



World Bank Administrative Tribunal

2013

Decision No. 481

**BY (No. 2),
Applicant**

v.

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

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

**BY (No. 2),
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, Ahmed El-Kosheri, Andrew Burgess and Abdul G. Koroma.
2. The Application was received on 17 December 2012. 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. In this Application, his second to the Tribunal, the Applicant challenges the termination of his employment on the ground the Bank failed to provide him the reasonable accommodation of reassignment to a vacant position outside the unit in which he worked, as he alleges was recommended by his doctors and those appointed by the Bank's Disability Administrator (Reed Group).

FACTUAL BACKGROUND

4. The Applicant joined the Bank in March 1998 as an economist, serving as a Country Economist for several countries. In 2007, he was selected for a Grade Level GG Senior Country Economist position in one of the Bank's Regions (the "Region"). In October 2007, he was relocated to a duty station for a three-year field assignment.
5. Prior to 2009, the Applicant had received strong Overall Performance Evaluation ("OPE") ratings. In 2009, however, he had serious disagreements with his manager and Sector Director with regard to his work performance and his 2009 OPE ratings. In September 2009, he was recalled to a position at the Bank's Washington headquarters because of his managers' concerns about his performance.

6. On 17 July 2009, the Applicant requested mediation, through the Bank's Office of Mediation Services, in respect of the disagreement over his OPE. He began taking sick leave in late July and mid-August 2009, while still in the field, and in September – October 2009 on his return to Washington. On 21 October 2009, at the recommendation of the Bank's Health Services Department ("HSD"), he went on sick leave and was placed on Short Term Disability status in December 2009. A 2012 decision of the Bank's Workers' Compensation Review Panel concluded that numerous work-related stressors encountered before June 2009—including an unsafe living environment, a burglary of his residence while he was asleep there, heavy work responsibilities, and work-related conflicts—as well as those related to his work performance in June 2009, resulted in the Applicant's psychological condition.

7. In late 2009 and early 2010, the Applicant's doctor opined that he would be able to return to work so long as his "work situation is modified to enable him to report to a different management team." HSD and the Disability Administrator required that the Applicant undergo two Independent Medical Evaluations ("IMEs"). These took place in January 2010. The first IME dated 23 January 2010 recommended that the Applicant be given "an accommodation of working in a different area of the Bank, i.e. re-assignment to another management team." The second IME dated 31 January 2010 recommended that accommodations be made to allow the Applicant "to continue to function in the work environment, under new supervisors and with only one job responsibility." The "Release to Work Form" dated 27 January 2010 completed by the Applicant's doctor stated that the Applicant could return to work "[a]s soon as arrangements can be made for [the Applicant] to work under different supervisors."

8. On several occasions Dr. B of HSD discussed accommodations that would allow the Applicant to return to work with the Vice President of the Region (the "Vice President"). On 23 February 2010, Dr. B met with the Vice President and the Applicant's Sector Director. Dr. B reported to the Applicant that the Applicant's Sector Director had agreed to provide him with a proposal for accommodation in a different unit within the Region.

9. On 15 March 2010, in an e-mail to the Applicant, Dr. B noted his concern that no proposal in terms of reassignment had come from the Region and that the Applicant's situation

should not last too long because “the more [the Applicant remains on] sick leave, the more it will be difficult to return to work.”

10. In April 2010, Dr. B referred the Applicant to Mr. F, Lead Specialist in HR Corporate Operations to seek assistance. Mr. F, whose responsibilities with regard to disability cases include arranging for reasonable accommodations, met with the Applicant and subsequently with the Vice President. Mr. F states that he and the Vice President discussed potential placement opportunities for the Applicant. The Applicant and Mr. F subsequently met approximately once per month until April 2011 to discuss accommodation possibilities for the Applicant.

11. On 18 May 2010, the Applicant wrote to Dr. B that although Mr. F had been in contact the Vice President and the management of the Poverty Reduction and Economic Management (“PREM”) Network and “supposedly they were supportive ... we have heard that for months now” but “[n]othing is happening in practice.”

12. On 7 June 2010, Dr. B wrote to the Applicant asking him to make an appointment to meet the Vice President “if you think that you have improved enough to consider a potential return to work on a part-time basis initially.” On 17 June 2010, the Applicant wrote to Dr. B informing him that he had asked Mr. F to follow up with the Vice President initially as the Applicant was afraid “if the conversation is difficult ... I may get unsettled in front of him ... which I cannot afford.”

13. On 19 July 2010, Mr. F told the Applicant that the Vice President was “trying to put together a [Terms of Reference (“TOR”)] for [him] which draws on your skills as an economist” but that “[g]iven the Summer period” this would not be ready “before [the] second half of August, with [a] start date either late August or early September, if you are then ready for it.” Mr. F also told the Applicant that the Vice President saw no “perspective for a job outside his VPU.” The Applicant agreed to speak with Mr. F about the TOR offer when the latter returned from leave on 11 August 2010.

14. In a signed declaration submitted in these proceedings, Mr. F states that the Vice President conveyed to him the Terms of Reference for a position within the Region to be offered to the Applicant. The Applicant, on the other hand, claims that, despite promises from Mr. F, no new job was ever offered to him.

15. By the end of October 2010, the Applicant's psychological condition had worsened. An IME conducted on 29 October 2010 found that the Applicant would only be able to manage working "four hours a day, *outside the division in which he worked before*, as that is too highly charged for him to work effectively and the anxiety he would experience in that environment would impede his work." (Emphasis added.)

16. On 26 January 2011, the Applicant's doctor noted her concern that "the longer [the Applicant's] work situation remains unresolved, the more his symptoms become entrenched and chronic."

17. In March 2011, according to Mr. F, he "again encouraged the Applicant to reconsider accepting the position that management was willing to create for [him]. By then, [his manager] was no longer in [the Region] and [his Sector Director] was about to retire ... Yet [the Applicant] again reaffirmed his lack of interest in the position and expressed his frustration that the same position would be offered to him again." The Applicant contends no such offer was made. In support of his version of events, Mr. F refers to his e-mail to the Applicant of 9 March 2011 which stated, among other things, "I am informed that [the Sector Director] will retire in May. I don't know whether that changes anything in your view, but I thought I should at least mention this."

18. Mr. F states that "[d]espite [the Applicant's] refusal to accept the position offered to him ... I continued to work with [the Applicant] to find him a different placement, even outside [the Region]." He explains that this included meeting with the PREM Vice-President and the Director for Economic Policy and Debt in PREM, although there were "no immediate openings." On 6 April 2011, this PREM Director confirmed this lack of openings in an e-mail to Mr. F.

19. On 17 May 2011, the Applicant's Sector Director retired from his position and took up an appointment at the Bank as a Short-Term Consultant.

20. By August 2011, the Applicant's condition had deteriorated further. On 29 August 2011, an IME noted that the Applicant "will need to report to a different management team and be assigned to a different part of the organization to minimize contact with his previous management ... on a part time basis initially" and that "[i]f the requested accommodations were offered to enable him to attempt to return work as a Senior Economist, it would be easier to estimate when and whether he might recover. At present, it is not clear whether he will recover even if such an offer were to be made."

21. On 1 September 2011, as the two-year period of the Applicant's Short Term Disability was drawing to a close, the Disability Administrator informed the Applicant that he would be approved for Long Term Disability benefits. On 21 October 2011, his World Bank employment was terminated pursuant to the terms of the Long Term Disability program. As of these Tribunal proceedings, he remains on Long Term Disability status.

22. On 27 November 2011, the Applicant filed a Request for Review with Peer Review Services ("PRS"), alleging the Bank had failed to provide him with the medically recommended accommodation of reassignment to a different department, leading to the termination of his employment and deterioration in his health. The Applicant was not well enough to participate in the oral hearing so the PRS Panel conducted written proceedings. In its report of 2 July 2012, the PRS Panel noted that, while there was no documentary evidence of an accommodation being offered to the Applicant, Mr. F's representations that there were at least three offers of a new position were credible. The Panel found that the Bank acted in conformity with the Applicant's contract of employment and terms of appointment although it was unable to provide him the medically recommended accommodation and subsequently terminated his employment as a result of his transfer to the Long Term Disability program. On 13 July 2012, the Bank accepted the recommendation of the PRS Panel.

23. On 17 December 2012, pursuant to an extension granted by the Tribunal, the Applicant filed the present Application claiming compensation for loss of income resulting from his termination in the sum of \$1,284,607; such additional compensation as the Tribunal deems fair and appropriate for damage to his health, pain and suffering, and the damage to his reputation and lost career opportunities; and attorneys' fees and costs.

24. On 13 February 2013, the Tribunal delivered its judgment in the Applicant's first case regarding his 2009 OPE and his recall from his duty station to headquarters. *BY v. IBRD*, Decision No. 471 [2013]. The Tribunal held that the Applicant's OPE was flawed in that, among other things, the OPE discussion took place after his OPE and SRI ratings had been set by his managers; that the Reviewing Manager had, contrary to the Staff Rules, been directly involved in setting the Applicant's OPE ratings; and that the Applicant had not received any notice of, nor opportunity to improve, certain behavioral and performance issues that were of concern to his managers. The Tribunal ordered that the Applicant's 2009 OPE and SRI ratings be removed from his personnel record and that he be awarded compensation in the amount of six months' salary net of taxes. His additional claims for compensation for damage to his health, career prospects, reputation and professional life were dismissed.

THE CONTENTIONS OF THE PARTIES

The Applicant's Principal Contentions

25. The Applicant contends that the Bank breached his right to fair treatment, which forms part of the terms of employment of Bank staff, by making "very little effort to make the accommodation unanimously recommended by health care providers" after the Applicant became ill for work-related reasons. The Applicant further contends that the Bank committed itself to, and failed to, provide a reasonable accommodation within the meaning of the Americans with Disabilities Act ("ADA").

26. According to the Applicant, the Bank's efforts to accommodate him were undermined by prejudicial statements made by his managers and were therefore "bound to fail." The Applicant points out that the Vice President "did not have any authority over positions in other Regions"

and Mr. F of HR “worked almost exclusively with [the Vice President]” to find a reasonable accommodation for the Applicant.

27. The Applicant states that the Bank’s claim that he was offered, and rejected, a position in July or August 2010 is “completely fictitious.” He states that there is “absolutely no contemporaneous documentary evidence that a TOR was in fact developed and a concrete offer made.” He contends that “[d]eveloping a TOR takes considerable work and would certainly have required communications between the [Vice President] ... and others responsible for developing the TOR.” He submits that there would “surely have to be at least a draft TOR and some email trail.” In the absence of such evidence, the Bank’s claims, he says, are not credible.

28. The Applicant argues that Mr. F’s claim before the PRS Panel that he offered a position complete with TORs to the Applicant in July 2010 is “demonstrably false.” In response to the Bank’s contentions, he states that it is not true that he would not permit the maintenance of mediation records or the taking of meeting notes, and that his reluctance to have mediation discussions reduced to writing did not apply before late November 2010 because there was no mediation taking place before then. He points out that there was no hearing in the PRS case such that the Bank’s suggestion that the findings of the PRS Panel are important on the issue of credibility is “disingenuous.” He also claims that the Bank “well knows” that his health does not permit him to attend a hearing in the present proceedings as the Bank proposes.

29. The Applicant contends that his doctors specifically recommended that he be assigned to a part of the Bank other than the Region; that communications between the Vice President and the Applicant’s former Sector Director evidence “ongoing prejudice” against him “based on criticisms of his performance in the 2009 OPE which [the] Tribunal has recently overturned;” and that the Bank’s arguments that the Bank’s Workers’ Compensation Program is the Applicant’s exclusive remedy are unsound because his claims in this case are “different and separate from the damages for which he was found eligible” under that program.

The Bank's Principal Contentions

30. The Bank states that, while it is not bound by national employment laws, “for purposes of determining what is reasonable accommodation, [it] decided to follow the ADA definition” and that assessing its actions against the relevant ADA jurisprudence is “instructive.” In the Bank’s view, such an assessment shows that the Bank complied with and exceeded its obligation to reasonably accommodate the Applicant.

31. The Bank notes that under the ADA an employer is required to provide a reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment unless to do so would cause “undue hardship.” The Bank further notes that both the ADA and the Bank’s own policies recognize reassignment to a vacant position as a type of accommodation. The Bank points out that this was the kind of accommodation the Applicant requested when he presented the recommendation from his doctor that he return to work under different supervisors.

32. The Bank accepts that it was required to engage in a good faith interactive process with the Applicant, designed to find reasonable accommodations for his disability. The Bank submits that relevant case law establishes that its obligation is limited to reassignment to a vacant position and that it is not required to create a new position. The Bank argues that the required interactive process is evidenced by the many meetings between the Applicant and Dr. B, the Vice President and Mr. F respectively regarding possible positions outside his management team, and states that it undertook numerous efforts to find a position away from the Applicant’s former managers.

33. The Bank contends that it acted in excess of its legal duty when it offered to create a new position for the Applicant within the Region, with a TOR tailored to his professional background. According to the Bank, it first made this offer to the Applicant in August 2010 and the Applicant rejected it. The Bank states that when the offer was renewed, in March 2011, neither of the Applicant’s former supervisors remained in the Region, but the Applicant again rejected it. The Bank refers to ADA jurisprudence which indicates that an employer is not

required to continue offering further opportunities for reassignment to a disabled employee who rejects an initial offer.

34. In the Bank's view, the Applicant's medical reports recommended only a transfer to a different team and to different supervisors, rather than outside the entire Region and the Applicant's allegations that the IMEs "recommended a return to work so long as he was moved from" the Region have no basis in the record. In addition, the Bank interprets the relevant ADA jurisprudence to mean that changing an employee's supervisor or transferring the employee out of his former department, even when recommended by a treating physician, is generally not a form of reasonable accommodation because it interferes with the employer's personnel policies and may cause undue hardship for the employer.

35. The Bank further argues that the Applicant has failed to adduce any evidence to support his claim that the deterioration in his health was a result of the Respondent's conduct and that the heavily redacted medical reports submitted by the Applicant do not establish that the Bank's conduct caused such a deterioration.

36. The Bank further contends that the Applicant's claims for compensation for his loss of income resulting from his termination, and for the deterioration in his health, are precluded by virtue of the exclusive remedy provision of Staff Rule 6.11 ("Workers' Compensation Program"). The Bank notes that an Administrative Review Panel found that the Applicant's psychological condition arose out of and in the course of the Applicant's employment and is therefore covered by Staff Rule 6.11. The Bank submits that, in exchange for the benefits provided by the Workers' Compensation Program, the Staff Rule provides that a Workers' Compensation claim shall constitute an exclusive remedy against the Bank Group "for any illness, injury or death arising out of and in the course of the staff member's employment" and that this bars the Applicant's claim for damages, including financial losses resulting from his termination, and damages for emotional distress, pain and suffering resulting from the underlying harm.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

37. The Applicant claims he was not provided a reasonable accommodation for his disability (a psychological condition caused by several work-related stressors) in violation of the Bank's Staff Principles and Staff Rules. He seeks compensation for loss of income because, he contends, his employment with the Bank was consequently terminated and the Long Term Disability benefits he receives equal only 70% of his salary; and also for damage to his health, career and reputation; and for pain and suffering.

38. The Bank's Guidelines on "Accommodations for People with Disabilities & Assistance to Severely Disabled Staff" ("Guidelines") state that the Bank is "committed to creating a supportive workplace for people with disabilities that enables them to fulfill their job responsibilities while fully utilizing and developing their capacities" and that staff with disabilities "should be enabled to perform their work at the same level as non-disabled staff." The Guidelines define an accommodation as "a product or service that enables a person with disabilities to perform in a work situation at the same level as a person who is not disabled" and go on to state that "[w]ithin the framework of the Principles of Staff Employment and the Staff Rules, the Bank Group relies on a combination of cost, business needs and common-sense judgment to determine" the reasonableness of an accommodation.

39. The Bank has also produced a "Disability Toolkit," a document published by the Bank's Human Resources Vice Presidency on the Bank's intranet. This states that the Bank follows the ADA definition of reasonable accommodation; that a "reasonable accommodation is a modification or adjustment to a job, the application process, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity and benefits and privileges of employment"; and that a "modification or adjustment is 'reasonable' if it seems reasonable on its face, meaning feasible or plausible." One example of a reasonable accommodation mentioned in the Disability Toolkit is "reassignment to a vacant position."

40. The provision of reasonable accommodations for persons with disabilities is widely required in the employment legislation of many countries in order to prevent discrimination on grounds of disability and to promote equal opportunity. In these proceedings, while noting that as an international organization the Bank is not subject to national employment laws, the Bank has accepted that the standards established in the jurisprudence of the ADA are “instructive” and urges the Tribunal to take them into consideration in assessing the Bank’s actions.

Was the Applicant offered an accommodation by the Bank?

41. The Tribunal must first address a key issue in controversy: whether the Bank in fact offered the Applicant an accommodation.

42. The Bank contends that it offered the Applicant a new position, which would have “virtually eliminated” his interactions with his former team and supervisors, in August 2010 and reiterated that offer in March 2011. The Applicant contends that no such offer was made at any time.

43. The record relating to this significant matter is unusually thin. The direct evidence is limited to a signed statement prepared for these proceedings by Mr. F. His statement explains that one of his responsibilities is to handle disability cases and arrange reasonable accommodations for staff returning to work. He started to work with the Applicant in April 2010 at the request of HSD’s Dr. B.

44. Mr. F states that the TOR offered to the Applicant drew on his

analytical skills as an economist and was for the work that the unit needed to be done. The TOR included pulling together the quarterly updates on the advisory work the [Region] was performing; producing background studies, including an overview and analysis of dealing with economic crises and resources-rich countries. It would have been a new position that the [Region] was willing to create for [the Applicant] and allocate funding for it. While [the Applicant’s] Director would still have been [the Sector Director], because of the analysis and research focus of the position, the interactions that [the Applicant] would have had with his previous team and supervisors would have been virtually eliminated.

Mr. F says further:

I presented the TOR to [the Applicant] in August of 2010, after the summer holidays. It was not done in writing; rather, I communicated it to him orally, with the understanding that if [the Applicant] was willing to consider it, I would go back to [the Vice President] to have it formalized. [The Applicant] rejected the offer of this position because he did not want to have absolutely *any* interactions with [his Sector Director] and his manager ... and also because he was not really interested in doing the work offered to him.

Mr. F adds:

In March 2011, I again encouraged [the Applicant] to reconsider accepting the position that management was willing to create for [him]. By then, his [manager] was no longer in the [Region] and [his Sector Director] was about to retire ... Yet, [the Applicant] again reaffirmed his lack of interest in the position and expressed his frustration that the same position would be offered to him again ... Despite [the Applicant's] refusal to accept the position offered to him, which was tailored to his background and strengths, I continued to work with [the Applicant] in trying to find him a different placement, even outside the [Region].

45. Mr. F's statement that he made the Applicant an oral offer in August 2010 is consistent with his e-mail to the Applicant of 19 July 2010 in which he notes that the Vice President was "trying to put together a TOR" for the Applicant drawing on his "skills as an economist" and that this was expected to "come together before second half of August." Mr. F's e-mail to the Applicant of 9 March 2011, enquiring whether the impending retirement of the Sector Director in May that year "changes anything in [the Applicant's view]" also appears consistent with the contention that the offer of a position in the Region had by this time been made to, and rejected by, the Applicant.

46. The Applicant attaches a list of his meetings with Mr. F to his Application. This confirms that they held a meeting on 26 August 2010. The Applicant's e-mail to Dr. B of 17 September 2010 also confirms that he met with Mr. F in late August and that the subject of the meeting was his reassignment. As discussed below, however, the same e-mail suggests that the Applicant believed himself to be waiting for a "specific accommodation offer" from the Vice President.

47. The Applicant submits that the Bank's contention that Mr. F made him an oral offer of a new position is not credible in the absence of "a draft TOR and some email trail." Mr. F states that an oral offer was made on the understanding that if the Applicant was willing to consider it, it would be formalized. The Tribunal accepts that such an early stage offer would not necessarily have required background documentation and notes that the record indicates that Mr. F was in fact meeting with the Vice President and the Applicant in person. The e-mail correspondence between the Applicant and Mr. F also lends support to an additional explanation given by Mr. F for the lack of supporting documentation: that the Applicant was sensitive about his taking notes during meetings and reluctant for there to be written records of offers made during the settlement negotiations. The Applicant admits that he was extremely concerned because of an apparent breach of confidentiality in a prior mediation and his 24 December 2010 and 16 March 2011 e-mails to Mr. F confirm that, in relation to the then ongoing mediation proceedings, he would "not agree to conduct the mediation in writing or to keeping of written minutes, summaries of offers, responses, etc."

48. Mr. F's evidence also appears consistent with Dr. B's e-mail of 23 February 2010, indicating that the Vice President and the Applicant's Sector Director had agreed to accommodate the Applicant by reassigning him to another unit within the same Region; and Dr. B's e-mail of 7 June 2010 stating that the Vice President "would like to accommodate [the Applicant] in [the Region]."

49. The Tribunal notes that e-mail correspondence from the Applicant in the record leaves open the possibility that he had been orally offered an accommodation albeit not as "specific" or "concrete" as he would have liked. In his e-mail to Dr. B of 17 September 2010, the Applicant referred to his meeting with Mr. F in late August and indicated that he believed himself to be waiting for a "specific accommodation offer" from the Vice President. In an e-mail to the Disability Administrator of 6 October 2010, the Applicant stated that the Bank's management "had made a verbal commitment to make ... arrangements" for an "acceptable position ... in a supportive work environment" but that "no concrete proposals" had yet been made "although [Mr. F] continues to follow up."

50. The Bank proposed that an oral hearing be held to test the evidence of Mr. F and the Applicant. The Applicant has indicated that his health would not permit him to participate in a hearing.

51. The Tribunal reminds the Bank that it is critical that comprehensive records be maintained in relation to matters of such significance as an offer of reasonable accommodation. It is regrettable that such records were not kept in this case. Notwithstanding this observation, the Tribunal considers that the statement of Mr. F is detailed, specific and consistent with the contemporaneous documentary evidence. In all the circumstances, and considering all the evidence put before it, the Tribunal finds that the Applicant was offered a position in the Region in August 2010 and that this offer was reiterated in March 2011.

Did the Bank meet its obligation to offer the Applicant a reasonable accommodation?

52. The Bank accepts that it was under an obligation to offer the Applicant a reasonable accommodation, referring to Staff Rule 6.22 (“Disability Insurance Program”), paragraph 5.06; the Guidelines; and the Disability Toolkit. The Bank also accepts that ADA jurisprudence on the standards of reasonable accommodation is “instructive” but not binding. Both parties agree that the ADA requires employers to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment unless to do so would cause “undue hardship.” As does the ADA, the Bank’s Disability Toolkit recognizes reassignment to a vacant position as a form of reasonable accommodation.

53. The Tribunal accepts the Bank’s submissions that a reassignment to a vacant position connotes two requirements. First, the employee must be qualified for, and able to perform, the new position by his skill, experience, education and other job-related requirements, and able to perform the essential functions of the position. Second, the position must be vacant, meaning either available or becoming available within a reasonable period of time. The Bank is not required to accommodate an employee by creating a new position or by transferring another employee out of his or her job.

54. The Bank accepts that it was required to engage in a good faith interactive process with the Applicant designed to identify reasonable accommodations for the Applicant's disability and to help the Applicant identify possible vacant positions. The Tribunal notes that the Bank provides information on vacant positions through its online jobs database and accepts that the numerous discussions between the Applicant and Dr. B, the Vice President, and Mr. F show that the Bank engaged in an interactive process with the Applicant and attempted to find the Applicant a position outside of his management team.

55. The Bank asserts that it met its obligations once it was established there was no vacant position in the Region and exceeded them when it offered the Applicant a newly created position that would have "eliminated the need for [the] Applicant to interact with [his Sector Director] and [manager] on a daily basis." The Bank adds that the medical evidence does not support the Applicant's contention that it was necessary for the reassignment to be outside the Region, and that the Bank was required only to provide the Applicant a reasonable accommodation, not any accommodation of his choice.

56. The Applicant contends that the doctors who examined him specifically recommended that he be assigned to a part of the Bank other than the Region and that the recommendation in his January 2010 Release to Work Form that he be assigned to "work under different supervisors" in fact required a reassignment outside of the Region. He adds that although his manager had left the Region and the Sector Director retired in May 2011, the Sector Director continued to occupy "the same management office and ... [to] advise on [the Region's] management until at least October 2011 when [the Applicant] was terminated."

57. The Bank argues that the ADA jurisprudence indicates that changing employee supervisors, even when recommended by a treating physician, is generally not a form of reasonable accommodation as it interferes with the employer's personnel policies. The Bank refers to one case in which it was held that an employer was not required to accommodate an employee suffering from depression by reassigning her to a new supervisor and barring her previous supervisor from personal contact with her. The Bank also refers to a case in which it was held that an employee with a psychological condition allegedly developed as a result of

disagreements with a manager was not entitled to be transferred out of the entire department and that the employer provided a reasonable accommodation by transferring the employee away from the supervisor. In addition, the Bank refers to cases in which it was held that it was unreasonable for an employee to dictate the conditions of his employment by choosing the individuals with whom he will work, and that it would cause undue hardship for the employer to reassign a depressed employee in order to remove him from a stressful relationship with a co-worker; and in which it was held that the ADA was not intended to interfere with personnel decisions within an organizational hierarchy.

58. The Applicant argues that the cases referred to by the Bank are limited to their specific facts and relate to very different employment situations. For his part, the Applicant refers to a case in which it was held that the employer was required to assign an employee to the day shift when working the night shift was the cause of the employee's severe depression.

59. The Bank's Guidelines indicate that, in determining reasonableness, the Bank "relies on a combination of cost, business needs and common-sense judgment." The Disability Toolkit adds that, in order to be reasonable, an accommodation must be effective in that it "enables the employee to perform the essential functions of the job or to enjoy equal access to the benefits and privileges of employment that employees without disabilities enjoy." It also states that an "employee is entitled to an accommodation only when the accommodation is needed because of the employee's disability" and that the "employer can ask for medical documentation to show that the requested accommodation is needed."

60. While its analysis may be informed by an awareness of the ADA jurisprudence cited by the parties, the Tribunal considers it necessary to evaluate the reasonableness of an accommodation on a case-by-case basis, having regard to the specific facts of each case.

61. Turning first to the medical recommendations, the Tribunal observes that in an e-mail of 25 November 2009, HSD's Dr. B indicated that he believed a "change of work unit would be profitable." In a report dated 7 December 2009, the Applicant's doctor recommended that the Applicant's work situation be modified "to enable him to report to a different management

team.” The first IME dated 20 January 2010 suggested that the Applicant was capable of “working in a different area of the bank, i.e. re-assignment to another management team.” The second IME dated 31 January 2010 recommended that the Applicant be accommodated by a reassignment to “new supervisors.” The Release to Work Form completed the Applicant’s doctor on 27 January 2010 noted that the Applicant could return to work “under different supervisors” from around 15 February 2010. The thrust of the medical advice in early 2010 was that it was necessary for the Applicant to report to different managers or supervisors, rather than be assigned to any particular part of the Bank. This is clear from the Release to Work Form.

62. With the Applicant’s prolonged sick leave and the worsening of his condition, however, the medical recommendations became more specific by late 2010. An IME conducted on 29 October 2010 found that the Applicant would only be able to manage working “four hours a day, *outside the division in which he worked before*, as that is too highly charged for him to work effectively and the anxiety he would experience in that environment would impede his work” (Emphasis added.) The report of the Applicant’s doctor of 26 January 2011 noted that “the longer [the Applicant’s] work situation remains unresolved, the more his symptoms become entrenched and chronic” and advised that the Applicant needed to “report to a different management team and be assigned to a different part of the organization to minimize contact with his previous management.”

63. The Tribunal is of the view that it is not necessary to reach a conclusion on the adequacy of the Bank’s search for a vacant position because the Tribunal finds that the Bank met its obligation by offering the Applicant a newly created position in the Region in August 2010 and reiterating that offer in March 2011. Where more than one reasonable accommodation is possible, the Bank may choose between them on the grounds of cost or convenience. In the present case, rather than continue the search for vacant positions, the Bank was entitled to create a new position that would substantially eliminate the Applicant’s contact with his previous supervisors. The Tribunal is also inclined to the view that if a disabled staff member rejects a reassignment that is reasonable in the circumstances of the case, the Bank is under no obligation to continue offering other reassignments. This follows from the fact that the obligation is to

provide a reasonable accommodation based on medical need, not on the employee's personal preference.

64. According to Mr. F, "while [the Applicant's] Director would still have been [the Sector Director], because of the analysis and research focus of the position, the interactions that [the Applicant] would have had with his previous team and supervisors would have been virtually eliminated." Any doubt the Tribunal may have about the effectiveness of the accommodation offered in August 2010 is resolved by the fact that when the offer was reiterated to the Applicant in March 2011, his manager had by then left the Region and his Sector Director was due to retire two months later. Notwithstanding any subsequent engagement of the Sector Director as a consultant to the Bank, there is no suggestion that he would have served as the Applicant's supervisor.

65. For all the foregoing reasons, the Tribunal finds that the Bank complied with its obligations to provide a reasonable accommodation to the Applicant. Although the Applicant did not accept the accommodation offered, the Bank acted in accordance with the terms and conditions of the Applicant's employment.

66. The Tribunal wishes to note, however, its concern that it took the Bank some six months from the time the Release to Work Form was issued to first offer an accommodation to the Applicant. The record suggests a contributing factor to this may have been the state of the Applicant's health during this time. There may have been other factors as well. Nonetheless, the Tribunal wishes to underline to the Bank that reasonable expeditiousness is an implicit requirement in the provision of a reasonable and effective accommodation, in particular when medical opinion suggests the condition will worsen the longer the absence from work goes on.

DECISION

- (1) The Application is dismissed.
- (2) The Bank shall pay the Applicant's costs in the sum of US\$16,719.88.

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

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 3 October 2013