



**World Bank Administrative Tribunal**

**2012**

**Decision No. 466**

**BV,  
Applicant**

**v.**

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

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

**BV,  
Applicant**

**v.**

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Florentino P. Feliciano (Vice-President), Mónica Pinto (Vice-President), Jan Paulsson, Francis M. Ssekandi, and Ahmed El-Kosheri.

2. The Application was received on 28 October 2011. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency.

3. The Applicant made requests for provisional relief and anonymity. On 7 December 2011 the request for provisional relief was denied and his request for anonymity was granted. The World Bank Group Staff Association (“Staff Association”) filed an *amicus curiae* brief on 1 March 2012.

4. The Applicant challenges: (i) the Bank’s failure to reinstate him, until nearly the end of the written proceedings before the Tribunal, to his former position of Senior Resource Management Officer (“SRMO”) at Grade Level GG, in the World Bank Office, Bangkok (“EACTF”), as required by a Memorandum of Understanding of 31 August 2009 (“MOU”); and (ii) the Bank’s decision to reassign him from EACTF to the East Asia Region (“EAP”) Central Administrative Services Unit (“EAPCA”) until 1 May 2012.

#### FACTUAL BACKGROUND

5. The Applicant joined the Bangkok office in November 1998 and rose to the position of SRMO in EACTF at Level GG. The Applicant routinely received

“Outstanding/Best Practice” and “Superior” ratings in his Overall Performance Evaluations (“OPEs”). He was promoted in 1999, 2002 and 2004.

6. The Applicant had a career dispute with the Bank which resulted in his demotion. The Applicant thereafter filed an appeal with the Appeals Committee. The dispute was finally resolved in his favor with the signing of the MOU.

7. Under the MOU, the Bank undertook a number of obligations including the retroactive restoration of the Applicant’s grade level, and title; the retroactive adjustment of his salary increase; and the awarding of back pay after adjustment in one lump sum. The MOU provided in pertinent part:

*[The World Bank Group (“WBG”)] will reinstate [the Applicant] effective September 1, 2009 to the position of Senior Resource Management Officer, SE Asia CMU — an open-ended appointment.*

...

*In addition, management will arrange a period of 2 to 3 months for training in Washington, DC, to be arranged as soon as [the Applicant] is able to travel, and no later than 6 months from the signing of this MOU, absent exigent circumstances such as being on short term disability leave. This will be a period of “learning on the job” in which he will be tasked with contributing to parts of the [Resource Management (“RM”)] work program that both use his skills and experience and give him the opportunity to familiarize himself with new guidelines, practices, tools and policies. (Emphasis added.)*

8. In consideration of the obligations undertaken by the Bank, the Applicant agreed to withdraw his appeal and to settle fully and finally all matters raised therein.

9. In the meantime, on 9 January 2009, the Applicant, who is disabled and normally uses crutches, had suffered a fall as a result of water left on the floor of the Bangkok office after carpet cleaning. As a result of this fall he broke his femur and underwent two rounds of surgery, including a bone graft. Thereafter, he went on sick leave and, subsequently, was placed on short-term disability leave.

10. At the time the MOU was signed on 31 August 2009, eight months after his fall, and as recognized in the MOU, the Applicant was still not able to work in the office or to

travel to Washington for training purposes. The Applicant's training in Washington was necessary in ensuring his effective return to his former position as SRMO EACTF.

11. On 29 October 2009, about two months after the MOU was signed, the Country Director for Thailand announced the Applicant's reinstatement to his former position and stated that the actual date of the Applicant's return to the office would be announced separately. Because of the continuing problem with his leg, however, the Applicant was not able to work from the office immediately. In an e-mail message dated 4 December 2009, the Bank's Occupational Medicine Specialist assessed the Applicant to be "fit for duty with temporary restriction, which is working from home during the period of three months, ie until his recovery." When it became apparent that the "2 to 3 months for training in Washington, DC" required under the MOU was not feasible in the six-month time frame envisaged therein due to the Applicant's inability to travel long-distance, the Bank proposed to the Applicant the option of a temporary reassignment to EAPCA.

12. In mid-December 2009, the Applicant was assigned to work for three months in the Chief Administrative Officer ("CAO") office of the Central Administrative Services Unit ("CASU") which is part of the East Asia and Pacific Regional Office and is based at Bank headquarters in Washington. Arrangements were made so that he could work from home in Bangkok.

13. The Chief Administrative Officer provided the Applicant with a work program and arranged for an SRMO in EAPCA to provide the Applicant with direct work supervision. This SRMO supervised and trained the Applicant directly, and made himself available to the Applicant by way of weekly audio conferences.

14. As the Applicant's recovery from his leg injury continued to be slower than expected, his temporary assignment was extended throughout 2010. In July 2010, after the temporary assignment in CASU started, the Chief Administrative Officer (the Applicant's manager) proposed to the Applicant that he either remain with the Bangkok office or move to work with CASU on a permanent basis. He said he would respect the Applicant's decision.

15. The Bank's reason for proposing a permanent reassignment had been first communicated to the Applicant by his manager on 23 July 2010. Thereafter, for a period of approximately eight months from August 2010 through April 2011, the Bank had, on numerous occasions, sought to explain its reassignment decision, both in writing and orally, to the Applicant.

16. On 10 August 2010, the Applicant sent an e-mail message to his manager, stating that he was being offered a permanent position in CASU and was waiting to review the Terms of Reference ("TOR") for that new position. He stated that, while he would consider the offer, he was concerned with the job's long-term viability given the *ad hoc* nature of the tasks involved. When the Applicant was eventually provided with the TOR for the CASU position of the "EAPCA CORE Decentralized Senior Resource Management Officer," it listed a number of functions, many of which, the Applicant states, were carried out by others and were not specific to his position. The TOR used standard language regarding the "Purpose and Scope of Position." The Applicant believed that the tasks involved were "menial at best," and contrasted markedly with the responsibilities of his former position in EACTF.

17. After reviewing the TOR for the CASU position, the Applicant informed his manager by e-mail on 27 January 2011 that, while he was willing to continue to work with CASU on a temporary basis "for 1 year with possible extension or for an agreed period of time," he still wished to return to his former position in the Bangkok office.

18. On 31 January 2011, the Applicant's manager responded to him and sought to discuss the matter further. The manager stated that the TOR was not just a "disability job description" but was intended to address real business needs. He also stated that the proposal he had made was to enable the Applicant to work from home as opposed to "extended sick leave and eventually a disability."

19. In the meantime, an Independent Medical Evaluation ("IME") in November 2010 judged the Applicant able to return to the office for work and that he could move around with a wheelchair or walk short distances with crutches. The IME stated that he would need help only with transportation to and from the office. Another IME issued on 16 February 2011 confirmed that the Applicant was able to work full-time, although

recognizing that he would need some assistance with driving and traveling abroad and that he would be wheelchair-bound. The IME recommended that the Bank “accommodate his working environment to fit with what his functional capacity can meet,” and concluded that the prognosis for a complete recovery to his previous condition was good.

20. E-mail messages between the Applicant and his manager in March and April 2011 indicate that the Applicant continued to propose a temporary continuation of his assignment with CASU until his health had fully improved, while his manager continued to press for a permanent reassignment to CASU.

21. On 11 April 2011, the Applicant’s manager notified the Applicant that he would be reassigned permanently pursuant to Staff Rule 5.01, paragraph 2.04 (Reassignment within a Vice-Presidential Unit) and stated that “We must draw a closing line.” The manager refused to accept the Applicant’s suggestion that he be given a re-entry guarantee to his former position following a two-year continuation of the temporary reassignment. The Applicant’s manager then stated that

effective April 14, you will be formally transferred to EAPCA as a Senior Resource Management Officer into the decentralized position described in the attached TORs. ... As long as is needed by your recovery and mobility restriction you may continue to work from home. Your duty station remains Bangkok and arrangement[s] will be made in the office to accommodate your mobility limitation. You will report to the CAO or his designate. All other elements of your employment remain unchanged. ...

22. His manager also noted that “this decision was discussed with and is endorsed by the country director, the regional HR manager and EAP vice president.” While the Applicant protested the permanent transfer, it was made effective 16 May 2011.

23. On 8 June 2011, the Bank posted a vacancy announcement for the Applicant’s former position in EACTF.

24. The medical opinion given in February 2011 regarding the Applicant’s fitness for duty was re-confirmed on 8 August 2011 where another IME judged the Applicant ready to return to the office with the provision of temporary accommodations of a wheelchair

for distances longer than 10 meters and of a car driver and assistant to facilitate his transportation.

25. The Applicant initially attempted to resolve the dispute over his right to his former position informally. When mediation attempts did not prove successful, the Applicant filed an Application with the Tribunal on 28 October 2011.

26. On 3 and 4 April 2012, the parties informed the Tribunal that they wished to explore possibilities of settling the case, and requested the extension of applicable deadlines for filing pleadings. The extension was granted. However, as of 24 April 2012 no settlement agreement had been reached.

27. On Sunday 29 April 2012, the Applicant's manager informed the Applicant by e-mail that he was being reinstated to his former position. He wrote that

after further consideration, regional management has decided to reinstate you to your former position as Senior Resource Management Officer, SE Asia CMU as per the Terms of Reference set out in the Memorandum of Understanding (MOU) dated August 31, 2009 with effect from May 1, 2012. Please note that you will be expected to report for work at the Bangkok office on May 2, 2012. As you are aware, we have worked with the administrators of the Bank's Disability Accommodation Fund (DAF) program to secure funding in the sum of \$3000 to cover the cost of hiring a driver to transport you to and from the office for a period of 6 months which will commence from the date of your return to the office. To facilitate your return to the Bangkok office, we have also made the necessary administrative arrangements to reasonably equip the office and in particular, your work area with disabled access and facilities. Can you kindly confirm in writing that you are able and willing to return to work on May 2, 2012 at the Bangkok office upon receipt of this email? We will subsequently discuss with you handing over arrangements of your responsibilities and portfolio of activities of your current budget, fiduciary and control regional position.

28. The decision to reassign the Applicant was taken by new regional management in the EAP. On 2 May 2012, the Applicant responded to the e-mail message stating, among other things, that he would report to work but, following his lawyer's advice, he was not waiving any of his legal rights regarding his pending Application.

29. In his Application, the Applicant requested the Tribunal to order the Bank to: (i) reinstate him immediately to his former position under the terms of the MOU; (ii) provide him with (a) a travel assistant, (b) a business-related driver, (c) a career development program, and (d) a flexible work schedule so he can attend his physical therapy; (iii) award him compensation no less than \$1 million for the pain and suffering caused by the Bank's refusal to honor its MOU, as well as for the damage to his reputation, and an additional \$1 million, at least, for the pain and suffering caused by the Bank's discriminatory treatment of him; and (iv) award him attorney's fees and costs in the amount of \$19,666.47. After the reinstatement decision, the Applicant makes the same requests for relief except for the request for reinstatement and requests that "the Tribunal award him very substantial damages for the terrible way he has been treated – up to and including the heartless way in which he has been suddenly reinstated."

## THE CONTENTIONS OF THE PARTIES

### THE APPLICANT'S MAIN CONTENTIONS

30. Before his reinstatement, the Applicant claimed, *inter alia*, that (i) the Bank's refusal to reinstate him to his former position in the Bangkok office was a clear violation of the terms of the MOU; (ii) the Bank had no legitimate business needs that warranted abrogation of the MOU or his reassignment; (iii) the Bank ignored its obligation to respect the conclusions of the IMEs that he was able to perform the duties of his former position with only minor accommodations, did not properly use the Disability Accommodation Fund ("DAF") to provide him with such accommodations, and used the alleged difficulties with his ability to travel as an excuse for not reinstating him to his former position; (iv) he was discriminated against because of his disability; and (v) he has been treated unfairly and has incurred damage to his career, health and reputation.

31. After the Applicant's reinstatement, he states that (i) such a last minute attempt by the Bank to cure its breach of the MOU neither renders the case moot nor cures the terrible damage inflicted on him; (ii) the delay in implementing the MOU cannot be justified by an alleged "cautious approach" by the Bank to ensure that reasonable accommodations had been made because in the past the Bank did not consider possible accommodations at all but simply assumed that he was unable to perform the



responsibilities of his former position; and (iii) the “opportunity to demonstrate that he is able to fulfill the requirements in the SRMO EACTF function” given to the Applicant by the Bank is more a threat than a determination by management to make reasonable accommodations for his disabilities. The Applicant states that he is fearful that the Bank may reverse itself once again and reassign him on the basis that he is not able to perform his duties.

32. In its *amicus curiae* brief filed on 1 March 2012, before the Bank reinstated the Applicant, the Staff Association presented arguments supporting the Applicant’s claims.

#### THE BANK’S MAIN CONTENTIONS

33. Before the Applicant’s reinstatement, the Bank contended mainly that (i) the Applicant’s slower-than-expected recovery from his leg fractures, and his ensuing mobility restrictions, made it impossible to reinstate the Applicant to the SRMO EACTF position without significant disruptions to the Bank’s EACTF business operations; (ii) the Applicant was offered the option to be assigned temporarily to EAPCA because such a reassignment could afford the Applicant the flexibility to work from home, which he welcomed; (iii) the Applicant’s work preferences had been accorded due consideration, but were ultimately outweighed by the Bank’s evolving business needs in EACTF; (iv) reasonable accommodations were made for the Applicant’s disabilities and ensuing mobility restrictions, and the Bank’s Disability Steering Group was asked to consider the reimbursement of costs for hiring a driver to transport the Applicant to and from work under the DAF; and (v) the Applicant has failed to demonstrate how his career has been damaged by the Bank’s decision to reassign him to a comparable position with substantive tasks, at the same substantive grade, salary and benefits within EAP.

34. After it reinstated the Applicant, the Bank contends that: (i) more recently, new EAP management reconsidered the earlier contested decisions and concluded that circumstances had evolved sufficiently to justify reassigning the Applicant to his former position as set out in the MOU, without placing him at undue risk of harm; (ii) it had employed a cautious approach to ensure that reasonable accommodations had been made to take into account the Applicant’s mobility restrictions and ensure his workplace safety; (iii) its decision was also guided by EAP’s work program needs, including the urgent

business needs for the position of SRMO EACTF to be filled; (iv) notwithstanding EACTF's changing business needs, management is prepared to give the Applicant the opportunity to demonstrate that he is able to fulfill the current job requirements of the SRMO EACTF function; (v) the Applicant's reinstatement comes after considerable efforts by management and the Health Services Department which administers the DAF to secure funding to cover the costs of providing a driver for the Applicant; and (vi) it has complied with the substance of the MOU and therefore the Applicant's case is moot.

## THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

### MOOTNESS OF CLAIMS

35. The Applicant filed this Application challenging (i) the Bank's failure to reinstate him to his former position of SRMO EACTF pursuant to the MOU and (ii) its decision to reassign him from EACTF to EAPCA in May 2011. On 29 April 2012, shortly before the filing of its Rejoinder in the Applicant's case, the Bank decided to reinstate the Applicant to his former position effective 1 May 2012. As a result of this recent reinstatement, the Applicant has received the relief requested for the main claims in his Application. Therefore, the first question that the Tribunal will have to address is whether the case is moot.

36. The Tribunal finds, first, that as the Bank complied with its main obligation under the MOU to reinstate the Applicant to his former position, the two aforementioned contested decisions are no longer in effect. Accordingly, the Applicant's claims for rescission of these decisions and for reinstatement to his former position have been satisfied and in these respects the case is moot. The Tribunal finds, however, that the facts surrounding this belated implementation of the main term of the MOU and the earlier reassignment of the Applicant to EAPCA cannot be overlooked. The Bank took two years and eight months to implement its undertaking to reinstate the Applicant to his former position. A review of the circumstances and the timing of the Bank's recent and past actions, even in cases where the main claims are moot, is appropriate, as it may shed light upon the Bank's motivation for its actions and whether they resulted in unfair treatment of the Applicant for which he may deserve compensation. (*See Isaac*, Decision No. 274 [2002], paras. 12-17 and *Sengamalay*, Decision No. 254 [2001], paras. 42-43.)

37. In addition, there remain other claims in the Application that have not been satisfied, and to which the Applicant points, such as: (i) the award of additional compensation to the Applicant for intangible injuries caused by the Bank's refusal to honor the MOU; (ii) the damage to his reputation; (iii) the compensation for the pain and suffering caused by the Bank's discriminatory treatment; and (iv) the provision of an assistant to help him with travel. The Applicant has also sought attorney's fees and costs. The Tribunal concludes that these claims are extant, and they shall now be reviewed.

DELAY IN IMPLEMENTATION, NON-COMPLIANCE WITH THE MOU AND THE QUESTION OF  
THE BANK'S DISCRETION

38. The main issue that will be addressed by the Tribunal in this judgment is whether the delay in the implementation of the main term of the MOU to reinstate the Applicant to his former position resulted in the violation of his right to fair treatment.

39. The Applicant claims that the Bank had no right to abrogate the MOU and that its refusal to reinstate him to his former position of SRMO EACTF as well as his subsequent unilateral permanent reassignment to a position that was meant to be temporary was unfair and discriminatory. He further considers his reinstatement to his former position on 1 May 2012 as a "last minute action" that "comes years too late" and cannot cure the breach of the MOU or remedy all the harm he suffered. The Bank, on the other hand, views its actions as reasonable because the prospect of reinstating the Applicant to his former position had been frustrated by the circumstances prevailing from September 2009 until January 2012 (when the Answer was filed). It states that it reassigned the Applicant because his recovery from his injuries was slower than expected, because of the ensuing restrictions on his mobility and because of the Bank's evolving needs in EACTF. The Bank points out that it has broad managerial discretion to reassign its staff members to different functions as it deems appropriate as long as it has a reasonable basis for its decision.

40. The question for the Tribunal to address is whether the Bank had managerial discretion to modify the MOU or the obligation to honor its terms. The Tribunal has recognized in many decisions the discretion of the Bank to reassign staff on the basis of

its evolving business needs and circumstances. (*See e.g. Mpoy-Kamulayi (No. 2)*, Decision No. 457 [2011], paras. 42-46; *Sengamalay*, Decision No. 254 [2001], paras. 29 and 47; *Sweeney*, Decision No. 239 [2001], paras. 49 and 74.) This is also recognized by Principle 5.1 of the Principles of Staff Employment, and by Staff Rule 5.01 (“Reassignment”), paragraph 2.04, which prescribes:

A staff member may be reassigned within a vice-presidential unit at any time by a senior manager to meet the work program needs of the vice-presidential unit.

41. At the same time, the Bank’s Staff Rules have recognized the binding nature of MOUs. Staff Rule 9.01, provides at paragraph 4.12:

If parties to a mediation agree on the terms of a mutually acceptable solution, the mediator may draft a Memorandum of Understanding (MOU) which records specific agreements made by all parties. A signed MOU represents a binding commitment for the parties.

42. In addition, the Tribunal’s jurisprudence has recognized the binding nature of settlement agreements. (*See e.g., Mr. Y*, Decision No. 25 [1985], para. 26; *Nyambal*, Decision No. 395 [2009], para. 21; *Brebion*, Decision No. 159 [1997], paras. 29-30.) In *Brebion*, Decision No. 159 [1997], the Tribunal found at para. 41 that “the Respondent has breached the terms and conditions of the separation settlement made with the Applicant because an essential term of those arrangements was changed without her assent.”

43. In the present case, item 4 of the August 2009 MOU states:

WBG will reinstate [the Applicant] effective September 1, 2009 to the position of Senior Resource Management Officer SE Asia CMU — an open-ended appointment.

44. The Tribunal finds that the Bank had the obligation to observe this term of the MOU as it constituted an essential condition in its employment relationship with the Applicant. The Applicant had entered into the MOU on the basis of the specific commitment given to him by the Bank to reinstate him to his former position, and had agreed to withdraw his appeal.

45. The Tribunal finds that while the Bank has the discretion under the Staff Rules to reassign staff in the interests of efficient administration and in order to meet its changing business needs, it should have examined, in this case, whether there was a specific agreement that would prevent such a reassignment. Indeed, such an agreement existed. Any amendment of the terms of the MOU, and particularly the term relating to the Applicant's reinstatement, required the assent of the Applicant especially because such terms constituted an essential condition in the employment relationship of the Applicant with the Bank. (*See Brebion*, Decision 159 [1997], paras. 29, 34 and 41.)

WHETHER UNFORESEEN CIRCUMSTANCES JUSTIFIED THE NON-COMPLIANCE WITH THE  
MOU

46. The next question that the Tribunal will address is whether the treatment of the Applicant by the Bank in delaying his reinstatement under the MOU and in the meantime permanently reassigning him to his temporary position was justified because of unforeseen changes in circumstances after the parties signed the MOU.

47. *The temporary reassignment.* When the Bank announced its decision to reinstate the Applicant about two months after the MOU was signed, it added that the actual date of the Applicant's return to work would be announced separately. The Bank asserts that circumstances existed that prevented it from reinstating the Applicant immediately after the signing of the MOU, prominent among which were the Applicant's unexpectedly long recovery from his injuries and the ensuing mobility restrictions caused by the workplace accident in January 2009. The Bank does not dispute that it was aware of the workplace accident when it signed the MOU in August 2009. Indeed, such aggravation of the Applicant's disability as well as his inability to travel at the time was taken into account in the MOU which provided in pertinent part that

management will arrange a period of 2 to 3 months for training in Washington DC, to be arranged as soon as [the Applicant] is able to travel, and *no later than 6 months from the signing of this MOU, absent exigent circumstances such as being on short term disability leave.* This will be a period of "learning on the job".... (Emphasis added.)

48. It is clear therefore that his aggravated condition and its adverse consequences were not an unforeseen circumstance at the time of the signing of the MOU. The record shows that the Applicant was not able to return immediately to the office and that in early December 2009 the Bank's Occupational Medicine Specialist assessed him to be fit for duty working from home for a period of three months. Thereafter, as it was obvious that he would not be able to travel to receive the required training under the MOU in the six-month period provided therein, the Country Director for Thailand reassigned him temporarily to the CAO office in CASU for the three-month period during which he worked from home in Bangkok. The Tribunal notes that, at that time, the Applicant's view was sought and that he agreed to this temporary reassignment. As this was a modification of an essential term of the MOU in that the Applicant would not be reinstated to his former position at that time, the Tribunal finds that the Bank acted properly then in requesting the Applicant's assent before reassigning him temporarily to that position. (*See Brebion* at para. 41.)

49. *The permanent reassignment.* The Bank states that there were several supervening events which occurred thereafter, including the Applicant's lengthy recovery, his continuing mobility restrictions and EACTF's evolving business needs over time which contributed to the Bank's decision to reassign him permanently to EAPCA. The relevant question here is, however, whether these events were unforeseen, and whether the Bank had the right to modify the MOU and permanently reassign the Applicant without his assent.

50. The Tribunal notes that when the Bank and the Applicant reached agreement on the terms of the MOU, both were well aware of the workplace accident the latter had suffered and the uncertain evolution it could have. It was explicit in the MOU, which clearly recognized the possibility that the Applicant's recovery might last more than six months from its signing when it stated that the Applicant should travel for training no later than six months after its signing "absent exigent circumstances." One example of such circumstances was the placement of the Applicant on short-term disability leave. The Bank was therefore aware that his recovery might be slower than expected.

51. The record shows that beginning July 2010, the Bank had on several occasions tried to have the Applicant agree to a permanent reassignment in EAPCA. He continued

to decline. Eventually the Bank reassigned him permanently to that position in April 2011, despite his protests. The Bank explains its action as a common sense and practical approach which, in its business judgment, would have made the most efficient use of the Bank's limited resources without compromising the Applicant's interests. However, as seen above in paragraph 45, the Tribunal finds that it was not open to the Bank to reassign him permanently against his will at that stage.

52. *The recent reinstatement.* Most recently, the Bank reinstated the Applicant to the SRMO EACTF position effective 1 May 2012. The decision to reinstate the Applicant was taken by new EAP management which, the Bank states, recently reconsidered the earlier contested decisions by the Applicant and concluded that circumstances had evolved sufficiently to justify reinstating him to his former position according to the MOU, without placing him at undue risk of harm. The Bank has stated that this decision was also guided by EAP's work program needs, including the urgent business needs for the SRMO EACTF position to be filled. The Bank argues that it has now complied with the substance of the MOU including reinstating the Applicant to his former position.

53. The Tribunal finds the decision of the new management commendable as, even at this late stage, the Bank has complied with its obligations under the MOU. However, the Tribunal finds that the explanations proffered by the Bank for reinstating the Applicant to his former position contradict the Bank's justifications of its actions prior to the reinstatement of the Applicant. These justifications will now be examined.

#### *Slow recovery*

54. The Bank invoked the Applicant's mobility restrictions and slow recovery as the reasons preventing the Applicant's reinstatement. The Applicant claims, among other things, that the Bank violated its guidelines on "Accommodations for People with Disabilities & Assistance to Severely Disabled Staff" ("Accommodations Guidelines") and that the Bank used his inability to travel frequently as a pretext to preclude him from being reinstated to his former position. He points out that he was able to travel when he was serving successfully in that same position in the past and could still do so with minor accommodations, that the current vacancy announcement of his former position did not include frequent traveling as a prerequisite and that other staff who served in his former

position in his absence did not travel frequently. The Tribunal notes that, while the Applicant's inability to travel frequently was presented as a main obstacle to the Applicant's reinstatement, the TOR for the advertised position of SRMO did not include any reference to a requirement for frequent traveling. The Tribunal also notes that the Applicant underwent a number of IMEs in November 2010, February 2011 and August 2011 all of which found him fit for duty in his former position but noted that he would require some accommodations: the use of a wheelchair as provided under the Bank's disability program, provision of a driver to drive him to the office, and provision of an assistant who would facilitate his transportation when traveling.

55. Furthermore, the Accommodations Guidelines provide, *inter alia*, for the service of a personal assistant to a disabled staff member who needs to travel and for the possibility of reimbursement of related expenses by the DAF. As the record shows, the DAF program is an institutional program independently administered by the Health Services Department and the Applicant would need to make requests for reasonable accommodations to be provided on a case-by-case basis. The program, however, does not preclude the possibility for management to intervene to facilitate the provision of such accommodations by the Disability Steering Group, which administers the DAF. The Tribunal is therefore not persuaded by the Bank's recent attribution of its delay in the implementation of the terms of the MOU to "a cautious approach to ensure that reasonable accommodations have been made to take into account Applicant's mobility restrictions and ensure his work place safety," when all of these accommodations could have been made at a much earlier stage.

56. In this respect, the Tribunal finds the Bank's position inconsistent. Despite the fact that on 6 January 2012, the DAF Steering Group approved the hiring of a driver to transport the Applicant to and from the Bangkok office for a period of six months, the Bank continued to argue in its Answer, filed shortly thereafter, that the Applicant was not ready to be reinstated to his former position because of the restrictions on his mobility. Only three months later, just before the signing of the Rejoinder, the Bank decided that circumstances had evolved sufficiently to justify reassigning him to his former position without placing him at undue risk of harm, offering as one of the reasons for the reinstatement its successful efforts in finding a driver to drive the Applicant to and from



his work, an accommodation already provided when the Bank still insisted that the Applicant was not to be reinstated because of risk of harm.

57. In addition, the Applicant's disability, and its aggravation, appear to have been factors to which excessive negative weight was given to justify first the earlier failure of the Bank to reinstate him and then the delay in such reinstatement.

58. The Applicant has made a claim of discrimination and unfair treatment in this respect, alleging, among other things, that the Bank did not reinstate him on the basis of his disabilities.

59. In *Bertrand*, Decision No. 81 [1989], para. 18, the Tribunal found:

*In any particular case, though the management may be entitled to take a given factor into account, there must at the least be some plausible indication that there is factual support for the factor given negative weight, that such factor has not been weighed in a manner that is discriminatory when compared with its application to other staff members, and that the weight given to such factor is not otherwise arbitrary or manifestly unreasonable.* (Emphasis added.)

60. The Tribunal notes that the Bank, in addition to its other contentions related to the Applicant's slow recovery examined above, has admitted that it acted responsibly when it unilaterally decided to reassign the Applicant permanently to the EAPCA position in 2011. It states that, after considering all the relevant factors including available information relating to the Applicant's mobility which continued to be "very limited," it tailored the Applicant's work program in EAPCA more closely to his needs.

61. It appears therefore that indeed the Applicant's disability or aggravation thereof and the resulting slow recovery were factors that the Bank took into account and to which it gave negative weight. It did not, however, give equal consideration to the provision of accommodations which would have helped bypass this impediment to his reinstatement and thereby treated the Applicant unfairly.

*Business needs*

62. The Tribunal will turn now to the second justification invoked by the Bank for not reinstating the Applicant until recently, namely, the evolving business needs of his position, which the Bank believed the Applicant could not meet.

63. The Bank states that at the time the MOU was signed, the Applicant was unable to assume his responsibilities as an SRMO immediately, because he needed training in order to perform the duties of his position efficiently. Due to his inability to travel, the Applicant never received the requested training. The Bank has further explained that since 2006, when the Applicant was last in the SRMO EACTF function, the business conditions and resource management needs for the EACTF evolved as the number of staff that reported to the SRMO in the EACTF country offices had increased significantly. The SRMO EACTF would therefore be required to travel at least 50% of the time, to provide on-the-ground supervision and make on-site visits to the construction of new buildings in neighboring countries, which, the Bank argues, would be challenging for the Applicant considering his mobility restrictions.

64. Furthermore, the Bank states that in a period of more than five years it had to take extraordinary measures to cope with the serious fiduciary and control risks to which EACTF's operations were exposed as a result of not having a permanent SRMO EACTF in place; that the prolonged absence of SRMO EACTF had led to other EACTF staff having to assume heavier work responsibilities which far exceeded their respective pay grades and job accountabilities; and that staff in EACTF had to cope with not having a consistent manager to provide professional mentorship, career guidance or technical coaching for an unacceptably long period of time.

65. As to the first set of challenges that the Bank had presented regarding the increased responsibilities in the SRMO position and the difficulty in traveling, the Tribunal recalls its finding above at paragraphs 55 and 57 and concludes that by not providing the appropriate accommodations to the Applicant to carry out his tasks, the Bank treated the Applicant unfairly, did not fulfill its obligations under the MOU and did not follow the Accommodations Guidelines. In addition, the Tribunal finds merit in the Staff Association's contention in its *amicus curiae* brief that the Bank could have

explored with the Applicant, who was the former incumbent and most likely the person best positioned to know, the future needs of the position and how he could accomplish them with appropriate accommodations.

66. As to the second set of challenges regarding the Applicant's reinstatement, the Tribunal notes that since the Applicant had been adjudged fit for duty with some accommodations, the Bank could have reinstated him to his former position at the latest as of February 2011 when the second IME concluded that he could return to work with reasonable accommodations.

67. In addition, the Tribunal notes that up until the filing of the Bank's Answer, in January 2012, the urgent need to fill the SRMO EACTF position was used to justify not reinstating the Applicant to that position. Subsequently, in the Rejoinder filed three months later the same reason is provided to justify reinstating him to that position. The Bank states now that it is prepared to give the Applicant the opportunity to demonstrate that he is able to fulfill the current job requirements of the SRMO EACTF function. The Bank has not advanced a convincing explanation for its failure to provide the Applicant with this opportunity at a much earlier stage when the IMEs concluded that he could return to work with accommodations. This change of the Bank's position creates an inference that the "business needs" justification was unsound.

68. The only significant change of circumstances that appears to have taken place is a change in management in EAP, which presumably, after reviewing the Applicant's case, understood its obligation to comply with the terms of the MOU. The delay in the implementation of the main term of the MOU on the ground of business needs and mobility restrictions has resulted in the violation of the Applicant's right to fair treatment, for which he must be compensated.

69. The Applicant has raised claims of intangible injury but the Tribunal finds that they do not give rise to autonomous grounds for recovery.

## REASONABLE ACCOMMODATIONS FOR THE APPLICANT

70. The Applicant has recently requested that he be provided with a personal assistant in order to assist him in his travel to neighboring countries to assess resource management work. The administrator of the DAF program has explained the different requirements for an application to the DAF and for the provision of an updated medical report verifying contemporaneously the staff member's level of disability. The Applicant sees these requirements as roadblocks to his successful reinstatement. The Tribunal finds, however, that the Bank's DAF administrator has persuasively explained the legitimate rationale behind the need for adherence to procedures in order to assist the DAF administrator to make a determination as to eligibility for DAF funding and to calculate the anticipated costs of travel. These procedures apply equally to disabled staff members who request reimbursement under the DAF and they should so apply to the Applicant. The record shows that on a recent occasion when the Applicant followed the requisite procedures, his request was approved.

71. The Tribunal calls upon the Bank to facilitate all arrangements for reasonable accommodations, some of which are described in the Applicant's pleas, to assist the Applicant until he has fully recovered from his workplace injury and to undertake all necessary efforts as required by its "Accommodations Guidelines" to create a supportive workplace to enable him to fulfill his job responsibilities. At the same time, the Applicant is expected to follow the requisite procedures under the applicable guidelines and rules in order to receive such accommodations.

## CONCLUDING DETERMINATIONS

72. The Tribunal has found that the Applicant's right to fair treatment was violated by the Bank's failure to implement the MOU in a timely fashion causing prejudice to the Applicant. The Applicant should be compensated for the unfair treatment. The Tribunal notes in this respect that he remained at all times on full pay and continued to be employed at a comparable Level GG position during his reassignment to EAPCA.

DECISION

- (1) The Bank shall pay the Applicant compensation in the amount of three months' salary net of taxes.
- (2) The Bank shall pay the Applicant's attorneys' fees in the amount of \$19,666.47.
- (3) All other pleas are dismissed.

/S/ Stephen M. Schwebel  
Stephen M. Schwebel  
President

/S/ Olufemi Elias  
Olufemi Elias  
Executive Secretary

At Paris, 27 June 2012