



World Bank Administrative Tribunal

2014

Decision No. 499

**CL,
Applicant**

v.

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

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

**CL,
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), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, and Mahnoush H. Arsanjani.

2. The Application was received on 26 November 2013. 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. The Applicant's request for anonymity was granted on 17 September 2014. The Tribunal held oral proceedings on 24 September 2014.

3. The Applicant challenges the July 2013 decision of the Vice President and Corporate Secretary (VPCS) to terminate his employment on the ground of unsatisfactory performance and his treatment by the Bank.

FACTUAL BACKGROUND

4. The Applicant was appointed by the Bank as an Information Technician, Level GB, on 1 November 2000 and as a Records Assistant, Level GC, in July 2004. At the time of the challenged decision, he continued to serve as a Records Assistant, Level GC, on an Open-ended appointment in the Bank's Corporate Secretariat.

5. The Applicant's duties included processing and distributing documents and minutes for the Bank's Board of Executive Directors, preparing related statistical reports, and performing general office tasks such as ordering office supplies. Until 2010, his managers rated his

performance fully satisfactory and sometimes superior. Between 2000–2007, he was also recognized for good performance by the award of numerous Spot Awards.

6. In June 2010, the Applicant underwent surgery for the removal of a spinal cord tumor. In November 2010, he underwent further back surgery. Following this surgery, he suffered pain and limited movement. Between March 2010 and July 2011, he took several months of sick leave.

7. The Applicant's 2010–2011 Overall Performance Evaluation (OPE) noted that he had “made a lot of effort this year to get back to a full work load after a series of serious health issues” and “done well in spite of his serious health challenges.” It also noted the expectation that he would “further normalize” his workload and attendance. In his written comments on the OPE, the Applicant said he was grateful to his managers for allowing him the “flexibility to deal with my health issues last year” and to “work from home from time to time.”

8. The record shows that the Applicant had suffered from depression for some time. Notwithstanding that, he performed well at work and was known as a capable and collaborative team member. Around the time of his spinal surgery, however, his mental health began to deteriorate substantially. He became, in his own words, “profoundly depressed.” He suffered from insomnia and his bodyweight fell by 45 pounds.

9. He returned to a full time work schedule in July 2011. However, he was frequently late for work or took leave without giving notice. In late 2011, the Applicant's managers formally drew this to his attention. On 17 October 2011, the Applicant's manager noted in an e-mail to the Applicant that he had informed a colleague that he would be late that morning but instead, without further communication, did not come to the office at all. His manager asked the Applicant to be mindful of informing her if he intended to take a day off “so that appropriate back up arrangements can be made” and noted “[t]his sort of unpredictability in your attendance is not acceptable.”

10. The Applicant's late arrivals and failures to report to work continued. On 2 April 2012, the Applicant's manager reminded him in an e-mail that “[w]ork from home arrangements need

to be discussed with the Manager preferably ahead of schedule and [are] not a substitute for taking leave.”

11. The Applicant’s manager sought the assistance of the Counseling Unit in the Bank’s Health Services Department (HSD). On their advice, she met with the Applicant on 10 May 2012 to discuss his attendance, teamwork, and behavior. She and the Applicant agreed on the conduct expected of the Applicant going forward. As summarized in her follow-up e-mail, the Applicant agreed that he would notify his manager “in advance of any expected leave”; “minimize unplanned absences not due to health reasons or other emergency”; “file leave as appropriate”; “be mindful of the burden that unexpected absences impose on colleagues”; “work collaboratively with ... them and back them up in turn”; and relate to “colleagues always respectfully and in a considerate manner.” The Applicant’s manager also urged him to contact the HSD Counseling Unit to seek their confidential help and noted that she would “touch base every two weeks to take stock of progress.”

12. In June 2012, a new Director of the Applicant’s unit (the “Director”) was appointed. He monitored the Applicant’s performance and attempted to motivate him by making some adjustments to his work program. The Applicant continued to arrive late, to be absent from work, and to behave in a disruptive manner. After several weeks, the Applicant informed the Director that he was taking medication and that his work performance was being affected by health issues. On 10 August 2012, the Director requested that HSD conduct a Fitness for Duty assessment of the Applicant.

13. HSD conducted a Fitness for Duty assessment in consultation with Dr. K, a board-certified psychiatrist. On 19 September 2012, Dr. K delivered a detailed report, diagnosing the Applicant as suffering from, among other things, a Recurrent Major Depressive Disorder.

14. On 12 October 2012, HSD advised the Director that the Applicant had “a chronic medical condition that requires ongoing clinical treatment and management” but that with “compliant treatment inclusive of monitoring and managing his issues (work and personal) his long term prognosis can be considered as very good.” HSD assessed the Applicant as fit for duty and made

a number of recommendations intended to assist his work performance. HSD advised that the Applicant “may have a difficult time understanding the reactions of his co-workers and supervisors,” may be “disrespectful to other colleagues and supervisors, [pay] poor attention to working hours, [display an] inappropriate response to criticism, and a lack of dependability in the work place” and “may find it difficult to motivate himself when needed.” HSD further advised the Director

it would be beneficial if [the Applicant] was provided with specific instructions and guidance on what kind of behavior is required for his job. He would benefit from a structured work environment, regular meetings with his supervisor, accountability for his actions and regular feedback related to the above. This includes specifying hours that he is expected to be at work, reporting leave of absences appropriately and proper etiquette required in the work place. ...

The[se] ... recommendations were discussed with [the Applicant] on the 4th of October 2012 where he acknowledged the content demonstrating his understanding of the situation [and] ... his cooperation and participation. ...

[T]he resources of HSD (the Occupational Health Unit and the Staff Counseling Unit) are available to refer to for further assistance for both your unit and [the Applicant].

15. On the same day, HSD also sent Dr. K’s report to the Applicant’s treating psychiatrist, Dr. F.

16. On 26 October 2012, the Director signed the Applicant’s 2011–2012 OPE. The Applicant was rated Partially Successful in one results category and in two behavioral categories, namely “Drive for Results” and “Teamwork.” The Applicant’s manager noted in her OPE comments that the Applicant needed “to improve his reliability, attendance and timeliness as well as being more willing to contribute to team efforts. He has agreed to work on these areas and his progress will be monitored going forward.” The Director noted that the Applicant

is one of the best in what he does in [the Applicant’s unit], but has let other issues [get in] the way of his reliability and delivery. He has a strong capacity and experience [and] he can play a very important role in the unit, as we are going through [the] internal change agenda. His performance and behaviour will be closely monitored throughout the year to provide him with ample

opportunities to continue delivering his contributions to our work but with significant improvement in his reliability and overall consistency

17. On 17 November 2012, Dr. F wrote to HSD confirming that he had discussed Dr. K's recommendations with the Applicant who had "agreed to comply" and that he had recommended the Applicant consult another specialist psychiatrist to "supervise his continuing treatment."

18. Subsequently, the Applicant continued to manifest the same attendance and performance issues as in the past. Since the Applicant had been found fit for duty, the Applicant's Director decided, after consulting with Human Resources (HR) and HSD colleagues, to implement an Opportunity to Improve (OTI) as provided for in Staff Rule 5.03 ("Performance Management Process"). This commenced after the Director discussed it with him on 4 December 2012. The Director's discussion with the Applicant was summarized in the Director's memorandum of the same day as follows:

1. I explained that the following aspects of your performance were unsatisfactory:

- **Timeliness and attendance** - You have not kept a regular work-schedule and have not notified your managers and colleagues promptly and consistently of delays in you(r) arrival to work and/or early departure from the office. On several occasions, you have omitted notifying your managers in advance when not reporting for work and have not filed for leave even when prompted to do so by the department's attendance coordinator. Also, you have absented yourself during the work-day without a clear business need and without notification to colleagues or managers.
- **Team work** - The lack of reliability in your work schedule has imposed a burden on some of your colleagues, who have had to take on assignments which you were not able to carry out or to complete promptly due to your absences. Without advance notice, your absences and delays have contributed to uncertainty for colleagues, whose work plans were affected by the need to carry out your tasks. You have also not been always willing to reciprocate the help received with your assignments when requested by others to assist at peak business times.
- **Behaviors towards colleagues** - You have on a couple of occasions behaved aggressively (raising your voice and losing your temper)

towards another staff member who was supervising your work as part of her office manager duties.

2. I explained that you are being given an opportunity to address these deficiencies. Specifically,

- i) Improve your timeliness and attendance by reporting for duty promptly at 9:00 a.m. every day and leaving not before 6:30 p.m. – your agreed working hours. You will be required to sign yourself in and out with the attendance coordinator daily. If you are not able to report for work or anticipate being late or need to leave early, ensure that the Managers and the attendance coordinators are informed of your plans in advance and that the appropriate leave is filed before your absence.
- ii) Inform your colleagues in advance of your absences. To the extent possible, complete tasks assigned to you, which are due, before you take leave. On an exceptional basis, if that is not possible, give your colleagues all the information they need – in writing through an “absence note” – on pending tasks, expected completion times, stage of readiness of tasks and additional steps that need to be taken to complete them.
- iii) You must notify your managers and attendance coordinators promptly, if without prior approval, you are unable to report for duty on a scheduled work day. Unless prevented by emergency or illness, the notification should be given by 10:00 a.m. of the first day of such absence and on a reasonable basis thereafter. Please inform them verbally or in writing of any outstanding tasks which are assigned to you and are due, and provide other relevant information to facilitate their completion by colleagues in your absence.
- iv) Complete all tasks assigned to you in a timely manner and with due attention to quality and high standards of client service.
...
- v) Cooperate with colleagues, going the extra mile when asked for help, even if not formally assigned as a back-up. You have been assigned two colleagues whom you will mentor and coach on new assignments. Their feedback will be an input in assessing your performance improvement.
- vi) Improve your workplace behavior by working better in team and collaborative settings by exchanging criticism in a non-confrontational manner; by respecting the views of others; and by

not allowing personal issues to impede delivery of work. You have been asked to contribute to the team work on eCenter and your contributions and behavioral improvements will be tracked in that context as well as more broadly in office interactions.

...

3. I expect to see improvement before the end of Fiscal Year 2013, i.e. before end June 30, 2013. I will discuss your progress with you every two weeks and have an end-of-month assessment at the end of each month until June 2013.

4. Please note that failure to improve at a reasonable pace or to sustain satisfactory performance is a serious matter and could result in the termination of your employment from the World Bank Group in accordance with Staff Rule 7.01: Ending Employment, Section 11.

19. During the period of the OTI, the Applicant continued to manifest the same behavior, tardiness and absenteeism as before. According to a table recording the Applicant's attendance submitted by the Bank, the Applicant took one day of leave without notice in December, 4.5 days in January, 4.5 days in February, 7.5 days in March and 6 days between 1 April–18 April. He also arrived after 10:00am on eight occasions and after 11:00am on six occasions during this period.

20. The Director indicated to the Applicant on several occasions that his attendance and tardiness were unacceptable and encouraged him to improve. On 25 January 2013, the Director noted that the Applicant was on the Bank's Alternative Work Schedule (AWS) and so was

required to be at work for 9 hours for 8 days, and 8 hours for 1 day, with 10th day off, per staff rules, plus the lunch and personal breaks. Your breaks are long throughout the day and frequent, but even averaging them as 30 min a day would imply that if you come to work at 9:30, you are expected to be at work till 7PM. If you come at 10AM, then at work till 7:30PM or so. See below your record on this. Also, as part of our agreement, you need to inform in advance or early in the day when you take leave, which you have also failed to do regularly. In general, your leaves (except for annual leave) are again unexpected and unscheduled, also causing disruption. Today, as inclement weather day, you should have informed me of you deciding to take unscheduled leave, which you did not do; and called in to inform about taking the leave at 11AM. You should do so by 10AM. Please also note that you cannot show up at work later than 10AM unless some exceptional circumstances take place, as Bank's core hours start at 10AM. Thus:

1. Specifically about today, pl[ease] note that I expect you to be available and work from home (as you already did) full day, and your starting hour is counted as 11AM.

2. In the next round of this review, with similar indicators, I will ask that your AWS plan is revoked and you move to regular schedule.

3. This illustrates that you have not yet been able to comply with agreements that we have reached under your [OTI], and again, I note, that your continued failure to do so will lead to actions noted in the Plan. Also, be mindful, that you would need to establish and demonstrate a continued and sustained trail of complying with agreed actions during the [OTI] period.

21. On 26 February 2013, the Director noted in an e-mail to the Applicant “as in the previous update, you have not yet been able to comply with agreements that we have reached under your [OTI], and again, I note, that your continued failure to do so will lead to actions noted in the Plan. Also, be mindful, that you would need to establish and demonstrate a continued and sustained trail of complying with agreed actions during the [OTI] period.” On 19 March 2013, the Director sent him another e-mail in very similar terms.

22. On 3 April 2013, the Director e-mailed the Applicant stating:

You continue not complying with agreements that we have reached under your [OTI] ... I would like to actually notice a considerable regress rather than progress ... you have not reported to work on March 28, but then also Apr 1, Apr 2, Apr 3. On top of it, you have failed to even inform the unit of not planning to report to work until such time you were contacted by us. This is very unfortunate

23. On 18 April 2013, the Director e-mailed him stating:

Since my last update on Apr[il] 3, you have been barely at work at all, occasionally saying that you will come at some point during the day, and not even showing up - like yesterday, or coming in half day - like the day before yesterday or today; and you just never showed up most of days. Not only you have not used the opportunity to improve to demonstrate improvements, but in fact you have been behaving in the most unacceptable manner. Your absence this week has actually caused disruption in our ability to carry out our duties, and led to very late clearances of documents submitted because of which we need to reschedule few items for Board approval which ultimately affects the World Bank Group reputation with clients. This is simply intolerable. I would

like to make it very clear for you - you have totally and indisputably failed to comply with agreements in your [OTI].

Please also note - as of today, you are not any more eligible for any AWS.

24. Later the same day, the Applicant's behavior caused his colleagues to believe he may be suicidal and the Director took him to HSD out of concern for his wellbeing. HSD referred the Applicant to a new psychiatrist, Dr. C.

25. On 26 May 2013, the Applicant received hospital treatment following a suicide attempt. On 28 May 2013, the Applicant again received hospital treatment following another suicide attempt. Having tried to discharge himself from hospital, he was involuntarily admitted to a psychiatric institution from 29 May until 3 June 2013.

26. On 10 June 2013, following consultations with HSD and HR colleagues, the Director sent the VPCS, with a copy to the Applicant and others, a memorandum dated 28 May stating:

1. The purpose of this memo is to follow up on the [OTI] afforded [the Applicant] on December 4, 2012 and advise you of the outcome. ... The performance deficiencies discussed with [the Applicant] are detailed in the attached copy of the memo shared with the staff member dated December 4, 2012.
2. Following our discussion, [the Applicant] made efforts to address his performance deficiencies, and we provided support, resources and time to improve. His performance deficiency remains, in particular,
 - (i) Attendance- As of May 28, 2013 [the Applicant] has missed many days of work and in most cases has failed to inform colleagues of his absence in advance. Whilst these days have now been filed as leave days, on 17 occasions they have been filed post factum. There is also a high number of half days [10] in this time period, because he did not come to work for half the day without prior approval; ii) His arrival and time at work remained inconsistent with many days with late arrivals. As of May 28, 2013, on 17 occasions, he reported to work after 11:00am; and on 10 occasions he came to work after 10:00am. In addition, there were 11 days of sick leaves and home-based work days not filed in advance. Subsequently, he has not been consistent in attending the weekly staff meetings where we discuss the upcoming work

program so we can anticipate and plan; iii) [the Applicant's] attendance has been unreliable, having a negative impact on the team. In some instances this has led to failure to clear documents for Board consideration - leading to delays in approval of projects by the Board and thus directly impacting the ability of the Bank in serving its clients - a big institutional risk. Being unreliable has generated stress amongst colleagues who back him-up and has contributed negatively to overall morale of the team. I requested him in middle April to discontinue his AWS (Alternative Working Schedule) because he was not meeting the required working hours to avail himself of the flexibility.

In my judgment, continued efforts to improve are not in the Bank's interest. I have consulted with [our] HR Business Partner on next steps. Therefore, I recommend that:

[The Applicant's] employment be terminated in accordance with Staff Rule 7.01 Ending Employment, Section 11, Unsatisfactory Performance.

27. The same day, the Director e-mailed the Applicant stating that he had been informed that the Applicant would be on sick leave until 17 June 2013 and that, given the circumstances including "concerns [his] behavior in the office has raised with colleagues," the Applicant would henceforth be required to give at least 24 hours' notice to access the Bank's premises and that his access would be supervised by the Bank's security personnel "in the manner deemed suitable."

28. On 14 June 2013, Dr. C diagnosed the Applicant as suffering from Bipolar Type I Disorder. Dr. C considered the symptoms of this disorder had first appeared around May 2012.

29. On 17 June 2013, the Applicant applied for Short Term Disability (STD) benefits under the Bank's Disability Insurance Program.

30. On 18 June 2013, the Applicant e-mailed the VPCS referring to the memorandum sent by the Director to the VPCS on 10 June 2013. He stated that while his attendance had "not always been perfect, that is because of a serious medical condition of which [HSD] is fully aware"; that he was applying for STD benefits so that he could "concentrate on his recovery"; and that

treating his “medical condition as ‘unsatisfactory performance’ justifying termination [was] inappropriate, unfair, and contrary to numerous Staff Rules and Principles.”

31. On 27 June 2013, the Applicant sent an e-mail to the VPCS notifying him that the Bank’s disability administrator had approved his eligibility for STD benefits as of 28 May 2013 and requesting that the VPCS therefore take no further action as he was on disability leave. He stated that the approval of his STD benefits was “further evidence that [his Director’s] criticisms of [his] performance ... were based entirely on [his] medical situation.”

32. On 16 July 2013, the VPCS sent the Applicant a notice of termination stating that because the Applicant’s performance had “not shown significant improvement ... I have decided to accept [the Director’s] recommendation and terminate your appointment” effective 27 September 2013 “in accordance with Staff Rule 7.01, Section 11.”

33. On 22 July 2013, the Applicant sent an e-mail to the VPCS urging him to reconsider the termination decision and raising objections to it on several grounds. He copied his attorney as well as the Bank’s Legal Department.

34. On 25 July 2013, the VPCS wrote to the Applicant stating that he had given careful consideration to the matter but did not “see a reason to reconsider” his decision. He stated that although the Applicant “had numerous opportunities during the [OTI] to indicate to [his] Manager any limitations in [his] ability to improve [his] performance,” he did not do so.

35. On 21 October 2013, the Applicant underwent an Independent Medical Evaluation (IME) by another psychiatrist, Dr. G, at the request of the Bank’s disability administrator. Dr. G concurred with Dr. C’s diagnosis of Bipolar I Disorder, noting that the Applicant’s symptoms included “suicidal ideation and major depression, resulting in serious impairment in his social and occupational functioning.”

36. The Tribunal received the Application on 26 November 2013. The Applicant seeks rescission of his termination; his re-hire when/if he is deemed medically fit to return to work, or

the payment of a lump sum equivalent of such a re-hire commitment; removal of all records of his OTI and of his termination from his personnel files; reinstatement of his retirement plan and the opportunity to replace those funds which he was “forced to withdraw in order to survive and pay his medical insurance following his termination”; the severance payments to which he was entitled under Staff Rule 7.01, paragraph 7.08; and such additional compensation as the Tribunal deems fair and appropriate for pain, suffering and reputational damage. He also seeks his attorneys’ fees and costs.

THE CONTENTIONS OF THE PARTIES

The Applicant’s Main Contentions

37. The Applicant complains that although HSD advised his Director that his mental health may lead him to “have issues with self regulation and self discipline” including “being on time for work,” the OTI requirements took no account of these limitations.

38. He claims that he was treated with scorn and anger for failing to meet the terms of the OTI and as if his absences from work were the result of willful behavior.

39. The Applicant also contends that, faced with his declining performance during the OTI period, the Director was under a duty to seek HSD’s further assistance and should also have requested a new Fitness for Duty assessment. This, he submits, his Director “failed spectacularly” to do until after he had decided to terminate the Applicant’s employment, told him so, and was then concerned he might be suicidal. The Applicant argues that HSD’s October 2012 Fitness for Duty assessment put the Bank “on notice that a reappearance of the troublesome behaviors would be the result of his health condition and that he would need medical treatment – not punishment.”

40. The Applicant also contends that HSD should have been proactive in ascertaining whether he was receiving the support and treatment he needed because, as HSD was aware, he was not well enough to help himself and still suffered from periods when he could “not get out of bed.” He submits that the September 2012 psychiatric report obtained by HSD strongly

recommended that the Applicant's progress be carefully monitored and assessed again in future, including by way of reports from "his treating psychiatrist, therapist and group therapist."

41. The Applicant adds that the VPCS should not have approved his termination because (i) by April 2013 he was "finally getting the psychological assistance he needed" from a psychiatrist to whom HSD had referred him and (ii) he explained to the VPCS that his so-called "unsatisfactory performance" was caused by his "medical disability."

42. Based on these alleged failures, the Applicant contends that the Bank failed to afford him fair treatment within the meaning of Staff Principles 2.1 and 9.1.

43. He also contends that the Bank breached Staff Rules 6.22, paragraphs 3.08–3.10, and Staff Rule 7.01, paragraph 7.02 because it should have waited until the end of his STD benefits before terminating his employment. In the alternative, he contends that the Bank breached Staff Rule 7.01, paragraph 7.02 because it did not provide him a severance payment. He submits that all aspects of his behavior treated as "poor performance," and used as the basis for the termination of his employment, were "entirely a result of" and "inextricably tied" to his psychiatric condition.

The Bank's Main Contentions

44. The Bank contends the Applicant's managers "went to great lengths to determine whether his poor performance could be attributable to ill health" and once it was determined that he was fit for duty, they gave him "clear guidance and feedback in an effort to give him every opportunity to improve his performance."

45. The Bank points out the OTI was implemented only after the Applicant had been declared fit for duty and that the September 2012 psychiatric report noted the Applicant's mental health did "not limit his ability to return to work." The Director was, the Bank submits, entitled to rely on the expert medical evaluation that the Applicant was fit to work. In the Bank's view, he was accordingly entitled to implement the OTI pursuant to Staff Rule 5.03 because the

Applicant's performance was unsatisfactory and this was not considered to be health-related. The Bank considers that the OTI "fully reflected" the recommendations received from HSD and complied with all requirements of Staff Rule 5.03. In addition, the Bank asserts that the Director made "every effort during several months to engage the Applicant, and to encourage him to improve his performance" and gave him "ample opportunity to demonstrate improvement."

46. The Bank states that on several occasions the Director asked the Applicant if his medical condition was the reason he was failing to improve his behavior and that the Applicant told him this was not the case. In the Bank's view, the Director had no reason to believe the contrary and was entitled to conclude that by April 2013 the Applicant had failed to demonstrate the sustained improvement required by the OTI. Contrary to the Applicant's claims, the Bank submits that the Applicant was dealt with "fairly," "leniently and with understanding."

47. The Bank rejects the Applicant's contention that Staff Rule 7.01, paragraph 7.02 applied to his case, arguing that he had been assessed by HSD as fit for duty and his employment was terminated for unsatisfactory performance under Staff Rule 7.01, Section 11. The Bank points out that the Applicant had failed to meet the requirements of the OTI while he was considered fit for duty and prior to the retroactive approval of his STD benefits as of 28 May 2013. In the Bank's submission, the approval of STD benefits for the Applicant should not excuse periods of poor performance prior to the effective date of the approval.

48. The Bank further submits that, as required by Staff Principle 2.1, it (i) treated the Applicant fairly and without bias and (ii) flexibly accommodated him to the extent that his absenteeism was health-related, including by granting him sick leave and allowing him to work from home on occasion. The Bank argues that it was required to balance its treatment of the Applicant with the "detrimental impact the Applicant's behavior was having on fellow staff members" and with the interests of the organization in delivering its work program.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

49. This case involves a staff member who performed well in his work for the Bank for more than ten years before he was diagnosed with a spinal cord tumor and had to undergo significant surgery in June and November 2010. He had suffered from a mental disorder for some time, but had a record of strong work performance and was known as a capable and collaborative team member. Following the surgery he underwent in 2010, he suffered pain and limited movement, and took several months of sick leave. Around this time, his mental health deteriorated substantially.

50. His managers warned him about unsatisfactory performance in late 2011 and again in May 2012. Around August 2012, the Applicant informed the Director that his performance was being affected by his health. The Director asked HSD to undertake a Fitness for Duty evaluation. HSD, with the assistance of a psychiatrist, assessed the Applicant as fit for duty in October 2012. Thereafter, his Director implemented an OTI. It set out standards for expected timeliness, attendance, team work and work behavior. It afforded the Applicant six months in which to demonstrate a sustained improvement. Some 4.5 months into the OTI, his Director informed the Applicant that he had failed to meet the requirements of the OTI. In July 2013, the VPCS accepted the Director's recommendation and notified the Applicant that his employment would be terminated in September 2013 due to his unsatisfactory performance.

Staff Rule 6.22 ("Disability Insurance Program"), paragraphs 3.08–3.10

51. The Applicant contends that the Bank breached Staff Rule 6.22, paragraphs 3.08–3.10 because it did not wait until the end of his STD benefits to terminate his employment. He asserts that the Staff Rules entitle him to a full two years of STD "in order to give him a chance to recover."

52. The paragraphs in question provide:

End of STD Benefits

3.08 During STD, the Disability Administrator will monitor the staff member's condition to assess continued eligibility for STD benefits. STD benefits will end at any time the Disability Administrator determines, following receipt of a release to work form, that the staff member is no longer disabled. In that event, the Disability Administrator will then determine after consulting HSD and the Staff member's management unit if necessary, whether the staff member can return to work based on his/her ability to perform the material duties of his/her regular job.

If the staff member is able to return to work, Section 7 of this Rule will apply. *If the staff member is not able to return to work, he/she may be terminated in accordance with Staff Rule 7.01, Section 7.*

3.09 If a staff member remains on Short-Term Disability for 20 months from the Start of Disability, the Disability Administrator will assess the staff member's eligibility for Long-Term Disability (LTD) benefits. *If, in accordance to said assessment, the Disability Administrator determines that the staff does not qualify for LTD benefits or will not qualify for disability benefits at the conclusion of the 24 months STD period, the provisions of paragraph 3.08, above, will apply.*

3.10 Staff who are approved for LTD Benefits following 24 months of STD benefits, are separated from the Bank Group's employment in accordance with Staff Rule 7.01, Section 7 and provided LTD benefits in accordance with Section 4 of this Rule.

(Emphasis added.)

53. In interpreting the applicable rules, the Tribunal may first look to the plain and ordinary meaning of the relevant rule (*Mould*, Decision No. 210 [1999], para. 13). In appropriate cases, in addition to the text itself, the Tribunal may have regard to the object and purpose of the rule (*Cissé*, Decision No. 242 [2001], para. 23). The Tribunal has also held that, where there is ambiguity, the applicant should receive the benefit of the doubt (*Cissé*, para. 31).

54. The Tribunal considers that, on their plain and ordinary meaning, paragraphs 3.08–3.10 of Staff Rule 6.22 do not have the effect the Applicant claims. These paragraphs refer to the consequences of a staff member being found *ineligible* for *continued* disability benefits and the attendant implications of such a finding for his or her continued employment. Although not a determinative factor, this is consistent with the heading to these paragraphs, namely “End of

STD Benefits.” The Applicant, however, was not determined to be ineligible for STD benefits. He continues to receive them at the time of these proceedings.

55. The Tribunal notes the Bank’s confirmation in the course of these proceedings that “a former staff member whose employment has been terminated under Staff Rule 7.01, ‘Ending Employment,’ after he has been found eligible for Disability Benefits, continues to be eligible for Disability Benefits as provided under Staff Rule 6.22, ‘Disability Insurance Program.’”

*Staff Rule 7.01 (“Ending Employment), paragraph 7.02
 (“Decisions to End Employment as a Consequence of Ill Health”)*

56. The Applicant also contends that the Bank breached Staff Rule 7.01 (“Ending Employment”, as amended on 9 July 2012), paragraph 7.02 (“Decisions to End Employment as a Consequence of Ill Health”). He argues that paragraphs 7.02 and 7.03 make it clear that those on STD may only be separated from the Bank’s employment after certain conditions have been met. He asserts that the Staff Rules entitle him to a full two years of STD “in order to give him a chance to recover.”

57. The Bank rejects the Applicant’s contention that Staff Rule 7.01, paragraph 7.02 is applicable because the Applicant’s employment was terminated for poor performance under Staff Rule 7.01, Section 11 (“Unsatisfactory Performance”). The Bank emphasizes that (i) the Applicant was assessed by HSD as fit for duty prior to the implementation of the OTI and (ii) that the Applicant’s Director concluded that the Applicant failed to meet the requirements of the OTI while he was considered fit for duty and prior to the retroactive approval of the Applicant’s STD benefits as of 28 May 2013. In the Bank’s submission, the approval of STD benefits for the Applicant should not excuse periods of poor performance prior to the effective date of the benefits approval. The Bank says further that Staff Rule 7.01, Section 7 provides for STD for up to 24 months but does not provide “a right to twenty-four months” of STD benefits.

58. Staff Rule 7.01, paragraph 7.02, as in force at the material time, states:

Decisions to End Employment as a Consequence of Ill Health

7.02 *A staff member on short term disability who in accordance with Staff Rule 6.22, has not been determined eligible for Long Term Disability benefits by the Disability Administrator may be separated from the Bank Group's employment subject to the following:*

- a. The Bank Group's Disability Administrator has determined after consultation with the Bank Group's Director of Health Services, or designee and the staff member's manager that *the staff member will not recover sufficiently to permit resumption of the material duties of his/her regular job on a full time basis within the earlier of 60 calendar days following such determination or the expiration of the staff member's appointment.*
- b. The Bank Group's Disability Administrator has consulted with the Bank Group's Director of Health Services, or designee and the staff member's manager who shall make a determination on whether the recommended work accommodations can be achieved within the business needs of the unit, and determined that there are *no reasonable work accommodations that will allow the staff member to resume the material duties of his/her regular job within 60 calendar days following such determination and before the expiration of the staff member's appointment.*
- c. The staff member will be entitled to severance payments equal to the severance payment that would have been payable to the staff member had his or her employment been terminated in accordance with Section 8 of this Rule.

(Emphasis added.)

59. By its own terms, this paragraph applies to a "staff member on short term disability who in accordance with Staff Rule 6.22, has not been determined eligible for Long Term Disability benefits." Staff Rule 6.22, paragraph 4.01 provides that the period of absence due to illness or injury which must have elapsed before an individual is eligible to receive Long Term Disability (LTD) benefits is "24 months of STD benefits including the elimination period for STD and any period of sick leave." At the time of his termination, the Applicant had not received 24 months of STD benefits and accordingly no determination as to his eligibility for LTD had been made. In

other words, it is apparent that Staff Rule 7.01, paragraph 7.02 did not apply to his situation at the material time.

60. The Tribunal is reinforced in this conclusion by the Bank's assurance in these proceedings that the "Applicant remains eligible for the full twenty-four months of Short Term Disability benefits, followed by Long Term Disability benefits, under Staff Rule 6.22, irrespective" of the termination of his employment on grounds of unsatisfactory performance.

The requirement to keep a regular work-schedule and provide advance notice of leave

61. The Applicant complains that although HSD advised his Director that his mental health may lead him to "have issues with self regulation and self discipline" including "being on time for work" and that he "may find it difficult to motivate himself ... to conform to expectations of behavior in the work place," the OTI requirements took no account of these limitations. He says he alerted his Director to the fact that his medical condition was affecting his performance during the OTI and that the Director's denial that he did so is "simply false."

62. The Director was, the Bank submits, entitled to rely on the medical evaluation obtained by HSD that the Applicant was fit to work and to implement the OTI because of the Applicant's unsatisfactory performance. The Bank contends the Applicant's managers "went to great lengths to determine whether his poor performance could be attributable to ill health" and once it was determined that he was fit for duty, they gave him "clear guidance and feedback in an effort to give him every opportunity to improve his performance." It takes the view that the September 2012 psychiatric report obtained by HSD indicated that the Applicant's performance issues were "a question of willingness on his part." The Bank also avers that the Applicant's manager made "every effort during several months to engage the Applicant, and to encourage him to improve his performance" and gave him "ample opportunity to demonstrate improvement." In the Bank's view, the Applicant's manager had no reason to believe the Applicant's unsatisfactory performance was due to his medical condition and was entitled to conclude that by April 2013 the Applicant had failed to demonstrate the sustained improvement required by the OTI.

Contrary to the Applicant's claims, the Bank submits that the Applicant was dealt with "fairly," "leniently and with understanding."

63. Furthermore, according to the Bank, the Applicant denied his health issues were a reason for his unsatisfactory performance during the OTI period when asked about this by his Director. The Director says in his signed statement that during conversations with the Applicant prior to the OTI, the Applicant "indicated that he was going to improve 'little by little.' ... for instance, that he would start coming to work a couple of minutes earlier every day, in order to eventually start arriving at the office at 9am every day. At the time I took this as implying that [the] Applicant could in fact control his behavior and that he recognized this." In an e-mail in the record the Applicant indeed refers to making "gradual steps" to improve his adherence to the agreed work schedule.

64. The September 2012 psychiatric report obtained by HSD recommended a "performance plan"; "feedback from his fellow employees and supervisor"; and "specific instructions of what kind of behavior and performance is required for this job"; a "structured work environment"; and "regular meetings with supervisors." The psychiatrist consulted by HSD specifically noted that the Applicant had "the physical and intellectual capacity to do his job and to be on time" and that "the issue for him is self regulation and discipline, and whether he is motivated to change his behavior in order to keep his job." She also concluded that "his depression does not limit his ability to return to work." (Emphasis in original.)

65. The Tribunal also notes that, as required by Staff Rule 5.03 ("Performance Management Process"), Section 3 ("Management of Unsatisfactory Performance"), the Applicant's OTI was discussed with him and shared with him in writing. It set out the aspects of the Applicant's performance that were not satisfactory (timeliness and attendance; team work; and behavior towards colleagues), provided guidance on what improvement was expected and by when (before 30 June 2013), and the possible consequences of failure to improve (including termination).

66. The Applicant contends that the Bank failed to afford him fair treatment contrary to Staff Principles 2.1 and 9.1.

67. Staff Principle 2 (“General Obligations of The World Bank and IFC”), paragraph 2.1, provides insofar as material:

2.1 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.

68. Staff Principle 9 (“Appeals”), paragraph 9.1, provides that staff members “have the right to fair treatment in matters relating to their employment.” It goes on to require that dispute resolution mechanisms shall be established and that this Tribunal shall hear applications from staff members.

69. Staff Rule 3.01 (“Standards of Professional Conduct”), paragraph 4.01 (“Supervisory Relationships”) provides: “Supervisors shall at all times treat staff in a fair and unbiased manner.”

70. The Bank submits that, as required by Staff Principle 2.1, it (i) treated the Applicant fairly and without bias and (ii) flexibly accommodated him to the extent that his absenteeism was health-related, including by granting him sick leave and allowing him to work from home on occasion. The Bank argues that it was required to balance its treatment of the Applicant with the “detrimental impact the Applicant’s behavior was having on fellow staff members” (who, among other things, felt threatened) and with the interests of the organization in delivering its work program.

71. In support of his contentions that he was treated unfairly, the Applicant refers to *G* (No. 2), Decision No. 355 [2006], paras. 32–34; *N*, Decision No. 356 [2006], paras. 30–31; and *Mendaro*, Decision No. 26 [1985], para. 21. These cases cast little light on the nature of the treatment that will be considered “unfair” within the meaning of Staff Principles 2 and 9.

72. In several other cases, the Tribunal has held that specific types of treatment are unfair within the meaning of the Staff Principles, including: (i) a breach of requirements subsumed under the general phrase “due process of law” (*Salle*, Decision No. 10 [1983], para. 50); (ii) the lack of a reasonable opportunity for a probationer to prove his ability (*McNeill*, Decision No. 157 [1997], para. 44); (iii) a failure to strictly observe proper and transparent procedures in relation to redundancy and non-confirmation decisions (*Husain*, Decision No. 266 [2002], para. 50; *Lysy*, Decision No. 211 [1999], paras. 72–79); (iv) “strikingly negligent actions” relating to the misconduct investigation of a staff member based on flawed evidence (*N*, Decision No. 362 [2007], para. 30); (v) a failure to consider a redundant staff member for an available position (*Jakub*, Decision No. 321 [2004], para. 70); (vi) the retroactive application of an amended salary decision (*Rae*, Decision No. 74 [1988], paras. 48–52); and (vii) the creation of conditions that were not supportive of work objectives including a failure to reimburse the staff member for legitimate expenses incurred (*Visser*, Decision No. 217 [2000], paras. 55, 66, 83, 87 and 88).

73. Having regard to these cases, the Tribunal considers that “fair” treatment includes treatment that is unbiased (that is, conducing to equal treatment of staff in like circumstances) and reasonable (that is, reasonably related to the achievement of its objective and proportionate). In assessing fairness, it may also be relevant to consider whether the impugned treatment is conducive to the staff relations and morale that will sustain a staff of “the highest standards of efficiency and technical competence” as required by Staff Principle 4. The Tribunal also considers that fair treatment includes the observance of general principles of law such as *pacta sunt servanda*, good faith, due process, estoppel (including protection of legitimate expectations), and unjust enrichment. *See de Merode*, Decision No. 1 [1981], para. 25. In a similar vein, the United Nations Disputes Tribunal held in the 2009 case of *James* (UNDT/2009/025), para. 28:

It is a universal obligation of both employee and employer to act in good faith towards each other. Good faith includes acting rationally, fairly, honestly and in accordance with the obligations of due process.

74. The Tribunal concludes that, at the time it was agreed with the Applicant, the OTI was not unfair. It was not biased. It did not include requirements with which the Bank knew the

Applicant could not comply. Nor was it unreasonable. It accorded with the medical advice received by the Bank and was reasonably related to the objective of improving the Applicant's work performance.

The Director's treatment of the Applicant

75. The Applicant claims he was treated with scorn and anger for failing to meet the requirements of the OTI and as if his absences from work were the result of willful behavior. He says that when he told the Director the effect his medical condition was having on his accomplishment of the OTI requirements, the Director told him to "snap out of it," that his medication was "bullshit," and suggested he try "[expletive] yoga or meditation or something."

76. In a signed statement, and again in oral testimony, the Director explained that, in his view, he treated the Applicant fairly and went beyond what was required to understand and support him, saying:

I invested much of my time in trying to encourage [the] Applicant to improve his behavior. For a while we spoke on a daily basis. I even resorted to taking [the] Applicant for a coffee ... every morning that he arrived on time. ... I was trying very hard to engage [the] Applicant's interest to overcome his performance issues. When [the] Applicant indicated he was bored at work, I adapted his work program in the hope that renewed interest in his work would encourage him to improve his performance. In no way did I treat the Applicant unfairly.

77. In his signed statement the Director did not directly deny he made the alleged statements. In his oral testimony he said that he had many conversations with the Applicant and may have made elements of the statements alleged. He said that these statements should be understood in the context of the many friendly conversations he had with the Applicant and that they had exchanged a lot of personal information. The Director noted that he practices meditation himself, finds it a helpful way to relieve stress and that is why he may have suggested it to the Applicant.

78. The Tribunal finds that the Director made the alleged statements or similar statements. It is noteworthy that other statements made by the Director in the record (to the psychiatrist

consulted by HSD in late 2012 and in e-mails to the Applicant) evidence a significant level of understandable frustration.

79. In common with all employees, international civil servants have a right to be treated with dignity. This is also an aspect of fair treatment. Health and medical issues are, of course, topics that must be handled with sensitivity. Statements of the kind alleged might in certain situations amount to unfair treatment. Moreover, Bank policy is clear that staff members are required “to treat one another with courtesy, dignity, and respect” and that this includes avoiding insults “related to personal or professional competence.” A “single incident can be considered harassment if it is so severe that it has a negative impact on the individual or the work environment.” *See* The World Bank Group Code of Conduct (2009); “Working with Respect in the World Bank Group: Building a Positive Work Environment” (2007).

80. Having heard from both the Applicant and the Director, the Tribunal concludes that the statements made—in the context within which the Director and the Applicant shared much personal information, had frank personal conversations, and in which the Director was actively trying to assist the Applicant to improve his performance—were not malicious or so severe as to give rise to liability under the Staff Principles.

The decision not to re-engage HSD towards the end of the OTI

81. The Applicant contends that, in light of his declining performance during the OTI, his Director was under a duty to seek HSD’s further assistance. This, he submits, his Director “failed spectacularly” to do until after he had decided to terminate the Applicant’s employment, told him so, and was then concerned the Applicant might be suicidal. The Applicant argues that HSD’s October 2012 Fitness for Duty assessment put the Bank “on notice that a reappearance of the troublesome behaviors would be the result of his health condition and that he would need medical treatment – not punishment.”

82. The Applicant says: “Instead of sending [the Applicant] increasingly angry emails about his attendance, [the Director] should have sought advice from [HSD], who in turn should have

had another medical assessment done. Had that happened, there can be little doubt that [the Applicant] would have been placed on Short Term Disability until such time as he recovered sufficiently to be able to return to work.” The Applicant states that he told his Director that his depression made it difficult for him to keep a regular schedule, but that his explanation was rudely dismissed. He says the Bank’s denial that this occurred is simply false.

83. The Bank contends that the Applicant’s manager was required to respect the Applicant’s privacy and the boundaries of the Bank’s legitimate interest in his health. The Bank asserts that the Director met with the Applicant formally and informally in order to understand his concerns and identify ways in which the Bank could assist. This led to the Applicant confiding in him that his health issues were affecting his performance in summer 2012, which prompted the Director to request the Fitness for Duty assessment. However, the Bank states that although during the OTI period the Director met with him on numerous occasions to encourage compliance with the OTI and see how he was doing, the Applicant did not raise any concerns about his health. In his statement, the Director states he asked the Applicant about this “on several occasions.” In fact, says the Director, the Applicant explained his poor performance by referring to “social commitments” keeping him up late at night. The Director says further that the Applicant’s claim that he informed him that his performance during the OTI was due to his medical condition is not true. Rather, the Bank asserts, the Applicant indicated he would progressively make an increasing effort to adhere to his required office hours. The Bank supports this by reference to the Director’s statement as well as an e-mail exchange in which the Applicant refers to making “gradual steps” to improve his punctuality.

84. The Bank also asserts that there was no sign or incident indicating that the Applicant’s medical condition was deteriorating or affecting his performance, so as to give the Director reason to contact HSD during the OTI period. The Bank adds that the Applicant could have raised any medical concerns with HSD himself. The Director states that throughout his time as the Director, the Applicant

was consistent in his unsatisfactory performance. There was a pattern of absenteeism and late arrival. ... there was no variation in his behavior or performance during the OTI ... [and] ... no apparent indication, no event nor

specific evolution that could have put [him] on notice of the fact that [the] Applicant's unsatisfactory performance may be due to the onset of a medical condition.

85. The Director points out that, on occasions when the Applicant displayed unusual behavior, he referred him to HSD. The Bank refers to an 11 September 2012 e-mail in which the Director notes the Applicant's behavior to be a cause for concern and suggests that he might wish to discuss it confidentially with the Bank's Counseling Unit or HSD.

86. The Bank rightly points out that in the present case the scope of the Tribunal's review is limited to ensuring that the Bank exercised its discretion reasonably, not optimally or perfectly. It submits that reasonableness is to be judged in light of the information available at the material time.

87. It is well-established that discretion must be exercised reasonably and must be based on a proper consideration of the relevant facts. In the Tribunal's view, the assessment of reasonableness is to be made in light of what was known by the Bank and what should have been known by the Bank. This is consistent with *BX*, Decision No. 470 [2013], para. 38. In that case, the Tribunal confirmed that where a manager is aware that a staff member has health problems affecting his or her performance, the discretion to request a Fitness for Duty assessment pursuant to Staff Rule 6.07 ("Health Program and Services"), paragraph 3.03 ("Fitness for Duty Assessments") must be exercised reasonably (para. 47).

88. In the present case, the Director's statement that there was no indication that the Applicant's health had worsened stands at odds with his April 2013 e-mails to the Applicant noting "a considerable regress rather than progress" and that since 3 April, the Applicant had "barely been at work at all." The Director told the Tribunal that he was shocked that the Applicant's performance was not improving during the OTI and that it crossed his mind that the Applicant's behavior was something other than wilful but not to the extent that he felt it appropriate to reengage HSD.

89. The Tribunal notes that, under the Fitness for Duty process, the manager does not receive specific information regarding the staff member's condition and did not in this case receive specific guidance for recognizing when he should reengage HSD, but only a general description of the effects of the condition along with recommendations for management action. The Director was faced with a very difficult situation which he approached diligently and in collaboration with the Bank's HR department and HSD. The Tribunal takes the view, however, that the record indicates that the Applicant's behavior in March and April 2013 should reasonably have been perceived as an indication that the state of his health had worsened and was affecting his performance. This being the case, the record indicates that an essential fact went unconsidered when the Director decided to end the OTI without requesting a Fitness for Duty assessment.

90. The Bank places emphasis on the fact that the September 2012 psychiatric report obtained by HSD noted that the Applicant's mental health did "not limit his ability to return to work" and that, in particular, he had "the physical and intellectual capacity to do his job and to be on time" such that the "issue ... [is] his self regulation and discipline, and whether he is motivated to change his behavior in order to keep his job." At the same time, however, the report also pointed out that there were periods in which the Applicant isolated himself and "cannot get out of bed." Certain health conditions require the Bank to act with particular caution and consideration because the affected staff member may be less likely to take steps that would reasonably be taken by a staff member to protect their position such as, for example, by making the Bank aware of his or her declining health or applying for STD.

91. In March and April 2013, the Applicant knew that his job was at risk and that he had a limited period in which to demonstrate improvement. His response was to considerably regress and barely come to work. This is not the behavior of an individual in control of his condition. On 18 April 2013, the Director escorted the Applicant to HSD fearing that he was suicidal. In May 2013, the Applicant twice attempted suicide and was involuntarily admitted to a psychiatric institution. As of 28 May 2013, the Applicant was assessed to be incapable of doing his job and therefore eligible for STD. These facts reinforce the Tribunal in its view that a reasonable exercise of discretion (see *BX*, para. 47) would have led to a request for a second Fitness for

Duty assessment before the Director decided to end the OTI and recommend the termination of the Applicant's appointment.

92. As the Applicant also points out, in the psychiatric report provided to HSD in September 2012, alongside her recommendations for the Applicant's treatment, Dr. K recommended that "[a]t the end of six months, a meeting should be held by his supervisor and the Health Services Department at the Bank to review compliance with the treatment and performance plan and to decide on the appropriate course of action to be taken." In other words, Dr. K recommended a review involving consultation between the Director and HSD "to decide on the appropriate course of action" around mid-March 2013.

93. The Tribunal notes that, out of concern for staff members' privacy, HSD limits the amount of medical information that is shared with management following a Fitness for Duty assessment. While HSD advised the Director that there was a risk that the Applicant's condition might relapse, Dr. K's recommendation that the Director consult again with HSD six-months after the Fitness for Duty evaluation does not seem to have been shared with the Director. This recommendation was a relevant fact for him to consider in the process of making his decision to end the OTI and recommend the termination of the Applicant's employment. Not being aware of it, he could not have taken it into account. Ultimately, the Director consulted with HSD only after he had told the Applicant of his decision to recommend his termination and only then because he was concerned that the Applicant had become suicidal.

94. The Bank was thus compelled to make a retroactive attempt to consider the possible effect of the Applicant's health during the OTI. As Dr. X of HSD testified, medical specialists are "reluctant to ... judge somebody's behavior in the past." He noted that the Bank inquired as to whether there was evidence that the Applicant's health had affected his performance during the OTI, but ultimately had to proceed on the basis that there was no information in the Bank's possession to support this suggestion. Of course, had the Director requested a second Fitness for Duty assessment, or consulted with HSD around the time he observed the Applicant's "considerable regress" in spring 2013 as Dr. K had recommended, there might well have been such evidence.

95. Indeed, the Tribunal considers it likely that the Applicant would have been found to be eligible for STD, that discussion of termination on performance grounds would have halted, and that the termination of the Applicant's employment deprived a long-serving staff member of the opportunity to return to work should he in fact recover. The Tribunal notes that, in the oral proceedings, a Director in the Bank's HR department, with fifteen years of experience of working with the Disability Insurance Program, testified that she could not recall any other case in which a staff member's employment had been terminated during STD for any reason other than expiration of a fixed term appointment.

HSD's responsibilities regarding the Applicant's further treatment

96. The Applicant contends HSD should have proactively followed up to ascertain whether he was receiving the support and treatment he needed because, as HSD was aware, he was not well enough to help himself and still suffered from periods when he could "not get out of bed." He points out that the September 2012 psychiatric report obtained by HSD strongly recommended that the Applicant's progress be carefully monitored and assessed again in future, including by way of reports from "his treating psychiatrist, therapist and group therapist."

97. The Bank submits that HSD's role in the Fitness for Duty process is to assess whether a performance issue is health-related and does not extend to monitoring a staff member's health or medical condition on a day-to-day basis. In the Applicant's case, after some specific accommodations were made, the Bank argues, no further action was required from HSD. On the contrary, the Bank submits, the Applicant remained personally responsible for the treatment and management of his condition. In his statement in these proceedings, the HSD doctor involved states that he met with the Applicant to explain the Fitness for Duty process, including that it is not designed to provide medical care to the Applicant, that no doctor-patient relationship is established, that the Applicant's treating physician would remain responsible for his medical care and that it was important for him to continue treatment with his physician. According to the HSD doctor, he met the Applicant on 12 October 2012 and the Applicant confirmed his willingness to follow the treatment recommendations made in the psychiatric report obtained by HSD. HSD

also sent the report to the Applicant's physician, who confirmed that the Applicant had agreed to comply with the recommendations therein.

98. The Bank adds that, in its view, HSD reasonably relied on the psychiatric report's conclusions in concluding the Applicant was fit for duty and notes that the report advised that the Applicant's medical condition did not limit his ability to return to work.

99. A Fitness for Duty assessment is provided for under Staff Rule 6.07 ("Health Program and Services"), paragraph 3.03 ("Fitness for Duty Assessments"), which states, in relevant part:

Fitness for Duty Assessments

3.03 See below:

- a. Fitness for duty assessments may be requested when performance problems are believed to be health-related or when a staff member has been on sick leave for periods that are extended and/or recurring. A fitness for duty assessment will determine the presence and extent of any health-related impairment to perform assigned duties. Fitness for duty assessments are conducted by HSD at the request of a staff member's manager or the Director, Health Services Department. As part of the fitness for duty assessment, HSD may request that an external physician conduct a health assessment of the staff member involved.
...
- b. The outcome of the Fitness for Duty Assessment shall be provided by the Director, Health Services Department or a Health Services Physician, to the requesting manager, the staff member and the Manager, Human Resources Team.

100. Staff Rule 5.03 ("Performance Management Process"), paragraph 3.02 provides that if a staff member's performance is not satisfactory, the manager may request a health assessment under Staff Rule 6.07, paragraph 3.03 if performance problems are believed to be health-related.

101. There is no indication in Staff Rule 6.07, paragraph 3.03 that HSD assumes an ongoing responsibility to monitor a staff member's health or medical treatment. The rule refers only to HSD providing the "outcome" of the assessment to certain staff members. The Tribunal also notes the HSD doctor's evidence that he explained to the Applicant the Fitness for Duty process,

including that it is not designed to provide medical care to the Applicant and that the Applicant's treating physician would remain responsible for his medical care. This is consistent with the fact that HSD transmitted the psychiatric report to the Applicant's treating physician who in turn discussed its recommendations with the Applicant and added his own.

102. The HSD doctor also testified that he has received feedback from staff members who find the Fitness for Duty process rather intrusive in that their employer gains access to their private medical information. He further testified that a staff member's treating physician, and not the Bank, has the responsibility to determine the appropriate treatment.

103. Employers do not generally assume a responsibility for monitoring the medical treatment of their employees. In light of this, and given that any such obligation would raise significant issues of privacy, there would need to be a very clear statement in the Bank's rules, policies or other employment documents if the Bank was indeed assuming such a responsibility and very likely documentation relating to the Applicant's consent to the Bank taking such an interest in his medical treatment.

CONCLUDING REMARKS

104. The Tribunal accordingly concludes, in light of the foregoing analysis, that the failure of the Bank to conduct a second Fitness for Duty assessment—or to give due consideration to the recommendation in the September 2012 psychiatric report that a follow up meeting between the Director and HSD be held in spring 2013—before ending the OTI and terminating the Applicant's employment, constitutes a failure in the exercise of its discretion. Had the Bank taken these steps, the Tribunal is of the view that the Applicant would likely have been found unfit for duty before the end of the OTI with the result that the Bank would not have proceeded to terminate his employment on performance grounds.

DECISION

The Tribunal decides that:

- (1) The decision to terminate the Applicant's appointment is rescinded.
- (2) The Bank shall reinstate the Applicant to the same position or to a position similar to the one he was occupying at the time of the termination of his employment.
- (3) The Applicant shall be placed into the position he would have been in had his employment not been terminated.
- (4) The Bank shall remove all references in the Applicant's personnel file to his failure to meet the OTI requirements and/or to his termination.
- (5) The Bank shall pay the Applicant's legal costs and expenses in the amount of \$13,771.87.
- (6) All other pleas are dismissed.

/S/ Stephen M. Schwebel

Stephen M. Schwebel

President

/S/ Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 26 September 2014