



World Bank Administrative Tribunal

2009

No. 408

**AK,
Applicant**

v.

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

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

**AK,
Applicant**

v.

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

1. This judgment is rendered by a Panel of the Tribunal established in accordance with Article V(2) of the Tribunal's Statute, composed of Jan Paulsson, President, and Judges Stephen M. Schwebel, and Francis M. Ssekandi. The Application was received on 24 November 2008. The Applicant's request for anonymity was granted on 21 July 2009.

2. The Applicant is one of sixteen current and former staff members working in the Bank's Department of Institutional Integrity ("INT") contesting decisions taken by the Bank in August 2008 not to award the entire relief, in particular monetary compensation, recommended by an INT Staff Grievance Review Panel ("Grievance Panel").

3. The fact that the present Application forms part of this group of cases has had some unusual procedural implications. All the Applicants worked in INT, and they all allege variations on the same recurrent themes: a hostile work environment, unfair treatment, abuse of discretion, and violations of due process at the hands of INT management between October 2005 and January 2008. In recognition of the unusual circumstances presented, the Bank set up an *ad hoc* Grievance Panel to review the allegations made by the INT staff members. In response to the Applicants' request for consolidation of the cases pursuant to Rule 27 of the Tribunal's Rules, the Tribunal decided on 31 March 2009 that

the cases will be treated separately, and separate judgments will be rendered in each case. Nevertheless, the Tribunal considers that there are practical reasons why efficiency militates in favor of *ad hoc* accommodations to the specifics of the

situation. All Applicants are represented by the same counsel. The Bank is represented by its Legal Vice Presidency. The cases will be decided by the same judges. Accordingly, counsel may make joint submissions where appropriate, and may make extensive use of cross-references to documents and information that are common to all or some of the Applications in order to avoid the need for unnecessary duplication of documents.

Pursuant to this ruling, the sixteen Applicants and the Bank submitted pleadings that contain joint submissions and cross-references to documents and information that are relevant to more than one of these cases.

GENERAL BACKGROUND

4. INT was established in 2001 when the Anti-Corruption and Fraud Investigations Unit and the Business Ethics Office were merged, with the intent that it would take responsibility for the independent investigation of allegations of fraud and corruption in Bank Group operations, as well as certain allegations of staff misconduct.

5. In October 2005 the President of the Bank appointed Ms. X as Acting Director of INT. She became Director of INT in January 2006. At the time of her appointment, she was a Counselor in the Office of the President (“EXC”). In announcing her appointment as Director, the President confirmed that Ms. X would continue to serve in EXC “as my Counselor.” Ms. X’s tenure as Director was turbulent and disputatious within INT as well as in the Bank generally. There were acute controversies as to both principle and method. The claims made by the Applicant as well as the other fifteen staff members in INT are based on events that occurred during Ms. X’s tenure as Director.

6. Upon Ms. X’s appointment as Director, INT management began implementing a “comprehensive plan,” the purpose of which was stated to be the improvement of the “quality, consistency, and timeliness” of INT investigations. This included: (i) a new work program with higher performance expectations for INT staff; (ii) mandatory training workshops for all

investigators; and most controversially (iii) performance improvement plans (“PIPs”) for INT staff with “technical shortcomings or behavioral issues.” The management of INT at the time acknowledged that it “fully understood that the PIPs would be controversial in many instances and generate tensions within the Department.” It nevertheless decided that it was essential to resort to these measures in order to improve INT’s performance.

7. Within a short period an unusually high rate of staff turnover was observed. In September 2006 a group of INT staff members sent an anonymous letter to the Bank’s Board of Directors and the World Bank Group Staff Association (“SA”) complaining about what they considered to be a hostile work environment in INT. They alleged harassment, retaliation based on allegations of disloyalty to INT management, verbal abuse, humiliation, favoritism, non-compliance with normal Human Resources (“HR”) practices and threats of termination of employment and revocation of G-4 visas. They also alleged arbitrary adverse personnel actions relating to their Overall Performance Evaluations (“OPEs”), Salary Review Increases (“SRIs”), PIPs, grade level classifications and compensation. In addition, they alleged a conflict of interest arising from Ms. X’s dual role as both Director of INT and Counselor to the President which, they contended, impeded INT’s ability to work independently and effectively because its work program and priorities were being dictated by EXC.

8. In the course of 2006 and 2007, several INT staff members reported to the Ombudsman concerns about Ms. X’s “abusive and retaliatory” management practices. They also complained about HR’s “ratification” of these practices. The Applicants contend that the Ombudsman confirmed that he had conveyed these concerns to the Bank’s senior management.

9. In the meantime, the Bank’s President and its Board of Directors established an independent panel of experts (“the Volcker Panel”) in March 2007 “to carry out a comprehensive

review of INT to assess how it can best contribute to the Bank's poverty reduction mission and to safeguard the institution from legal, fiduciary and other risks." The focus of the Volcker Panel's review was the scope of INT's mandate and its relationship with other parts of the Bank. Its terms of reference also required it to assess and make recommendations regarding INT's budget and staffing. In the course of the Volcker Panel's work, several INT staff members were interviewed. In addition, the Volcker Panel interviewed the Vice President, Human Resources ("HRSVP"), and requested and received some data from HR.

10. The Volcker Panel issued its report in September 2007. With respect to the management and staffing issues, and as a consequence of the representations submitted by the INT staff, as well as responses from INT management, the Volcker Panel observed that "the number of PIPs used by INT far exceeds their relative use by any other unit within the Bank." It also noted that the manner in which INT's management resorted to PIPs was not in conformity with normal HR practice. The normal practice was stated to be as follows: (i) a staff member whose performance is not satisfactory will be advised of that fact and given the opportunity to improve "without management's further intervention" in the first instance; (ii) if there is insufficient improvement, the staff member will ordinarily be asked to agree to a monitored work program; (iii) if the staff member still fails to improve, a formal PIP is imposed, and failure to comply with the terms of the PIP may result in termination of the staff member's employment. In contrast to this practice, the Volcker Panel found that INT did not resort to the "intermediate management mechanisms" before placing "a relatively large number of staff" on PIPs, and that this had led to "resentment and a high level of uncertainty" among INT staff. It noted, however, that INT used PIPs in this manner with the concurrence of the designated HR representative in INT, and that Ms. X had advised the President of the Bank of the actions taken.

11. The Volcker Panel also noted that:

In general, staff turnover at INT has been high. Intensive time demands and uncertainty about INT's status within the Bank are said to be significant contributing factors. Managerial issues have also been cited by a number of staff. Efforts to address these concerns are clearly needed.

12. In his interview with the Volcker Panel, HRSVP expressed concerns about INT's HR practices. His successor subsequently communicated these concerns to the Bank's Senior Vice President and General Counsel by e-mail on 29 June 2007. In addition to confirming the observations of the Volcker Panel in its report regarding the use of PIPs, the new HRSVP noted firstly that the rate of completion of OPEs in INT was "among the very lowest" in the Bank, which indicated "a lack of agreement between managers and staff on performance assessments," "a breakdown of constructive management" within the unit, and "overly critical" assessments of performance. Secondly, HRSVP noted that the attrition rate in INT was unusually high for any unit within the Bank in 2006. Thirdly, some HR policies had not been correctly implemented in INT since Ms. X became Director. HR was not allowed to participate in INT's external recruitment processes "in the way they normally do," and the Senior HR Officer assigned to work with INT "was asked not to work with staff and managers in the department." HR thus had "less insight" into the implementation of HR policies in INT. In addition, HRSVP found that

INT staff in separation discussions with INT management were asked to sign confidentiality agreements with INT management, undertaking not to discuss the terms of their agreement with anyone except INT management or their families. This is not an accepted HR practice in the Bank and should not have been required of INT staff. It effectively denied INT staff in these situations the right to counsel and advice through the CRS.

13. HRSVP's observations stand in unresolved contrast with the Volcker Panel's findings, as described in paragraph 10, to the effect that the management decisions taken by Ms. X were done with the concurrence of the HR officer in INT and the President of the Bank was kept informed.

14. The 29 June 2007 e-mail message from HRSVP was communicated to the Bank's senior management on 30 June 2007. The record before the Tribunal does not describe any action taken to address these concerns at that time.

15. On 15 December 2007 an "Open Letter to President Zoellick" signed by "INT staff members" was sent by e-mail to several addressees (including the President's Chief of Staff, the Bank's Managing Directors and some Executive Directors), reporting serious concerns about Ms. X's management of INT. In response to this message, a second set of e-mail messages was sent by "Dedicated INT Staff Members" on 16 and 17 December 2007 to the Bank's senior management, alleging misconduct by several INT staff members and publicizing sensitive details of their personal lives.

16. In January 2008 President Zoellick (who had taken office in July 2007) ordered an inquiry into the allegations contained in the messages of 16 and 17 December 2007, containing specific allegations against certain INT staff members, but significantly not the allegations made against Ms. X in the 15 December 2007 email. The Acting General Counsel who carried out the investigation found, in each case, no evidence to support the allegations against the named INT staff. Ms. X resigned from the Bank in January 2008.

17. That same month, INT's Acting Director decided to address the concerns of INT staff members, in particular their allegations of mistreatment by the management of INT during Ms. X's tenure, by establishing the Grievance Panel. The Panel's Terms of Reference provided as follows:

Several staff of the Department of Institutional Integrity claim that they were treated unfairly with regard to performance reviews, salary increases and other matters affecting their careers. INT's Acting Director is establishing a panel to review and provide advice about these claims. The Panel will consist of three members and be supported by an HR liaison officer.

The panel will review statements submitted by INT staff members challenging the fairness of decisions made during CY 2006 and CY 2007 regarding [OPEs, SRIs, PIPs], grade level classifications and compensation, and other actions affecting their careers. The panel's responsibility is to make judgments whether the decisions being challenged were fair, in accord with the Bank's Staff Rules and relevant policies and procedures, and to recommend restitutive actions, if appropriate.

INT staff members should submit three copies of statements of their claims to INT's Acting Director. The statement is not to exceed three pages. The staff member may attach up to ten relevant documents to the statement. ...

INT's Acting Director will designate an INT manager or other INT staff member to prepare a written response to the statement within ten working days The written response is not to exceed three pages.

The panel will schedule a meeting to review the statement and the written response. The meeting will be attended by the panel, the HR liaison officer, the staff member, and the management designee; the staff member may request the presence of a Staff Association Staff Relations Officer or an Ombudsman. If the staff member requests, the panel will arrange to meet him or her without the management designee present There will be no transcript of the meeting. ...

The panel will endeavor to issue its findings and recommendations to INT's Acting Director for review and decision within ten working days of the meeting. The Acting Director has the discretion to accept the panel's findings and recommendations in whole or in part or to reject them.

18. The Acting Director further informed staff that participation in this process "will ... not prejudice your right to pursue another remedy under the Bank Group's Conflict Resolution System."

19. Twenty-one staff members, including the Applicant, filed statements with the Grievance Panel. As provided by the Grievance Panel's Terms of Reference, INT's Acting Director designated a Lead Institutional Integrity Officer, Wayne Nardolillo, who served as the Manager of INT's Internal Unit and was one of Ms. X's former deputies, to prepare a written response to the statements filed with the Grievance Panel. As part of the responses from management, Mr. Nardolillo submitted an "Affirmation" which records in the first sentence that he had been asked,

and agreed, “to act as management’s representative in connection with the INT Staff Grievance Review Panel.” The Affirmation included the following remarkable passages:

At the outset, I enjoyed a close working relationship with [Ms. X]. During her tenure, I became concerned about her management style, decision-making, and work ethic, and in early 2006, with her behavior and in her actions. As these concerns arose with increasing frequency and intensity, I felt that I had three options: (i) resign; (ii) directly confront her as a member of the INT management team; or (iii) endeavor with best efforts to serve as a buffer between her and INT staff to help mitigate the effects of her behavior in the spirit of fulfilling INT’s mandate. As long as [Ms. X] enjoyed or at least appeared to have enjoyed the full support and protection of the former President through June 2007, I concluded that confronting her directly on decisions or seeking an intervention through the Conflict Resolution System (CRS), the President, or the Board, would be futile. I chose to serve as a buffer to seek to mitigate her actions that were creating increasing anxiety and tension within and outside the department. However, beginning in the summer of 2007, I began to challenge [Ms. X] on certain decisions she had taken and certain behavior I felt she has engaged in, which was in my judgment indicative of disparate treatment of staff, favoritism and/or retaliation. My working relationship with [Ms. X] then began to deteriorate. ...

[Ms. X] displayed behavior that was unethical, including: being manipulative; engaging in acts of deception; and habitually making willful material misrepresentations of fact to her staff ...; being verbally abusive; ... engaging in tactics of intimidation; retaliating against staff

Having led the Internal Investigations function within the Bank Group for the last nine years, I have received and reviewed hundreds of allegations of staff misconduct. Among the cases have been scores of complaints from staff who allege abusive, hostile, harassing, and/or retaliatory conduct on the part of their supervisors or managers. To help put [Ms. X’s] apparent behavior and actions in perspective ... in my professional judgment, none of these workplace misconduct cases *as alleged* compared to the level of egregiousness, intensity, and frequency of the apparent abusive, hostile, harassing, and retaliatory behavior [Ms. X] subjected INT staff during her tenure as INT Director.

20. The record before the Tribunal contains no response from Ms. X to the foregoing statement, or indeed to other criticisms of her conduct in office. It is unclear whether Ms. X was afforded an opportunity to respond. The Bank contends that the Grievance Panel formulated its recommendation “on a limited record, in a non-adversarial and highly truncated proceeding without the benefit of having heard directly from [Ms. X] and the former Chief Investigative

Officer.” The Tribunal indeed regrets that it does not have the benefit of their testimony, but cannot in light of the Bank’s actions simply assume that their statements would have been exculpatory. If the Bank believed such would have been the case, it should have either secured this evidence or explained why it was not possible to do so. In the end, the Bank explicitly states that what it “presented before the [Grievance Panel] were Mr. Nardolillo’s affirmations.” Having so confirmed, and having nowhere disavowed Mr. Nardolillo’s self-description as “management’s representative,” the Bank cannot resile from Mr. Nardolillo’s declarations. They were “presented” on behalf of the Bank and are to be treated as such, without any assumptions as to whether they were either irresistible or rebuttable.

21. The Grievance Panel concluded that there was no basis to disagree with the accounts of mistreatment reported to it, and found in favor of the aggrieved staff members. In a memorandum to INT management, the Grievance Panel described the guidelines it followed in making its recommendations:

The Panel researched Bank Principles of Staff Employment and Staff Rules, as well as past deliberations and decisions of the Bank’s Administrative Tribunal concerning allegations of retaliation, hostile work environment, emotional distress, personal and professional injury and related issues. The following were particularly relevant:

- a. *“The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members ... They shall respect the essential rights of staff members that have been and may be identified by the World Bank Administrative Tribunal.”* (Principle of Employment 2, Para. 2.1)
- b. *“Supervisors shall at all times treat staff in a fair and unbiased manner. Treatment of staff shall not be influenced by personal ties between the supervisor and the staff member, nor shall it be influenced by race, nationality, sex, religion, political opinions, or sexual orientation of the supervisor or staff member.”* (Staff Rule 3.01, Para. 4.01)

- c. *“Retaliation by a staff member against any person who in good faith provides information about suspected misconduct, or who uses the Conflict Resolution System, is expressly prohibited and can subject a staff member to disciplinary action...”* (Staff Rule 8.01, Para. 2.03)

...

In determining recommended compensation, the Panel grouped together several grievance categories under the heading “hostile work environment.” For each case, the Panel assessed the duration of the hostile work environment experienced by the grievant, and in some cases differentiated between differing levels of hostility.

In addition, the Panel considered that some individuals were targeted by INT management and subject to abuse, threats of retaliation, and/or threats of PIPs. With targeting too, the Panel assessed the length of time during which the grievant was targeted.

The Panel was cognizant of the personal and professional impact of unfair and unwarranted Performance Improvement Plans, all of which were applied to staff with G-4 visa status. The Panel also took note of significant procedural delays in completing HR actions in a number of cases. While delays occur in many Bank units, the Panel concludes that INT Management used delays selectively as retaliatory action in these cases.

Beyond the facts of individual grievances, the amounts of compensation recommended are intended to ensure, in the interests of all staff members and the Bank, that managerial behavior at least meets minimum standards. (See Administrative Tribunal “N” decision no. 362.) (Emphasis in original.)

22. The Grievance Panel noted that the overall scope and nature of the grievances reviewed and their concentration in the Bank’s own investigative unit was highly unusual because there was (i) a pervasive abuse of authority by former INT management; (ii) a prolonged period during which this abuse continued; (iii) no effective action to prevent the abuse; (iv) a significant number of INT staff who suffered personal and professional harm; (v) corroboration of the events reported by INT staff in the written submissions of INT management and by other well-informed Bank officials; and (vi) the particular vulnerability of INT staff as members of the Bank’s investigative unit.

COMMON GRIEVANCES

23. All Applicants have advanced two identical grievances which the Tribunal finds appropriate to dispose of *en bloc* since they are generic to all of them.

The Bank's refusal to implement the Grievance Panel recommendation in full

24. All the sixteen Applicants complain that they had been led by the Bank to believe that the Grievance Panel would have full authority to recommend unqualified relief, including monetary compensation, and that it was wrongful of the Bank to refuse to adopt the recommendations in full. This alleged unfairness is said to have compounded their injury and to warrant additional compensation.

25. With respect to this common grievance, the Tribunal disagrees. The Terms of Reference of the Grievance Panel contain the following statements regarding its mandate:

- (i) "INT's Acting Director is establishing a panel to review and provide *advice* about these claims" of unfair treatment by INT staff;
- (ii) "The panel's responsibility is to make judgments regarding whether the decisions being challenged were fair, in accord with the Bank's Staff Rules and relevant policies and procedures, and to *recommend* restitutive actions, if appropriate"; and
- (iii) INT management "has the discretion to accept the panel's findings and recommendations in whole or in part or to reject them." (Emphasis added.)

26. The Tribunal finds that the Terms of Reference establish beyond any doubt that the Grievance Panel's role was to provide recommendations and advice. Recommendations and advice are clearly not binding decisions. The Bank was under no obligation to implement the Grievance Panel's recommendations as such whatever those recommendations might have been.

27. The sixteen Applicants allege that, regardless of the Grievance Panel's Terms of Reference, representations were made to them that the findings and recommendations of the Grievance Panel would be binding on INT management. The Tribunal finds that the record does

not establish that management agreed in advance that it was bound to implement all the recommendations of the Panel. It therefore concludes that the Bank did not abuse its discretion by refusing to implement the recommendations in full. The Tribunal does not consider the Grievance Panel to have been a judicial body, nor its recommendations to be entitled to any presumption that they were based on evidence that could withstand the rigours of a formal adversarial process. Such was not its purpose, or the tenor of its Terms of Reference.

28. The Tribunal notes in particular that the Bank considers that the Grievance Panel exceeded its mandate in recommending lump-sum awards “beyond restitution for specific administrative actions” such as recoupment of salary grade, and that it made “profound missteps” in recommending lump sums “so that management would be deterred from repeating the acts in question.” There is merit in the Bank’s contention. Even the Tribunal has no mandate to make punitive awards. Its judgments may have an exemplary effect, not so much by way of making restitution to the particular applicant as seeking to ensure that the Bank takes remedial action in the interest of all staff members. But the cases considered by the Grievance Panel clearly had the full attention of the Bank, which constituted the Grievance Panel precisely in order to achieve remediation. The Tribunal notes that, of the sixteen Applicants, one was an Extended Term Consultant who has since left the Bank’s employment; the remaining Applicants continue to be employed by the Bank. The generic issues raised by this group of sixteen cases pertain to a particular period of time and a particular environment which, it is perfectly evident, the Bank does not seek to perpetuate. The Tribunal proceeds on the basis that remedies beyond the significant measures adopted in implementation of the Grievance Panel’s recommendations should be evaluated on an individual basis except as indicated below.

The stifling of access to the Bank’s internal grievance mechanisms

29. All the Applicants also assert that they were intimidated from bringing their claims into the ordinary Conflict Resolution System (“CRS”), which at that time included this Tribunal, during Ms. X’s tenure. In response, the Bank argues that the Applicants have failed to adequately demonstrate that they were prevented from making complaints about INT management using the CRS or experienced retaliation as a result.

30. Principle 2.1 of the Principles of Staff Employment provides in relevant part as follows:

The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members. ... They shall respect the essential rights of staff members that have been and may be identified by the World Bank Administrative Tribunal.

31. The Tribunal recalls that in its first decision (*de Merode*, Decision No. 1 [1981], para. 25), it ruled that the availability to staff members of an impartial adjudicator of claims of non-observance of contracts of employment and terms of appointment constitutes an essential condition of employment for all Bank staff, and that the right of recourse to the Tribunal “forms an integral part of the relationship between the Bank and its staff members.”

32. The Applicants included as evidence a statement made by the applicant in *AL*, Decision No.409 [2009], which contains a record of a conversation between that applicant and Ms. X regarding a colleague who was on a PIP, and reads as follows:

I proceeded to recount [the colleague’s] pleasing performance. However, instead of expressing satisfaction at [his] performance, [Ms. X] appeared to be angered by the fact that [he] was doing well. She became frustrated and agitated. She said to me, “I know he has been to HR and the Staff Association about this ... He must be a fool if he doesn’t know that I have my spies in those places...” It was apparent to me from this conversation, that despite [the colleague’s] pleasing performance, [Ms. X] would continue his PIP in retaliation for him exercising his staff rights.

This conversation confirmed to me what I had suspected for a long time. I could not exercise my rights as a staff member to complain or lodge a grievance against [Ms. X’s] harassment or abusive behavior. I had no confidential avenue within the Bank workplace to address my complaints without fear of retaliation.

33. The Tribunal notes this disturbing allegation, but is disinclined, in the absence of adversarial testing, to consider it fully reliable in isolation. The Tribunal gives greater weight to the fact that Mr. Nardolillo, as “management’s representative,” confirmed that intimidation was generalized but real. Mr. Nardolillo further affirmed to the Grievance Panel that:

As long as [Ms. X] enjoyed or at least appeared to have enjoyed the full support of the former President through 2007, I concluded that confronting her directly on decisions or seeking an intervention through the Conflict Resolution System (CRS), the President, or the Board, would be futile.

34. The Tribunal finds that the management practices in INT at the relevant time justified the conclusion of INT staff members that they would be at some risk if they exercised their rights of access to the Bank’s internal grievance mechanisms protected by Principle 2.1 of the Principles of Staff Employment and the Tribunal’s judgment in *de Merode*. That all of them to some extent had valid claims seems amply confirmed by the restitutionary recommendations of the Grievance Panel that were accepted by the Bank. That their claims to relief beyond the restitutionary measures accepted by the Bank are not well-founded in all cases does not detract from the seriousness of this grievance as a matter of fundamental principle. Each Applicant will therefore be given an identical lump sum on this account, irrespective of pay grade.

THE PRESENT APPLICATION

35. The Applicant joined the Bank in August 2004. At the relevant time, he was a level GG Senior Institutional Integrity Officer in INT. He filed his statement with the Grievance Panel on 7 April 2008, alleging a hostile work environment, unfair treatment, abuse of discretion, and violations of due process. On 28 July 2008 the Grievance Panel concluded that

the PIP of [the Applicant] was unfair and unwarranted. Moreover the PIP implementation deviated significantly from accepted Bank practices. In addition, [the Applicant] was subjected to a hostile work environment. The Panel concludes that the delay in [the Applicant’s] confirmation did not conform to the applicable Staff Rule and exacerbated the hostile work environment experienced by [the Applicant]. Consequently, the Panel concludes that there was a failure by

INT Management “to act with fairness and impartiality and to follow a proper process in their relations with staff” with respect to [the Applicant], as required by Principle 2 of the Bank’s Principles of Staff Employment.

36. The Grievance Panel recommended that (a) the PIP be expunged from the Applicant’s record; (b) INT management consult with the Applicant to determine his preference regarding removal of any references to PIPs in his career file; (c) “where the Applicant’s SRI(s) in 2006 and/or 2007 fall below the midpoint of the approved SRI increase range for SRI Performance Category 3 in 2006 and/or 2007,” SRI(s) should be adjusted to the midpoint of the range for SRI Performance Category 3 retroactive to 1 July of the relevant year, and “subsequent salary increases, if any, should be adjusted to reflect the revised 2006 and/or 2007 SRI increases, with no change in the percentages used to calculate any such increases”; and (d) the Applicant be paid \$145,000, net of taxes.

37. By letter of 26 August 2008, the new Vice President of INT decided to implement all of the corrective actions recommended by the Grievance Panel, except its recommendation for monetary compensation. He explained that he did not believe “that it is appropriate for management to determine whether compensatory damages are warranted” and that “the Panel may have misconstrued its mandate with respect to restitutive actions.” By the same letter, the Applicant was permitted to seize the Tribunal directly to contest the denial of compensatory damages.

38. The Applicant seeks the following relief from the Tribunal: (i) payment of the \$145,000, net of taxes, for violations that occurred prior to 7 April 2008 (i.e. the date on which the Applicant filed a statement with the Grievance Panel); and (ii) the equivalent of twelve months’ salary, net of taxes, for violations that occurred subsequent to 7 April 2008. He also seeks attorneys’ costs in the amount of \$37,094.29.

THE PARTIES’ CONTENTIONS

39. The Applicant contends that he was subjected to mistreatment by INT management as a result of Ms. X's management practices, for which he is entitled to monetary relief. In particular, the Applicant claims that INT management inappropriately placed him on a PIP, failed to award him an SRI in 2006 and awarded him a low SRI in 2007, and failed to follow a proper process with respect to the renewal of his Fixed-Term appointment and its subsequent conversion to an Open-Ended appointment.

40. In response, the Bank argues that the decisions regarding the PIP, the Applicant's SRIs in 2006 and 2007 and the process by which the Applicant's appointment was renewed and converted were all proper and reasonable managerial decisions, for which no further monetary compensation is owed. The Bank contends that, in an attempt to resolve the Applicant's grievances, it accepted the Grievance Panel's recommendation to expunge the PIP from his career file, and to grant retroactive salary increases to the midpoint of his SRI range for 2006 and 2007. It submits that the Applicant is not entitled to the relief he seeks, but if the Tribunal were to determine that monetary compensation is owed, it should authorize an award that is reasonable and proportionate in light of the facts of the case, and consistent with the Tribunal's precedents.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

41. Decisions that are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack a reasonable and observable basis, constitute an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment. *See De Raet*, Decision No. 85 [1989], para. 67; *Marshall*, Decision No. 226 [2000], para. 21; *Desthuis-Francis*, Decision No. 315 [2004], para. 19. The Applicant's allegations will be examined according to this standard.

The Bank's decision to place the Applicant on a PIP

42. The Applicant contends that the Bank abused its authority and violated applicable rules by placing him on a PIP. Specifically, he contends that (i) his performance did not warrant the imposition of a PIP; (ii) the PIP was premised on erroneous information; (iii) INT management's decision to place him on a PIP was motivated by improper reasons; and (iv) the PIP was improperly extended by INT management. He also claims that the PIP was imposed due to Ms. X's discriminatory animus towards staff members who were foreign nationals. He claims that, because he was placed on a PIP, INT management did not award him an SRI in 2006. He asserts that, in 2007, INT management decided that SRI ratings would reflect the fact that a staff member had been placed on a PIP regardless of whether it had been concluded or terminated, and that he accordingly received a "low" SRI despite his good OPE ratings for that year. While the Bank has undertaken corrective actions with respect to the Applicant's salary increases for 2006 and 2007 as recommended by the Grievance Panel, the Applicant argues that he is still entitled to monetary compensation for these irregularities. The Applicant submits that these actions caused significant damage to his career prospects.

43. The Bank responds that the PIP was implemented out of genuine concerns with the Applicant's performance, as was recorded in his 2006 OPE, and was consistent with the general goal of INT management under Ms. X to raise performance standards across the Department. It argues that the Applicant has adduced no evidence that the PIP was improperly motivated or based on ill-will, and that the procedure by which the Applicant was placed on a PIP was neither unreasonable nor unfair. Moreover, the Bank contends that, consistent with the recommendations of the Grievance Panel, it has already agreed to expunge the PIP from the Applicant's record, to consult with him in order to determine his preference for removing any reference to his PIP, and to award the Applicant retroactive salary increases to the midpoint of

his SRI range for 2006 and 2007, even though no staff member is entitled to a midpoint SRI. The Bank submits that, by taking these conciliatory steps, it made no concessions as to whether the Applicant's PIP represented an abuse of discretion and, instead, demonstrated its desire to lessen resentment, avoid further conflict and ensure that INT moves forward effectively, together with the Applicant. The Bank submits that it has long since remedied any harm that may have existed.

44. Staff Rule 5.03, paragraph 3.02(a), provides:

If a staff member's performance is not satisfactory, the Manager or Designated Supervisor shall provide the staff member a period to improve performance in the staff member's position. ... Normally, the performance improvement period shall not exceed six months. An extension beyond six months must be approved by the Vice President responsible for the position.

45. Staff Rule 5.03, paragraph 3.02(c), provides:

No later than fourteen working days after the end of the performance improvement period, the Manager or Designated Supervisor shall discuss and provide the staff member with a written evaluation. The evaluation shall specify satisfactory completion of the performance improvement plan or, in the event of less than satisfactory completion, any further action to be taken.

46. In the case of the Applicant, Mr. Nardolillo confirms the contention that the PIP was improperly used. Mr. Nardolillo's statement to the Grievance Panel notably recounted:

As with the other staff members who were subjected to PIPs, [Ms. X's] decision to place [the Applicant] on a PIP appeared in my professional judgment unwarranted and precipitous. When [Ms. X] directed [the Applicant's supervisor] to place [the Applicant] on a PIP, [the Chief Investigative Counselor], [the Applicant's supervisor] and I argued that a PIP, in the first instance, was not warranted and urged [Ms. X] not to proceed with one. ... The PIP should generally be used as a tool of last resort to provide the staff member with an opportunity to demonstrate the will and capacity to improve through this more structured and disciplined approach. [Ms. X] held a different view. It was clear to me, that on the basis of the number of PIPs instituted in INT in a very short space of time, [Ms. X's] determination to implement the PIP and the lack of consideration to other alternatives, that [Ms. X] had made up her mind to implement a number of separations in a given timeframe. In one instance, [Ms. X] stated to me that "the President wants me to get rid of the dead wood."

47. Regarding the Bank's argument that the PIP was imposed due to INT management's genuine concerns with the Applicant's performance as subsequently documented in his 2006 OPE, Mr. Nardolillo stated that:

[Ms. X's] practice during the OPE process was to meet with the rating supervisor to review the OPE in draft before it was discussed between the rating supervisor and the staff member. At [Ms. X's] request, I was normally present when [the Applicant's supervisor] met with [Ms. X] to review the OPEs he had prepared in draft. While I cannot attest with certainty to [Ms. X's] influence over [the Applicant's supervisor] regarding the ratings on [the Applicant's] OPEs, [Ms. X] in my presence did instruct [the Applicant's supervisor] to revise certain ratings downward (e.g. from Superior to Fully Successful or from Fully Successful to Partially Successful) on multiple OPEs [the Applicant's supervisor] drafted. This in turn, would serve to justify the PIP.

48. These statements clearly support the Applicant's contention that the Applicant's 2006 OPE could not have been a proper basis for placing him on the PIP as it did not properly reflect his supervisor's assessment of his work. The record before the Tribunal also demonstrates a concession by the Bank and its representatives that the decision to place the Applicant on a PIP was borne out of an improperly motivated desire to use PIPs as a tool to manage the Department rather than to correct observable issues with his performance. The Tribunal thus finds that INT management's imposition and conduct of the PIP was not in accordance with applicable rules, and will therefore award him compensation.

49. However, while a PIP is a serious measure with potentially grave consequences for a staff member's employment (*Mahmoudi (No. 2)*, Decision No. 227 [2000], para. 40), the Tribunal notes that the Bank has already agreed to implement measures of remediation in the Applicant's favor. It has agreed to remove any reference to the PIP from the Applicant's records, and it has adjusted the SRIs that were negatively affected by the improper PIP. There is therefore no reason to assume that the PIP has had or will have any lasting effect on the Applicant's career at the Bank. These considerations will be reflected in the damages awarded to the Applicant.

Delay in notifying the Applicant of his contractual status

50. The Applicant contends that the Bank abused its discretion and violated Bank rules by failing to follow a proper process with respect to the conversion of his position from a Fixed-Term position to an Open-Ended appointment. He claims that management delayed its decision to confirm his appointment, leaving only 43 days until his initial Term appointment was due to end before providing him with an extension. He submits that his attempts to gain an indication as to whether his appointment would become Open-Ended were met with no response. He argues that the uncertainty about the renewal of his appointment, and whether he would lose his G-4 visa and have to relocate his entire family to his home country caused him great anxiety, and that he incurred costs as a result because he had to retain an immigration lawyer to help him obtain an alternative work permit if his G-4 visa were to lapse.

51. The Bank submits that the Applicant had a Term contract that was set to expire at the end of August 2007, for which he had no guarantee of or entitlement to renewal, extension or an Open-Ended appointment upon its expiry. It submits that INT management's decisions to extend the Applicant's appointment by one year initially, and then to convert his appointment to an Open-Ended position, were made with ample time for the Applicant to make the appropriate visa arrangements.

52. The record demonstrates that the Applicant's initial Fixed-Term appointment was due to expire on 22 August 2007. On 9 July 2007, 43 days before it was due to expire, the Applicant's contract was extended by one year. Four months later, on 9 November 2007, the Applicant's employment was converted to an Open-Ended appointment. The Tribunal is not persuaded that the Bank violated any specific Staff Rule in this regard. The Bank's guidelines provide that managers should inform staff members if their Term contracts will not be renewed at least 60

days before the expiry of the contract. The Tribunal notes, however, that the guidelines call for 60 days' notice in cases of non-renewal only. But in the Applicant's case, his appointment was extended 43 days before its expiry, and he was subsequently offered an Open-Ended appointment. The Tribunal concludes that the claim regarding the alleged delay in notifying him of his status is not sustainable.

DECISION

The Tribunal decides that:

- (i) the Bank shall pay the Applicant \$30,000, net of taxes, as compensation for the reasons set out in paragraphs 29 to 34;
- (ii) the Bank shall pay the Applicant four months' salary, net of taxes, as additional compensation for its violations of the applicable Staff Rules;
- (iii) the Bank shall pay a contribution of \$25,000 towards the Applicant's attorneys' fees; and
- (iv) all other claims are dismissed.

/S/ Jan Paulsson

Jan Paulsson
President

/S/ Olufemi Elias

Olufemi Elias
Executive Secretary

At Washington, DC, 9 December 2009