World Bank Administrative Tribunal]. (Emphasis in original.)

17. On 18 September 2018, the Applicant received notice of her Fiscal Year 2018 (FY18) performance evaluation.

18. On 19 September 2018, the Applicant's new manager (Manager) informed her that her contract would not be renewed and would end on 1 April 2019. The Applicant received six months' written notice of non-renewal.

19. On 16 January 2019, the Applicant filed a Request for Review with PRS, noting the following as the disputed employment matter:

Management decision to non extend [*sic*] my term contract beyond April 1, 2019 on the basis that the decision is: a gross violation of the MOU I signed on Feb 19, 201[7]; a violation of due processes and my rights as WBG [World Bank Group] Staff member; and violation of core values of the WBG Core Values. In addition, management actions violated principles of equal opportunity employment and fair treatment.

20. The Applicant's employment with the IFC ended on 1 April 2019.

21. On 19 March 2020, the PRS Panel dismissed the Applicant's Request for Review in its entirety. The PRS Panel found the Applicant's claims were "either untimely, outside of the subject-matter jurisdiction of PRS or covered by the terms of a binding MA signed between IFC and [the Applicant] on February 19, 2017."

22. On 14 August 2020, the Applicant filed her Application with the Tribunal, after having received an extension from the President of the Tribunal on 9 July 2020. The Applicant states that she challenges the following:

- a. [T]he validity of the Mediation Agreement (MA) also referred to as MOU, signed by the Applicant on February 19, 2017 and by [...] then Director, Global Industry, Financial Markets, FIG, on February 16, 2017 on the basis that it was tainted by misrepresentation and violated the implied covenant of good faith and fair dealing[.]
- b. [T]he nonrenewal decision of her contract communicated on November 9, on the basis that the reason for the decision given was false, pretextual and violated [the] Applicant's right to due process.
- c. [T]he nonrenewal of her contract communicated to the Applicant on September 19, 2018 by [her Manager] was based on false and pretextual reasons because

he was a core part of the management that was recruiting new SIOs with identical skills and qualifications already possessed by the Applicant.

23. As relief, the Applicant seeks
- a. [A] declaration that the MOU was invalid because it was tainted by misrepresentation and violated the implied covenant of good faith and fair dealing;
 - b. [F]inancial compensation for unfair treatment and procedural violations in the nonrenewal decision;
 - c. [F]inancial compensation for career mismanagement, abuse of discretion and denial of due process;
 - d. [L]egal fees and costs as incurred; and
 - e. [A]ny other relief the Tribunal may deem appropriate.
24. The Applicant submits to the Tribunal her total legal fees and costs as US\$15,000.00 and ZAR3,684.40.
25. On 16 October 2020, the IFC filed preliminary objections challenging several of the Applicant's claims as inadmissible before the Tribunal on jurisdictional grounds.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The IFC's Contentions

26. The IFC's preliminary objections contest on jurisdictional grounds the following claims as raised by the Applicant in her Application: (i) the non-extension decision of the Applicant's contract, (ii) the Applicant's claim that her FY18 performance evaluation was arbitrary and baseless, (iii) the Applicant's claim that PRS failed to provide her with due process, and (iv) the Applicant's claim of systemic racism and that the non-extension decision was retaliatory.

Non-extension claim

27. The IFC contends that the Applicant's claim regarding the non-extension of her contract is time-barred. The IFC takes the view that the written notice the Applicant received on 19 September 2018 was a reconfirmation of the 15 December 2016 decision not to renew the Applicant's contract as communicated in the email of that date from the HR Business Partner. The IFC contends that the Applicant had 120 days from the 15 December 2016 date to file an application with the Tribunal and that her filing on 14 August 2020 was out of time. According to the IFC, the 15 December 2016 email informed the Applicant "that her appointment would end on April 1, 2019 'and will not be extended further.'" Therefore, in the IFC's view, this sets the *dies a quo* because the "Applicant should reasonably have been aware that her appointment was not to be renewed on December 15, 2016."

28. For the IFC, the MOU between management and the Applicant "finalized their understanding that [the] Applicant's appointment would terminate on April 1, 2019 and that there would be no further extensions of [the] Applicant's appointment." Further, the IFC notes that, per the Applicant, she was aware of management's intention not to renew her appointment as early as 15 September 2015. The IFC maintains that the 15 December 2016 email constitutes the *dies a quo* for the non-extension claim, and both the MOU of 19 February 2017 and the six months' written notice communicated on 19 September 2018 "are confirmations of management's December 15, 2016 decision."

29. The IFC further contends that the Applicant's claim regarding the non-extension of her contract is inadmissible due to her failure to exhaust internal remedies as a result of submitting her Request for Review to PRS in an untimely fashion. Specifically, the IFC claims the Applicant should have submitted her Request for Review within 120 days of receiving written notice of the disputed employment matter, which the IFC contends was on 15 December 2016. The IFC's position is that the Applicant's filing with PRS on 16 January 2019 was late, and that her claim is now inadmissible before the Tribunal for failure to exhaust internal remedies.

Performance evaluation claim

30. With respect to the Applicant's performance evaluation claim, the IFC asserts that this claim is inadmissible for failure to exhaust internal remedies. Specifically, the IFC contends that the Applicant incorrectly raised this particular claim with PRS rather than as a request for Administrative Review and Performance Management Review pursuant to Staff Rules 9.06 and 9.07, and that this claim was therefore correctly dismissed for lack of jurisdiction by PRS. The IFC avers that unawareness of the rules does not constitute an exceptional circumstance, further noting that the Applicant had been a staff member with the IFC for over ten years.

Due process claim

31. With respect to the Applicant's claim regarding the alleged violation of her due process rights by PRS, the IFC contends that these assertions are inadmissible before the Tribunal because the Applicant is challenging the policies and procedures of the PRS process and, pursuant to Article II(1) of the Tribunal's Statute, jurisdiction is lacking. Specifically, the IFC posits that the Applicant is contesting the functioning of PRS rather than the substance of the PRS recommendation and that, as such, her claim falls beyond the Tribunal's jurisdiction because, in the IFC's view, it does not relate to her contract of employment or terms of appointment.

32. In particular, the IFC specifies that the PRS Panel has the authority under Staff Rule 9.03, paragraph 11.06, to issue a recommendation on the basis of written submissions without an oral hearing if the Panel so determines appropriate. For the IFC, this is a purely procedural decision and does not relate to the Applicant's contract of employment or terms of appointment and, therefore, is not subject to the Tribunal's review. Additionally, the IFC asserts that the Applicant's due process claim pertaining to the length of time of the PRS proceedings must also fail because the Applicant herself contributed to the delays in the proceedings.

Systemic racism claim

33. The IFC asserts that the Applicant's claim concerning systemic racism and retaliation should be dismissed for failure to exhaust internal remedies. The IFC contends that the Ethics and Business Conduct Department (EBC) is the proper venue to investigate claims of retaliation and discrimination, and that the Applicant does not allege sufficient facts to constitute a *prima facie* case of systemic racism.

34. The IFC proffers that the Staff Rules and the Tribunal's Statute and Rules set the cases which are exempt from the requirement to exhaust internal remedies and that no such exemption exists with respect to claims of retaliation or discrimination. For the IFC, the Applicant should have brought this claim to EBC because it "is the internal institutional venue tasked with investigating allegations of misconduct" and because "[m]isconduct includes workplace matters such as discrimination and retaliation." The IFC asserts that the Tribunal has held that EBC is the proper venue for investigating claims of retaliation and discrimination.

35. Further, in the IFC's view:

In order for a claim to be cognizable before the Tribunal, there must first be a decision that adversely affects the staff member, taken by an individual (or individuals) in the non-observance of the staff member's employment contract or terms of appointment. For that decision to be declared discriminatory in nature, the Tribunal must find that the individual's decision had a discriminatory animus, was not in line with the institution's core values, and therefore was a result of individual misconduct. Simply said, there can be no systemic racism without individual misconduct.

36. The IFC maintains that the Applicant has not provided "*any evidence or factual support* of the alleged systemic racism as it has impacted her specifically," and further claims that the Applicant "has made only a cursory attempt to show that she was discriminated against and that she was the alleged victim of retaliation [...]." (Emphasis in original.) The IFC takes the position that the results of a WBG survey on racism "cannot be the sole basis of an individual's claim of discrimination," and asserts that "[s]imply being part of a class of persons is not sufficient evidence that [the] Applicant has been the victim of discrimination." The IFC asserts that Tribunal precedent

holds that “[a]pplicants make *prima facie* cases of racial discrimination if they adduce evidence from which the Tribunal can reasonably infer such discrimination.” For the IFC, the Applicant has not provided a factual basis for this claim.

The Applicant’s Response

Non-extension claim

37. The Applicant maintains that her claim regarding the non-extension of her contract is not time-barred because she filed her Request for Review with PRS on 16 January 2019, within 120 days of her receipt of written notice of non-renewal from her Manager on 19 September 2018. She asserts that the 19 September 2018 decision was not a reconfirmation as the IFC contends, and that she had challenged management’s attempts at non-extension of her contract as communicated to her on 15 September 2015 and 9 November 2016. For the Applicant, the email from the HR Business Partner on 15 December 2016 was not a “decision” but, rather, was “[the HR Business Partner] nudging the Applicant to proceed with negotiating and agreeing to the terms of the MOU.” Further, the Applicant contends that, “[i]n attempting to enforce the MOU, [the] IFC cannot rely on the personal opinion of an HR non-managerial officer who was not party to the MOU which contained the binding terms,” and that “[t]here is no dispute that [the HR Business Partner] was only expressing a personal opinion.”

38. The Applicant states that she was told her contract would not be renewed “due to business reasons.” She claims this rationale from her Manager was “unfounded because [she] was one of only a handful [of] IFC Africa employees with knowledge of the African Lusophone markets and a solid track record on Investments, in those markets, for over ten (10) years.” Further, the Applicant asserts that “barely six (6) months” after her contract was terminated, open positions for SIOs based in Johannesburg were advertised by IFC FIG Africa and these positions required the same competencies that she possessed and had demonstrated.

39. With respect to the MOU, the Applicant claims that she was advised to view it “as a fresh start on her career, with management giving her a chance with a new team [the Portfolio team],”

and that but for this representation she would not have agreed to the terms. The Applicant asserts that she was “led to understand” that management was making a good faith effort at mediation. The Applicant contends that, had she known of management’s “pre-agree exit” plan, “she would never have released all her claims nor agree[d] to the terms of the MOU as drafted and presented to her.”

40. Further, for the Applicant, the MOU’s Release Clause was undermined because of the “pre-exit” arrangement she alleges. In the Applicant’s view, the IFC violated the Principles of Staff Employment because, she claims, the MOU was “not negotiated in good faith” and “was procured by misrepresentation of material facts by IFC management.” She contends that IFC management abused its discretion and acted in an inconsistent and unreasonable manner, and that the non-renewal decision constituted a violation of her contract of appointment and employment.

41. The Applicant also contends that the MOU was obtained without full disclosure of the IFC’s true intentions, lacked mutuality, and is therefore invalid. She states that she was neither represented nor advised by counsel during the mediation and reiterates that had she been aware of the IFC’s true intentions she would not have agreed to the terms of the MOU. She further claims that the HR Business Partner said the MOU “was ‘standard’, but in reality, the Applicant did not have legal representation during the negotiation and signing of the MOU.” The Applicant posits that, “[b]ecause there was no ‘meeting of the minds’ between the parties, [she] questions the finality of the MOU.”

42. The Applicant further proffers that she had a “legal expectation of renewal” with respect to her contract. Specifically, she posits that the phrases “*should all conditions remain the same*” (emphasis added by the Applicant) in the email from the HR Business Partner and “[s]ubject to Applicant performance in the Portfolio team, the contract may be renewed” in the MOU suggest a legal expectation of renewal.

Performance evaluation claim

43. The Applicant claims that her performance evaluations were “arbitrary and baseless” and that, with respect to her FY18 Annual Review, her Manager “deliberately misrepresented the Applicant’s annual performance review by omitting the strong and positive written feedback that was provided [...] to the Applicant by other Managers and peers [...]” The Applicant contends that her Manager distorted her performance to her detriment and did not provide “an accurate and truthful representation of [her] work during FY18.”

44. In the Applicant’s view, her Manager “purposely misrepresented the contents of otherwise favorable comments and feedback about the Applicant in order to achieve some ulterior outcomes.” She further alleges that “this deliberate mischaracterization and efforts to undermine her work at IFC was designed to justify her eventual removal by the decision not to renew her contract beyond April 1, 2019, to implement the Applicant’s ‘pre-agreed exit’ conspiracy by the Managers as stated in [Mr. L’s] email of 15 January 2017 [...]”

45. Additionally, the Applicant notes that on 18 September 2018 she received “her final annual Performance Review FY18” and on 19 September 2018 was given “the final decision of non-contract renewal.” She contends that, with respect to her performance evaluation and the non-extension, these were “fast-moving and overlapping events” which the Tribunal should view as constituting exceptional circumstances which excuse her failure to file a request for Administrative Review and Performance Management Review.

Due process claim

46. The Applicant contends that PRS failed to respect her due process rights. According to the Applicant, reviewing such claims is within the purview of the Tribunal pursuant to Tribunal precedent. The Applicant cites *DK (Preliminary Objection)*, Decision No. 537 [2016], para. 76, and notes that “it is not for the Tribunal to review challenges to procedural decisions made by PRS” but that such claims may be reviewed if “they [result] in violation of a staff member’s rights.” The Applicant asserts that she is not seeking a “review of routine procedural arrangements” but instead

seeks review of “not insignificant violations of her rights as a staff member.” She contends that the PRS Panel did not issue its decision in a timely manner and that the effect of the delay was a denial of her right to due process given that her claim concerned termination. She further contends that the PRS Panel dismissed her Request for Review without a hearing even though she had requested one.

Systemic racism claim

47. The Applicant contends that “she was a victim of institutional racism at [the] IFC.” With reference to her 20 November 2016 email to the Senior Advisor, the Applicant states that “she was swept up in [a] ‘disturbing trend’” which the Applicant claims involved “African members of staff being replaced by Caucasian colleagues in what appeared to be a well-coordinated scheme.” The Applicant maintains that the non-renewal decision was motivated by systemic racism and was retaliation for previously raising the issue with IFC management.

48. The Applicant contends as proof that she was the only SIO from the CAF-FIG team excluded from strategy meetings on 23 August 2016 in Kenya. She further claims that she had worked on the documents pertinent to these meetings and that her written request to management to attend the meetings via WebEx or conference call was ignored.

49. According to the Applicant, the decision to renew or not renew a contract “may not be exercised in an arbitrary manner,” and, citing *Carter*, Decision No. 175 [1997], para. 15, she contends the decision may not be based “on considerations unrelated to the functioning of the institution, such as racial discrimination.” The Applicant submits that “systemic racism was prevalent at her team in CAF-FIG (Johannesburg Office)” and that the nonrenewal decision “was based at least in part, on considerations unrelated to her performance and the functioning of the Bank.”

50. The Applicant contends that she is “not necessarily asserting individual misconduct” with respect to her claims of racial discrimination, but instead “a systemic problem of racism within WBG which is not only acknowledged but documented.” She references a WBG institution-wide

survey of 2020, “End Racism.” The Applicant submits that this survey “revealed varying perceptions of racial equity and access to career opportunity at the WBG, as well as fears of retaliation by Black and African staff members if they reported racism,” and she contends that the survey provides “strong evidence that majority of Black professionals were victims of systemic racism [...]”

51. The Applicant asserts that EBC is not the only body for dealing with racism within the WBG and claims that WBG management itself did not use EBC to tackle systemic racism but, rather, used CEO town halls. She maintains that she did not report her claim to EBC because EBC investigates individual cases of misconduct. Instead, she contends that it is appropriate to report systemic racism to the CEO’s office.

52. From the Applicant’s perspective, she contacted the Senior Advisor in his capacity as Advisor to the CEO and following his visit to the Johannesburg office, the purpose of which included hearing staff member complaints. For the Applicant, her contact with the Senior Advisor was “because she not only found the reasons for non-renewal not to be credible and unfair, but also because she had witnessed several contracts non-renewal of her African colleagues and their replacement by Caucasian colleagues.” Accordingly, her claims therefore related to “systemic racism and increasing lack of diversity in her team,” and, according to the Applicant, both of these “are dealt with at the institutional level and handled by the CEO’s office.”

53. Additionally, the Applicant alleges career mismanagement in that she claims her work in the New Business Development team and the Portfolio team was misappropriated, and her work functions were marginalized by management. She states that her Manager “engaged in systematic managerial malfeasance” and that this was part of a plan to undermine her performance and effectiveness with the goal of removing her from the WBG.

54. In these respects, the Applicant states that, in the New Business Development team, a transaction she “had generated was taken over from her and handed over to her Caucasian colleagues, to finalize it and take credit for it.” She states that “[Mr. L] only acknowledged the Applicant’s efforts at originating the transactions, appointing Caucasian colleagues as Team and

Transaction leaders.” Further, the Applicant states that work she did in the Portfolio team “was handed over [to] a Caucasian American colleague, whose track record and background was in Advisory Services team.”

55. Additionally, the Applicant references a Zimbabwean colleague of African descent, Ms. A.A., who the Applicant claims had her work program misappropriated by a Caucasian South African colleague who was less qualified. As evidence of unfairness, the Applicant references an email from 15 January 2017 in which Mr. L states, “[Ms. A.A.] has continued to improve somewhat, and since she somehow got an SRI of 3, it will be difficult to remove her.” For the Applicant, “it is evident by Management own emails that they consistently manufacture forced exit [of Black staff Members of Africa descent] with impunity.” She maintains that “[s]he made reasonable efforts to report and address systemic racism with the [Senior Advisor].”

56. Finally, the Applicant submits that she has submitted *prima facie* evidence of systemic racism. She lists examples from 2015 to 2019 of Black professionals of African descent on her FIG team “who were exited” or whose contracts were not renewed, including herself, and also notes the “new Caucasian colleagues who were hired, and replaced the Black African colleagues.”

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

57. The IFC challenges on jurisdictional grounds four claims raised by the Applicant. These claims are (i) the non-extension claim, (ii) the performance evaluation claim, (iii) the due process claim, and (iv) the systemic racism claim. The admissibility of each of these claims is addressed in turn.

NON-EXTENSION CLAIM

58. The IFC contends that the Applicant’s claim relating to the non-extension of her contract is inadmissible both for being untimely and for failure to exhaust internal remedies. Specifically, the IFC submits that the 19 September 2018 six months’ written notice which the Applicant relies upon was in fact a reconfirmation of a previous administrative decision which was communicated

to the Applicant via email from the HR Business Partner on 15 December 2016. According to the IFC, Tribunal precedent instructs that staff members “cannot...toll the time limit by requesting an administrative review of alleged ‘administrative decisions’ which do not constitute separate administrative decisions, but which are simply re-confirmations of the original administrative decisions.” Further, the IFC contends that the Applicant’s late filing with PRS means that the Applicant failed to exhaust internal remedies, rendering the claim inadmissible before the Tribunal.

59. Article II of the Tribunal’s Statute provides:

1. The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. [...]
2. 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. The IFC’s preliminary objection relies on the email of the HR Business Partner dated 15 December 2016 as providing the Applicant with notice of the non-extension of her contract and allegedly setting the *dies a quo*. For the IFC, pursuant to Tribunal Statute Article II(2), the Applicant had 120 days from the date of this email to challenge the non-extension of her contract. The HR Business Partner’s email therefore requires scrutiny from the Tribunal.

61. Such scrutiny reveals inherent contradictions. The HR Business Partner's email stated, in pertinent part:

- Your contract will be extended for two years till 04/01/2019.
- On this date, should all conditions remain the same, your contract will end and will not be extended further.
- To ensure we have a binding agreement, we will need to go to Mediation to sign a Memorandum of Understanding. It will not be a long process, just one in which we can put together and sign the MOU.
- The details of the MOU will be agreed between both yourself and Management.

The above language is ambiguous and not definitive, particularly as it pertains to putting the Applicant on notice that her contract would not be extended beyond 1 April 2019. The HR Business Partner's email does not provide context for what "conditions" would need to remain the same in order to preclude extension of the contract, and she notes that the "details of the MOU" will be later agreed.

62. In this respect, and crucially, the MOU quite clearly leaves open the possibility for the Applicant's satisfactory performance on the Portfolio team to allow for her contract to be renewed. The "Terms" of the MOU state, in pertinent part:

- The contract will terminate on 1 April 2019.
- [The Applicant] will move to the Portfolio team with effect from 2 April 2017.
- Subject to satisfactory performance in the Portfolio team, the said contract may be renewed in accordance with the Staff Rules.

63. In contrast to the language of the HR Business Partner's email and the MOU, the communication from the Manager to the Applicant on 19 September 2018 states in full:

Dear [Applicant]

By this memorandum, I am providing you six months' written notice that your term appointment will not be extended and shall end on April 1, 2019.

There is no room for flexibility in the interpretation of this communication. Moreover, contrary to the IFC's position that this 19 September 2018 notice is a reconfirmation, there is nothing whatsoever in the Manager's communication which indicates that it serves as a form of repeat notice to the Applicant.

64. In the circumstances of the present case, the Tribunal finds the IFC's argument that the HR Business Partner's 15 December 2016 email constitutes notice of the non-extension decision unpersuasive. The Tribunal concludes that the 19 September 2018 notification resulted from new terms of arrangements created through a mediation agreement and was not a reconfirmation of a previous administrative decision made in 2016. For the purposes of the current proceedings, the effective date of notice of non-extension is the communication from the Manager dated 19 September 2018.

65. Additionally, the Tribunal notes that, before filing her Application with the Tribunal, the Applicant sought to exhaust internal remedies by bringing her claim to PRS. In the Applicant's Request for Review filed with PRS on 16 January 2019, she states that, "in accordance with the Tribunal procedures, a WBG staff must exhaust internal remedies before filing a claim with the Tribunal. This strict requirement dictates that I must present my case to PRS before proceeding to the Tribunal." In *Atkinson (Preliminary Objection)*, Decision No. 628 [2020], para. 47, the Tribunal explained that in non-renewal claims regarding termination of term contracts, and pursuant to Staff Rule 9.03, paragraph 7.03, an applicant has the option to bring a claim directly before the Tribunal without first going to PRS. However, as the Tribunal also explained in *Atkinson (Preliminary Objection)* [2020], para. 55, "if staff members elect to go through PRS first, they must exhaust the PRS process through compliance with its rules."

66. Here, the Applicant has exhausted the PRS process. The PRS Panel concluded that "all claims in [the Applicant's] [Request for Review], [are] either untimely or outside the subject-matter jurisdiction of PRS or covered by a binding MA signed between [the Applicant] and IFC." The PRS Panel referred to Staff Rule 9.03, paragraph 7.04(e), which states:

Panels do not review Requests for Review concerning:

[...]

- e. a challenge to the validity of a Memorandum of Understanding (MOU) or settlement agreement between the Bank, IFC or MIGA and a Staff Member. (Panels may review an allegation of breach of such an MOU or settlement agreement, although a Staff Member seeking review of an alleged breach of an MOU or settlement agreement may elect to bypass the peer review process and file an application concerning the matter directly with the World Bank Administrative Tribunal pursuant to Staff Rule 9.05, “The World Bank Administrative Tribunal”)[.]

The PRS Panel noted that, in her Request for Review, the Applicant “requested review of [the] IFC’s decision not to extend her Term Appointment beyond April 1, 2019 (Non-Extension Decision),” and noted: “[T]he Non-Extension Decision is covered and was settled with finality by the binding terms of the MA signed between [the Applicant] and the IFC [...]. Accordingly, the Panel does not have the authority nor the mandate to review the Non-Extension Decision.”

67. The Applicant sought to exhaust internal remedies before PRS in a timely manner, having filed her Request for Review on 16 January 2019, within 120 days of receiving notice of the non-extension of her contract on 19 September 2018. The Applicant received the Panel’s Decision to Dismiss the Request for Review on 19 March 2020. Pursuant to Tribunal Statute Article II(2), the Applicant had 120 days from this date to file her Application with the Tribunal. As she was granted an extension on 9 July 2020 until 17 August 2020 to file her Application, her 14 August 2020 filing was timely under the Tribunal’s Statute. The Tribunal therefore concludes that the Applicant’s non-extension claim is timely and that she has exhausted internal remedies in a timely manner.

PERFORMANCE EVALUATION CLAIM

68. The Applicant contends in her Application that her FY18 performance evaluation was “arbitrary and baseless.” The IFC objects to the admissibility of this claim, asserting that the Applicant failed to exhaust internal remedies as required by Article II(2) of the Tribunal’s Statute. The Tribunal has previously stressed the requirement to exhaust internal remedies. *See, e.g., Moss (Preliminary Objection)*, Decision No. 571 [2017], para. 46. Here, the Tribunal finds it clear that

the Applicant has indeed failed to exhaust internal remedies with respect to her performance evaluation claim.

69. Staff Rule 9.06, paragraph 3.01, states:

Administrative Review is the first step for requesting review of a Performance Management Decision and must be exhausted before seeking Performance Management Review. Administrative Review is conducted by the World Bank Group Human Resources Vice President, or an official designated by the World Bank Group Human Resources Vice President, who considers whether management acted within its discretion, satisfied its obligations to the staff member, and followed proper procedures in connection with the Performance Management Decision under review. Peer Review Services (PRS) does not review Performance Management Decisions. Staff members must seek Administrative Review and Performance Management Review of a Performance Management Decision prior to submitting an Application to the World Bank Administrative Tribunal (WBAT).

70. Staff Rule 9.07, paragraph 3.02, states:

Staff Members seeking formal reviews of Performance Management Decisions must do so through the Performance Management Review process. Peer Review Services (PRS) does not review Performance Management Decisions. Subject to Rule 7, "Applications," paragraph 8, "Filing," of the Rules of the World Bank Administrative Tribunal, a staff member must seek Performance Management Review of a Performance Management Decision prior to submitting an Application to the World Bank Administrative Tribunal (WBAT). If the staff member is not satisfied with the decision resulting from the Performance Management Review, or if the Decision-maker does not make a decision within the specified time period provided, the staff member may file an Application to the World Bank Administrative Tribunal (WBAT).

71. In the instant case, the Applicant did not go through the processes of Administrative Review and Performance Management Review with respect to her performance evaluation claim but, rather, incorrectly raised this claim with PRS, which dismissed the claim for lack of jurisdiction pursuant to Staff Rule 9.03, paragraph 7.04(h):

Panels do not review Requests for Review concerning:

[...]

- h. the following decisions regarding performance management: (i) a Staff Member's written performance evaluation; (ii) a Staff Member's performance rating; (iii) the decision to place a Staff Member on an Opportunity to Improve (OTI) plan, or (iv) the terms governing a Staff Member's OTI plan.

72. Based on the above Staff Rules, the Tribunal concludes that the Applicant's performance evaluation claim is inadmissible for failure to exhaust internal remedies.

73. The Applicant proffers, however, that the statutory provision of "exceptional circumstances" applies with respect to her performance evaluation claim and excuses her failure to exhaust internal remedies. She submits that she received her annual performance review on 18 September 2018 and notice of the non-extension of her contract on 19 September 2018, thereby making these the kind of "fast-moving and overlapping events" which the Tribunal has previously held constitute exceptional circumstances.

74. The Tribunal has emphasized a "strict approach" with respect to finding exceptional circumstances (*Nyambal (No. 2)*, Decision No. 395 [2009], para. 30), and the Tribunal finds the Applicant's contention of exceptional circumstances in this case unpersuasive.

75. In *Motabar*, Decision No. 346 [2006], upon which the Applicant relies, the applicant was in the probationary period of his employment with the Bank and received decisions relating to his first and second interim Overall Performance Evaluations (OPEs) in close proximity to his non-confirmation decision. More specifically, his first OPE, to cover a period from 8 July 2002 to 7 January 2003, became finalized only on 6 February 2004 thus giving the applicant until 6 May 2004 to bring a challenge to the Appeals Committee, the precursor to PRS. *Id.*, para. 19. The Appeals Committee denied the applicant's challenge on the basis of untimeliness because the applicant filed it on 23 June 2004, which was beyond the 90-day filing period. *Id.* The Tribunal noted at paras. 20–21:

[D]uring the 90-day period in which the [a]pplicant might have appealed from his first interim OPE, he was presented at a meeting in early March 2004 with written notice of a continuing shortfall in his performance (relating to the second interim

OPE period) – and indeed on 22 April 2004, he was given written notice that his appointment was not to be confirmed.

Given these fast-moving and overlapping events, brought about largely by the Bank's own failure to adhere to reasonable OPE deadlines, and given the obviously more grave implications of [the applicant's] 22 April 2004 notice of non-confirmation, the [a]pplicant's failure to challenge his first interim OPE by 6 May is fully understandable and indeed excusable.

76. As in *Motabar* [2006], the Applicant's non-extension may indeed hold more grave implications than her FY18 performance evaluation, and it is true that the Applicant received notice of these two decisions only one day apart. However, the Tribunal views the circumstances of *Motabar* as distinguishable from the present Application. In *Motabar*, the applicant was still in his probationary period with the Bank and the Bank had failed to meet reasonable deadlines with respect to his OPEs; in contrast, the Applicant was employed with the IFC for over ten years and there is no indication in the record that the IFC failed to meet any time requirements with respect to her FY18 performance evaluation. Additionally, while the Tribunal finds that the Applicant received notice of the non-extension decision through the communication on 19 September 2018 as discussed, this finding does not negate the fact that the Applicant had already had discussions with IFC management and Human Resources about her term appointment in the years prior, having also gone through the process of negotiating the MOU in 2017. The six months' notice of non-extension coinciding with the FY18 performance evaluation does not constitute sufficiently similar events as dealt with in *Motabar* [2006] to excuse the Applicant's failure to exhaust internal remedies with respect to her performance evaluation claim.

77. The Applicant's performance evaluation claim was incorrectly filed before PRS rather than through the processes of Administrative Review and Performance Management Review. The Tribunal has previously held that staff members have an obligation to be familiar with the Staff Rules. Even in *Motabar* [2006], the Tribunal stated that "it is reasonable to expect staff members to take the initiative to learn of the avenues of redress that are available within the Bank, from such sources as the Staff Association, Human Resources, the Ombuds Services, and the Appeals Committee Secretariat." *Motabar* [2006], para. 22.

78. The Tribunal therefore lacks jurisdiction to review the Applicant's performance evaluation claim because the Applicant failed to exhaust internal remedies and there are no exceptional circumstances which excuse this failure.

DUE PROCESS CLAIM

79. The Applicant has alleged that PRS failed to respect her due process rights. In particular, she claims that PRS failed to communicate its decision in a timely manner and failed to provide for a hearing in her case, instead conducting the process solely through written proceedings. The IFC contends that the WBG's "power to adopt policies and procedures ensuring the smooth functioning of the Internal Justice Services does not relate to [the] Applicant's contract of employment or terms of appointment" and that, therefore, pursuant to Article II(1) of the Tribunal's Statute, jurisdiction is lacking with respect to the Applicant's due process claim.

80. The Applicant's claims of due process violations by PRS are indeed inadmissible. The Tribunal's jurisprudence has established that "[t]he Tribunal is not an appellate body reviewing the proceedings, findings and recommendations of the Appeals Committee" (*Lewin*, Decision No. 152 [1996], para. 44), and that the Tribunal "does not micromanage the activities of such a body" (*Yoon (No. 11)*, Decision No. 433 [2010], para. 16). Simply put, "it is not for the Tribunal to review challenges to procedural decisions made by PRS." *DK (Preliminary Objection)* [2016], para. 76.

81. However, as the Applicant has contended, the Tribunal may review challenges to PRS procedural decisions if "they [result] in violation of a staff member's rights." *DK (Preliminary Objection)* [2016], para. 76, citing *Yoon (No. 11)* [2010], para. 16; *González Flavell (Nos. 5 and 7) (Preliminary Objection)*, Decision No. 603 [2019], para. 86. In the instant case, the Applicant is challenging procedural decisions of PRS in relation to issues of timing and the decision of whether to hold a hearing. The Applicant is not alleging that PRS refused to deal with her complaint at all; rather, she is contesting aspects of the process by which her complaint was addressed.

82. The record indicates that the Applicant has had the opportunity to have her claims heard before PRS. The PRS Panel requested additional documentation, specifically a copy of the MOU, and PRS replaced a panel member at the Applicant's request. While Staff Rule 9.03, paragraph 11.05, states that "[t]he peer review process shall generally include a hearing [...]," paragraph 11.06 goes on to explain,

The Panel may issue a recommendation based on the written submissions without a hearing when: (i) the Requesting Staff Member so requests; (ii) it appears based upon review of the written submissions that there are no genuine issues of material fact; (iii) the Requesting Staff Member has failed to make himself/herself available for a hearing within 90 days after the Responding Manager submits his/her Response; or (iv) the Panel determines that it is not feasible to conduct a hearing.

Staff Rule 9.03 therefore allows scope for the PRS Panel to proceed on the basis of written submissions only, as was ultimately done with the Applicant's Request for Review. The Tribunal concludes that there has been no violation of the Applicant's fundamental due process rights for which the Tribunal's intervention is necessary. The Tribunal remains reluctant to opine on how PRS should administer its internal processes.

83. The Tribunal notes that the Applicant has raised issues regarding some inconsistencies in the PRS proceedings. The Tribunal remains reluctant to assert jurisdiction on matters relating to the administration of a case by PRS unless an applicant shows that due process violations are so grave that the Tribunal's intervention is necessary. That is not the case here, and the Tribunal reiterates that "it is not for the Tribunal to review challenges to procedural decisions made by PRS." *DK (Preliminary Objection)* [2016], para. 76.

SYSTEMIC RACISM CLAIM

84. The Applicant states in her Application that she "verily believes that viewed in the totality of the prevailing circumstances and treatment by management, she was a victim of institutional racism at [the] IFC; the systemic practice and barriers that provides [*sic*] differential access to resources and opportunities, thus perpetuating and preserving the long-term inequalities faced by Black professionals." She contends that "the nonrenewal decision was also motivated by systemic racism and [...] was retaliation for raising the issue previously with IFC management."

85. To the IFC, the Applicant's claims on this front should be dismissed for failure to exhaust internal remedies. The IFC submits that EBC is tasked with investigating misconduct claims including discrimination and retaliation, and that the Applicant was required to bring her claim to this internal institutional venue prior to coming to the Tribunal.

86. The Applicant specifically insists in her pleadings that she "is not alleging incidents of individual misconduct – though there may well be bases therefor – but rather a well-documented phenomenon of systemic racism that the WBG and IFC Management has publicly acknowledged." The Applicant therefore asserts that "she was [a] victim of systemic racism which was evident in her team, and further demonstrated by handing over of the transactions (she had worked tirelessly to originate and develop) and of her work program to Caucasian colleagues who then took credit for it." She submits that it is precisely because EBC investigates individual misconduct that she did not report her allegations of discrimination and retaliation to that office:

When the Applicant sent her complaints to the [Senior Advisor], her complaints were not related to individual misconduct, but to systemic racism and increasing lack of diversity in her team, both of which are dealt with at the institutional level and handled by the CEO's office. The CEO's office is the appropriate office to report on systemic racism. For one, the CEO's office champions the diversity and inclusion agenda at the WBG and the Vice-Presidents responsible for the Diversity and Inclusion Council report thereto.

87. The Tribunal observes that the Applicant alleges to have been impacted by racial discrimination at the IFC, albeit in potentially nuanced yet systemic ways which may be different from individual misconduct. In this regard, the Tribunal recalls the Applicant's 20 November 2016 email to the Senior Advisor through which the Applicant posits that she complained of the alleged replacement of Black staff members of African descent by Caucasian staff members, stating, "To me the above is a disturbing trend, which everyone sees and talks about it in the background – but we cannot do anything about it." The record does not provide any indication of the response the Applicant received, if any, with respect to this particular issue as raised in her email to the Senior Advisor.

88. Further, the Applicant provides an email dated 15 January 2021 from the Acting IFC CEO to all IFC staff which includes the following statement: "[N]o one should ever be afraid to report

discrimination of any kind out of fear of retaliation. Whether subtle micro-aggressions or blatant misconduct, discrimination and racism are completely unacceptable and have absolutely no place at the WBG.” This email does not state where or how discrimination should be reported. It is not inconceivable that a staff member might think to report such racial discrimination to the CEO’s office, as the Applicant contends she has done in this case.

89. Pursuant to Staff Rule 3.00, paragraph 6.01:

EBC reviews and assists in the resolution of allegations of misconduct. Misconduct does not require malice or guilty purpose, and it includes failure to observe the Principles of Staff Employment, Staff Rules, Code of Conduct, other Bank Group policies, and other duties of employment, including the following acts and omissions:

[...]

- e. Harassment; contributing to a hostile work environment; Sexual Harassment; or wrongful discrimination, including on the basis of age, race, color, sex, sexual orientation, gender identity, national origin, religion or creed[.]

90. The Tribunal recognizes that racism may take direct and indirect forms, consisting, for instance, of micro-aggressions and widespread but subtle acts which cumulatively constitute an institutional environment in which discrimination exists, resulting in significant systemic challenges, such as accountability deficits and disparities in career prospects on the basis of race. In this context, it may be difficult, if not misplaced, for an applicant to bring a claim of individualized misconduct as conceived in the Staff Rules. Staff Rule 3.00 is structured for the possibility for staff members to be the subjects of allegations of misconduct which other staff members have brought against them (*see* Staff Rule 3.00 and WBG Directive/Procedure – Conduct of Disciplinary Proceedings for EBC Investigations). The Disciplinary Measures stipulated under Staff Rule 3.00, paragraph 10.06, include, *inter alia*, oral or written censure; suspension from duty with pay, with reduced pay, or without pay; and reassignment, and therefore also appear tailored to disciplining subject staff members. The Tribunal observes that there appears to be a potential lacuna with respect to the availability of internal remedies for claims pertaining to systemic racism.

91. Allegations of systemic racism require investigation, which is not the function of the Tribunal. The Tribunal notes the IFC's acknowledgment in its pleadings that racial discrimination is indeed an issue the Bank Group is working to address through various methods and that "[d]iscrimination, in any form, has no place in the World Bank Group [...]." Accordingly, given the seriousness of the allegations, the Tribunal considers that the Applicant may wish to pursue a more thorough investigation of her claim of systemic racism through EBC. It is not within the purview of the Tribunal to conduct the kind of factual investigations necessary to substantiate or refute the Applicant's claims of systemic racism, and, although EBC typically investigates allegations of individual misconduct, EBC is better structured to undertake review of the Applicant's allegation. As the Tribunal stated in *Sekabaraga (Preliminary Objection)*, Decision No. 494, [2014], para. 42:

[I]t appears to the Tribunal that there are good grounds for having EBC undertake a review of allegations of retaliation before such allegations are considered by PRS or by the Tribunal. EBC is the unit with the primary mandate and the resources to review allegations of retaliation, and review by EBC could make an important contribution to a proper consideration of the often complex factual background against which retaliation is alleged. In addition to ensuring a more complete factual record, prior review by EBC would also eliminate the possibility of EBC reaching conclusions that are at variance with findings of fact made by PRS or the Tribunal. In appropriate cases, the Tribunal may suspend proceedings before it to allow for review of retaliation claims by EBC.

92. The Tribunal accepts jurisdiction over the Applicant's claim that "the nonrenewal decision was also motivated by systemic racism and [...] was retaliation for raising the issue previously with IFC management." However, in the circumstances of the present case, the Applicant has the option of taking her allegation of systemic racism and retaliation to EBC before the Tribunal examines the merits of her Application. Should the Applicant choose to pursue the option of taking her allegation of systemic racism and retaliation to EBC and find the eventual outcome as notified to her to be unsatisfactory, or conversely should EBC decline to take jurisdiction, such that in either case the Applicant finds no recourse within the Bank's internal justice system, the Applicant may then return to the Tribunal and the Tribunal may review the relevant decision upon a new application or amendment to the present Application.

DECISION

- (1) The IFC's preliminary objection to the non-extension claim is dismissed;
- (2) The IFC's preliminary objection to the performance evaluation claim is upheld;
- (3) The IFC's preliminary objection to the due process claim is upheld;
- (4) Regarding the IFC's preliminary objection to the systemic racism claim, the Tribunal refers the parties to paragraph 92 of the Judgment;
- (5) The Tribunal will address the following claims on the merits: (i) the validity of the MOU and (ii) the non-renewal decision of the Applicant's contract; and
- (6) The IFC shall pay the Applicant's legal fees and costs in the amount of US\$6,000.00 for the preliminary objections phase of the proceedings.

/S/ Mahnoush H. Arsanjani

Mahnoush H. Arsanjani

Vice-President

/S/ Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., * 7 June 2021

* 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.