



World Bank Administrative Tribunal

2016

Decision No. 547

**DP,
Applicant**

v.

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

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

**DP,
Applicant**

v.

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

1. This judgment is rendered by a panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Judges Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, and Mahnoush H. Arsanjani.

2. The Application was received on 1 October 2015. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 20 October 2016.

3. The Applicant challenges her 2014 Overall Performance Evaluation (OPE) and performance rating. The Applicant also seeks redress for (i) harassment and retaliation by Mr. A, her former Track Team Leader, and Mr. B, her Manager; (ii) the failure of the Office of Ethics and Business Conduct (EBC) to investigate her various misconduct complaints against Mr. A and Mr. B; and (iii) EBC's abusive investigation and findings against the Applicant in a case filed by Mr. A.

FACTUAL BACKGROUND

4. The Applicant joined the World Bank Group in July 1993 as an Advisor to an Executive Director, then became a consultant. In June 2000, she joined the World Bank Institute (WBI) on an Open-Ended appointment, where she coordinated the Disaster Risk Management (DRM) learning programs.

5. In 2010, the Applicant was transferred to the Global Facility for Disaster Reduction and Recovery (GFDRR), where she is a Senior Disaster Management Specialist (Grade GG). In March

2012, Mr. A became the Applicant's Track Team Leader and Mr. B became the GFDRR Manager in May 2012.

6. The comments in the Applicant's 2012 OPE were written by Mr. A, because Mr. B was new to GFDRR, and the OPE was signed by Mr. B. Her OPE was generally positive, although the Applicant was rated as "partially successful" in teamwork, and identified areas of improvement included "teamwork (beyond her immediate colleagues) and expanding the reach of her program."

7. On the other hand, the Applicant's 2012 Talent Review, which was not shared with her as it is a confidential document but was reviewed *in camera* by the Tribunal, sets out the following overall comments:

[The Applicant] has limited career flexibility and restrictions that will be difficult to overcome. She does not appear to have a strong desire to take on responsibilities or move into a new role. Impossible to work with. Will try for early out or PIP and move out. No communications skills. [The Applicant] is a difficult staff. She demonstrates non-productive workplace behaviors with regular conflicts with other staff members. [The Applicant] has extensive experience working with external partners who produce and disseminate[s] knowledge products.

8. In May 2012, the Applicant first requested to be transferred to one of the other Tracks in GFDRR because she claimed that it was difficult to work with Mr. A, her Track Team Leader. She repeated her request to be transferred in the fall of 2012, but did not receive any response.

9. In her 2013 OPE, the Applicant was rated as "Fully Successful" in all categories. It was suggested that she could improve by becoming more proactive in involving the regional teams on program design and how best to respond to the increased demand, and seeking feedback and suggestions from the regions and partners.

10. However, the Applicant's 2013 Talent Review, which was also never shared with her, states in the comments, as one of the options to be pursued with regard to the Applicant: "4/2013 Dept: Exit from the Bank."

11. On 1 November 2013, the Applicant requested Mr. B to transfer her from her current Track to a different Track, for programmatic reasons and because she felt her health issues were aggravated by “the T3 management style and the resulting team dynamics as well as the hostile work environment.” The Applicant repeated her transfer request on 12 December 2013, claiming that Mr. A created a hostile work environment and constantly harassed female staff.

12. The Applicant also complained of harassment by Mr. A and Mr. B to EBC at a meeting on 3 December 2013. She submitted her first written complaint to EBC on 26 January 2014.

13. In response to Mr. B’s request for clarification and additional information about the Applicant’s harassment claim, on 8 January 2014, the Applicant mentioned additional female staff members, whom she claims had also been harassed by Mr. A, and she requested Mr. B to take action.

14. On 31 January 2014, Mr. B convened a meeting with the Applicant, Mr. A, and the Human Resources (HR) Business Partner for the unit. It was agreed at the meeting that the Applicant would be moved to a different Track under the supervision of Mr. C, that the Applicant would follow the Operational Guidelines pertaining to the Statement of Mission Objectives (SMOs) drafting and clearing procedure, and that the Applicant would prepare a detailed action plan for her program including deliverables with timelines and funding sources.

15. After receiving the Applicant’s complaint of harassment, Mr. B requested Mr. D, a Senior Operations Officer in GFDRR, to undertake a series of confidential interviews to determine whether there was rumor or evidence of harassment of staff by Mr. A. Mr. D interviewed several staff members and, on 3 April 2014, reported to Mr. B that the view of Mr. A was positive.

16. On 14 April 2014, the Applicant complained to EBC about retaliation by Mr. B because she had raised harassment and discrimination issues. The Applicant cited the following examples of retaliatory actions: instructing the acting manager not to approve the Applicant’s pending sick leave and home-based work, writing emails claiming that the Applicant did not follow proper procedures in requesting sick leave, reporting false allegations to HR about the Applicant’s

allegedly unauthorized absence and initiating action against her, and inspiring self-censorship among team leaders against the Applicant.

17. On 10 July 2014, EBC informed the Applicant that it had concluded its review of her allegations and had decided to close the case based on insufficient evidence, particularly because the witnesses did not corroborate her testimony.

18. The Applicant resent her original retaliation complaint to the Manager of EBC on 24 August 2014, and also noted that she had complained to EBC about Mr. A's harassment and discrimination. The Applicant submitted to EBC an additional complaint of retaliation by Mr. A on 15 June 2015.

2014 OPE

19. Due to "the on-going Change process and the anticipated new GP [Global Practice] management team launch on 1 July 2014", the Sustainable Development Network Vice-Presidential Unit (VPU) Directors launched the 2014 OPE on 1 May 2014 and agreed to commit to finalize the process by 30 June 2014, notwithstanding that the corporate timeline for 2014 OPE completion was 30 September 2014.

20. Staff were advised of the 2014 OPE timeline for the VPU, which indicated that the OPE should be initiated by sending requests to feedback providers by 6 May 2014 and the discussions were to take place by 6 June 2014. VPU Departmental Management Review Meetings were scheduled to take place between 6 and 9 June 2014, and the VPU Management Review on 16 June 2014.

21. On 22 May 2014, the Applicant sent her list of proposed feedback providers to Mr. C who approved it on 27 May 2014. On 1 June 2014, the Applicant asked her feedback providers for their comments by 4 June 2014.

22. The Applicant's performance rating was discussed during a management meeting on 5 June 2014 and was confirmed on 14 June 2014. Mr. B proposed a performance rating of 2 for the

Applicant. A rating of 2 means “below expectations” and “designates a staff member who does not meet performance expectations, including behaviors.”

23. For reasons that are disputed, as set out in paragraphs 55 and 56 below, the Applicant’s OPE review meeting was delayed and held only on 16 July 2014. The meeting was also attended by Mr. D who was asked by Mr. B to look into the Applicant’s allegations of harassment. In the meeting, Mr. B acknowledged that the Applicant had received some positive feedback but that she would be rated unsatisfactory because she did not meet the performance requirements of a Level GG staff member and did not contribute to GFDRR’s overall objectives.

24. On 24 July 2014, the Applicant received, for the first time, the written performance evaluation. The OPE had already been finalized and signed by Mr. B. The Overall Comments state:

[The Applicant] contributed to the Capacity Development agenda with a number of tasks, including the rollout of the Post Disaster Needs Assessment training to staff of multilateral organizations, the expansion of the on-line capacity building program to Africa and MNA, and the supervision of two recipient-executed grants.

External feedback providers highlighted her performance on these tasks positively. They recognized [the Applicant]’s abilities as training facilitator, and expert on various DRM issues. Feedback providers also underscored her personal effort to meeting deadlines, and commitment to her work, sometimes under difficult circumstance[s] due to health and family issues she faced during the year.

An assessment of her contributions to GFDRR’s broader objectives against management expectations based on her seniority, shows, however, that she unfortunately overlooked her main mission as thematic lead, which was to develop and implement a new strategy to scale up GFDRR’s capacity building program. Instead, [the Applicant] delivered assignments that were rather discrete, lacked visibility, and were conducted in isolation from the rest of GFDRR’s agenda. The strategy document she drafted was not substantive enough, did not have the buy-in of the regional teams, and did not follow the advice and direction provided by the management team. This failure to develop the thematic area under her purview affected this important area, which remains marginal and underfunded.

As a colleague, [the Applicant] kept her tendency to working on her own agenda, failing to integrate herself with the rest of the team, and not taking management’s feedback positively. Feedback providers noted [the Applicant]’s scant regard for ‘organizational rules and procedures’, including SMOs submitted at the last minute, time charged to closed accounts, extended sick leave without informing

management, and lack of active participation in staff meetings. This pattern, already apparent in previous years, has deteriorated despite repeated reminders.

Going forward, we will adapt [the Applicant]'s work program to maximize her value based on specific needs of the unit and monitorable contributions. This will include periodic review of agreed milestones, co-leading activities with a peer staff, and improvement in key competency areas, including sharing knowledge, collaborating with colleagues, and subscribing to basic organizational discipline in order to become a well-integrated senior staff in the unit.

25. On 30 August 2014, the Applicant wrote to Mr. B, disputing her OPE and taking issue with the presence of Mr. D at the performance evaluation meeting.
26. By email dated 4 September 2014, Mr. B confirmed that the OPE assessment and rating were final and that they would discuss placing the Applicant on an Opportunity to Improve Performance Plan (OTI) on her return from sick leave.
27. The Applicant was never placed on an OTI because she has been on Short Term Disability (STD) leave since July 2014.
28. On 11 August 2014, Mr. A and the Applicant, who was accompanied by her husband, had a closed-door meeting in Mr. A's office. The parties disagree about what transpired during the meeting. The Applicant claims that she informed Mr. A about her leave request plans and told him that she considered him to be abusing his authority and retaliating against her. According to the Bank, the Applicant was agitated and engaged in a hostile conversation, and her husband threatened Mr. A on his way out.
29. Mr. A immediately reported the incident to EBC. He was interviewed by EBC on 12 August 2014.
30. On 14 August 2014, EBC issued a Notice of Alleged Misconduct to the Applicant in respect of her conduct in Mr. A's office on 11 August 2014. She was interviewed by EBC on 20 August 2014.

31. On 18 March 2015, EBC provided the Applicant with a draft report. On 9 April 2015, the Applicant objected in writing to the evidence and conclusion in the draft report and submitted fifteen exhibits, including medical information. To reflect the Applicant's comments, EBC attached the Applicant's exhibits to the draft report and added, as exculpatory factors, the Applicant's medical condition and the medical necessity that she be accompanied by her husband.

32. The final EBC report was sent to the Vice President of Human Resources (HRVP) on 4 May 2015. EBC concluded that the Applicant's "actions amounted to (a) reckless failure to identify, or failure to observe, generally applicable norms of prudent professional conduct and (b) harassment and/or contributing to a hostile work environment." On 19 December 2015, the HRVP informed the Applicant of his determination that she had not engaged in misconduct.

33. On 21 November 2014, the Applicant filed a Request for Review with Peer Review Services (PRS), challenging her 2014 OPE. In its report issued on 4 June 2015, the PRS Panel found "that management provided a reasonable and observable basis for the 2014 OPE and the subsequent performance rating." It found "insufficient evidence to support [the Applicant's] claim of age discrimination in connection with the 2014 OPE and 2014 performance rating", no "indication that gender played any role in management's decisions", and that "management did not have a retaliatory motive in making its decisions." However, the PRS Panel found that management did not follow the applicable procedures for the OPE process and recommended the payment of one month's net salary to the Applicant as compensation. The Group Vice President and Special Envoy, Climate Change accepted the PRS recommendation.

34. The Applicant filed an Application with the Tribunal on 1 October 2015. In her Application and her Reply, the Applicant requests: (i) removal of the 2014 OPE from her files; (ii) change of the 2014 performance rating from 2 to at least 3; (iii) written guarantee that if she returns to work, she will be given an appropriate position away from the supervision of Mr. A and Mr. B; (iv) removal of all records of EBC Case No. 2014-2542 from her files, including the destruction of the EBC report; and (v) an order for EBC to conduct serious and complete investigations of her complaints against Mr. A and Mr. B.

35. The Applicant also requests the following financial compensation: (i) salary increase equivalent to that awarded in 2014 for a performance rating of 3, retroactive to 1 July 2014, with appropriate adjustments as needed going forward; (ii) an amount equivalent to the difference between the Applicant's full salary and the amount received for STD; (iii) reimbursements for the costs of her weekly therapy and prescribed medication; (iv) compensation for pain and suffering and damage to her health of not less than two years' salary; and (v) legal fees and costs in the amount of \$27,719.71.

36. On 4 November 2015, the Bank filed a request for a stay of proceedings until the HRVP had made a decision on EBC Case No. 2014-2542 regarding the harassment allegations made against the Applicant. Following an exchange of pleadings, on 18 November 2015, the President of the Tribunal granted the Bank's request and stayed the proceedings. On 22 December 2015, upon receipt of the HRVP's decision, the Applicant filed a request to lift the stay of proceedings. Following an exchange of pleadings on this request, the Tribunal decided to lift the suspension of proceedings in this case on 7 January 2016 and allowed the Bank sixty days to file an Answer.

37. On 7 October 2016, the Bank requested oral proceedings in this case. The Applicant provided comments on this request on 13 October 2016. On 18 October 2016, the Tribunal denied the Bank's request for oral proceedings in this case.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

THE APPLICANT'S MAIN CONTENTIONS

38. The Applicant claims that her 2014 OPE and performance rating were an abuse of discretion, being arbitrary, unbalanced, improperly motivated, and carried out in violation of fair and reasonable procedures. She claims that the OPE failed to give fair weight to the positive feedback on her performance. She contends that the OPE and performance ratings were retaliatory acts by Mr. A and Mr. B, in response to her reports of harassment to EBC. The Applicant also claims that the OPE was carried out in violation of fair procedures because of the inappropriate participation of Mr. D in the OPE discussion, the failure to give her adequate warning and advance

notice of her alleged performance issues such that she could improve, and the lack of opportunity to comment on or rebut the OPE before it was finalized.

39. The Applicant claims that she suffered harassment, discrimination and abuse by Mr. A and Mr. B. She claims that with Mr. A as her supervisor, she was forced to work in a hostile work environment where women were undervalued and where Mr. A criticized her no matter what she did. She claims that she was isolated, her work was taken away, she was not given information necessary to perform her job, female colleagues were not sent on mission, and her missions were limited to capacity planning and training. According to her, examples of Mr. B's improper actions consist of his instruction to Mr. D to conduct an investigation into the Applicant's allegations, telling the Applicant that it was unpleasant to talk to her and that she should take early retirement, and verbal abuse in response to her request to work from Hungary to take care of her critically ill parents.

40. The Applicant further claims that Mr. A and Mr. B retaliated against her after she complained about them to EBC. Specifically, within one month of her first complaint to EBC, she was accused by them of taking leave without informing the office or obtaining authorization, they reported her to HR, and they sought to impose sanctions on her. Other examples of retaliatory actions cited by the Applicant are her 2014 OPE, Mr. A's complaint of harassment to EBC, and her treatment while she was on STD leave, notably, packing up her office, removing her nameplate, and deleting her from the list of staff on the website.

41. The Applicant also contends that EBC failed to investigate her complaints of harassment and retaliation or if it did conduct an investigation, such investigation was not thorough.

42. Finally, the Applicant contends that EBC's investigation of allegations that she harassed Mr. A at a meeting on 11 August 2014 was unfair, abusive, and discriminatory. She argues that a different standard for investigation was applied to her complaint compared to Mr. A's complaint, which resulted in an investigation and adverse finding by EBC. She also submits that EBC's findings were entirely based on Mr. A's evidence, and no interview with her husband, who was present at the meeting, was conducted.

THE BANK'S MAIN CONTENTIONS

43. The Bank contends that the Applicant's 2014 OPE and performance rating had an observable and reasonable basis. The Bank submits that it followed proper procedures as there is nothing that precluded Mr. D's participation in the OPE discussion, the Applicant's shortcomings were brought to her attention multiple times throughout 2013-2014, and the delay in the OPE process, including having the final meeting after the management review panels, was due to the Applicant's tardiness.

44. The Bank claims that the Applicant was not subject to harassment or discrimination by Mr. A or Mr. B. The Bank maintains that it responded to the Applicant's claim of harassment and discrimination by transferring the Applicant to another team, away from Mr. A's supervision, and she was treated like other individuals on STD. The Bank also contends that Mr. B has always acted in good faith towards the Applicant, and tried to accommodate her needs.

45. The Bank submits that the Applicant was not a victim of retaliation; she has not established that a direct link in motive existed between her disclosure of alleged misconduct by Mr. A and Mr. B and her 2014 OPE or Mr. A's complaint about the incident on 11 August 2014. The Bank asserts that the 2014 OPE was fair and that Mr. A complained to EBC in good faith because he felt threatened.

46. The Bank argues that EBC conducted a proper initial review of the Applicant's claims of harassment, discrimination, and retaliation, and found insufficient evidence to open a full investigation into the Applicant's claims. The Bank also explains that it did not open a new investigation each time the Applicant alleged retaliation because the Applicant was essentially adding an element related to the "same nucleus of facts".

47. The Bank contends that the EBC investigation into Mr. A's complaint against the Applicant was thorough, balanced, fair, and observed the requirements of due process. The Bank states that EBC investigators asked the Applicant to reach out to her husband to schedule an interview, but the Applicant never replied. It submits that EBC probed the reliability of the witnesses and the consistency and soundness of the information, took account of the Applicant's comments and

input, and concluded that different individuals felt threatened by the demeanor of the Applicant's husband and his unexplained presence in the office. The Bank also explains that the Applicant was asked to remove her personal belongings from her office because of lack of space. According to the Bank, the Applicant's name and profile were removed from the list of staff on the website to avoid confusion.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

SCOPE OF THE TRIBUNAL'S REVIEW OF DECISIONS ON PERFORMANCE EVALUATION

48. The Tribunal stated in *Malekpour*, Decision No. 322 [2004], para. 15, that:

The evaluation of staff performance is an essentially discretionary act entailing the exercise of judgment by management, which is presumed to possess the requisite familiarity with the work of all departmental staff members and to have made many comparative quality judgments [...] The task of the Tribunal is not to "substitute its own judgment for that of the management" (*Polak*, Decision No. 17 [1984], para. 43) [...] The proper task of the Tribunal is, rather, to determine whether or not management's acts and decisions in connection therewith constituted or were attended by, an abuse of discretion.

49. The Tribunal in *Desthuis-Francis*, Decision No. 315 [2004], para. 23, held that

[the Respondent must be] able to adduce [...] a reasonable and objective basis for [...] adverse judgment on a staff member's performance [...] The Tribunal considers that failure on the part of the Respondent to submit a reasonable basis for adverse evaluation and performance ratings is evidence of arbitrariness in the making of such an evaluation and rating. Lack of a demonstrable basis commonly means that the discretionary act was done capriciously and arbitrarily.

50. Furthermore, the Tribunal has held that it will also examine whether a performance evaluation dealt with all relevant and significant facts and balanced positive and negative factors in a manner fair to the staff member. "Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable." *Lysy*, Decision No. 211 [1999], para. 68.

51. The Tribunal has emphasized the importance of conducting a formal OPE discussion in accordance with the Staff Rules and in the past has awarded remedies where this rule of procedure was breached. *See BY*, Decision No. 471 [2013], para. 29; *Prasad*, Decision No. 338 [2005], paras. 25-27; *Yoon (No. 5)*, Decision No. 332 [2005], para. 65; and *Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], para. 46.

52. According to the Tribunal, “a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work.” *Garcia-Mujica*, Decision No. 192 [1998], para. 19. *See also Prasad*, para. 30. In the context of performance evaluations, the staff member must be given “adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached [and] adequate opportunities to defend himself.” *K. Singh*, Decision No. 188 [1998], para. 21. *See also B*, Decision No. 247 [2001], para. 21.

53. This Tribunal will review the decision on the Applicant’s performance in the context of the above principles.

THE APPLICANT’S 2014 OPE

Procedural requirements

54. It is not disputed that the Applicant’s formal OPE discussion took place on 16 July 2014, after the management review meetings in June 2014 at which her performance evaluation and rating were set. The Applicant submits that the delay was due to Mr. B’s travel schedule, while the Bank attributes the delay to the Applicant being out of the country and her failure to complete the OPE process on time. The Bank submits that an email with the 2014 OPE timeline was sent to every staff member in the VPU, including the Applicant, noting that the deadline for feedback providers to send their feedback was 20 May 2014, staff discussions would take place by 6 June 2014, and the management review meetings would be between 9-16 June 2014.

55. The record shows that the Applicant asked her feedback providers for comments on 1 June 2014, and they provided their feedback by 4 June 2014. The Bank argues that this timing made it

impossible for Mr. B to have an OPE discussion with the Applicant by 6 June 2014. Mr. B also claims that it was important to him to have the meeting face-to-face, since the performance review was critical of the Applicant and she would be given a rating of 2.

56. The record shows that the Applicant's OPE meeting was first scheduled for 4 June 2014 via Skype. This belies the Bank's contention that the Applicant's tardiness automatically made it impossible for Mr. B to have an OPE discussion before 6 June 2014. However, Mr. B cancelled the meeting on 3 June 2014 and then proposed to reschedule it to 18 June 2014. The Applicant agreed to the new date. Then on 16 June 2014, Mr. B proposed to move the meeting a day later to 19 June 2014. Ultimately, the meeting was held on 16 July 2014.

57. Neither the Staff Rules nor the Tribunal's jurisprudence indicates that the OPE discussion must be held in person. In *CD*, Decision No. 483 [2013], para. 17, the Tribunal held that "where circumstances prevent a face to face meeting of the respective parties, a telephone conversation can satisfy the requirement of a formal OPE discussion under Staff Rule 5.03, paragraph 2.01."

58. Where an OPE final meeting was delayed almost five months after the initiation of the OPE and almost two months after the deadline for its completion, due to a manager's travel schedule and the manager's preference that a reviewing manager be present, the Tribunal has commented that "a busy travel schedule does not justify delays of this magnitude in OPE discussions. Staff appraisals are important functions of managerial responsibility. They must not be deemed a secondary task." *Yoon (No. 5)*, Decision No. 332 [2005], para. 65.

59. Based on the sequence of events in this case, it appears that while the timing of the Applicant's solicitation of feedback was later than ideal, it would not have been impossible for the OPE meeting to be held prior to the management reviews, and this was certainly contemplated in the original schedule. It appears from the record that the postponement of the meeting was always initiated by Mr. B. The Tribunal finds that the Applicant is not responsible for her OPE discussion taking place over one month after the management review meetings.

60. In *Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], where the applicant's salary review increase (SRI) rating and salary increase were set three days before the Applicant's OPE meeting, the Tribunal found that the OPE meeting appeared "perfunctory" as it was not clear what the applicant could have done to change the decision already taken. As well, in *BY*, Decision No. 471 [2013], the applicant's OPE and SRI ratings were set at a departmental meeting, which took place more than a month before the applicant had his formal OPE discussion. The Tribunal held that "the [a]pplicant's subsequent formal OPE discussion with Ms. X was perfunctory, and he was effectively denied any opportunity to address management's concerns about his performance before the adverse ratings were set." *BY*, para. 28.

61. As a result of the Applicant's OPE and performance rating being finalized in June 2014, her subsequent formal OPE discussion with Mr. B was perfunctory, and she was effectively denied any opportunity to address management's concerns about her performance before the adverse OPE and rating were set. The Tribunal finds that there is nothing in the record to support the Bank's assertion that Mr. B was ready to raise the Applicant's case with the relevant management teams following the 16 July 2014 meeting, had the Applicant given him a reason to change her performance rating. Rather, the record shows that the final meeting took place on 16 July 2014; the Applicant was sent a final, signed OPE on 24 July 2014; and in response to the Applicant's request for reconsideration on 30 August 2014, Mr. B responded on 4 September 2014 that "the OPE assessment and ratings are final."

62. The Tribunal is also unpersuaded by the Bank's explanation of Mr. D's participation in the Applicant's OPE meeting. The Applicant claims that this was a procedural violation because her confidential information was discussed with someone who was not her supervisor. The Bank justifies his presence on the basis that, while Mr. D was not the Applicant's direct supervisor, he had the opportunity to evaluate the Applicant's work and his presence "added the value of an observer that could help facilitate a balanced conversation." It is clear that Mr. D was not the Applicant's supervisor and his presence violated the confidentiality that the Applicant reasonably expected from the OPE final meeting. In *Yoon (No. 5)*, Decision No. 332 [2005], para. 69, the Tribunal observed that "the OPE Guidelines do not contemplate that 'other reviewers' should know what their peers have said, nor what the Supervisor's evaluation of the staff member's

performance may have been.” By extension, in this case, there is no reason why the Applicant’s performance evaluation should be discussed beyond her Manager.

63. Due process also requires that the Applicant be put on notice about any performance or behavioral deficiencies, with an opportunity to rectify them. The Bank relies on Mr. B’s response to the PRS Panel that he provided the Applicant with regular guidance and supervision to expand the capacity building program and to comply more strictly with organizational and procedural rules. In his submission to the PRS Panel, Mr. B stated that the Applicant’s “OPE for FY13-14 already highlighted performance issue[s] [...] and was followed with other meetings to discuss work planning and action items [...] In each case, discussion centered around the need to align the Capacity Building program ([the Applicant]’s responsibility) with GFDRR’s priorities, work with others (WBI, Regional Coordinators and other partners), and comply with organizational rules and procedures.”

64. In the context of the use of Talent Reviews to inform a recruitment, the Tribunal has held that any negative views contained in a Talent Review that have not been shared with the staff member should not be given weight. In *CQ*, Decision No. 509 [2015], para. 94, the Tribunal observed:

[T]o the extent that it discusses performance of staff members, criticism of such, and need for development in certain areas so that staff advance in their careers, Talent Review results should be expected not to contradict the evaluation in the OPEs of such staff members. If they do, the question arises as to whether Talent Review observations, meant to be confidential, are more candid, and more accurate, than OPE comments which the manager does discuss with the staff member.

65. The Tribunal observes that the Applicant’s 2012 and 2013 Talent Reviews raise serious red flags about the Applicant’s performance, and given the gravity of the comments, these concerns should have been brought to the Applicant’s attention. The 2013 Talent Review even goes so far as to include the comment “exit from the Bank,” which is in stark contrast to her 2013 OPE, where she is rated as “fully successful” in all Bank core competencies and was recognized as having “made significant progress this year to address concerns that had emerged at her last OPE.”

66. According to the Applicant's 2013 Talent Review, it was already clear to the Bank that there were such serious issues with the Applicant that her departure was a possibility. The Tribunal is troubled that these concerns were not brought to the Applicant's attention; instead, she was given a positive 2013 OPE, arguably misleading her to believe that her performance was satisfactory. In the Tribunal's view, this goes beyond the Bank's failure to give the Applicant sufficient notice that her performance was deficient. The contrast between the Applicant's OPE and Talent Review reflects poorly on management.

67. The Bank also cites at least four different occasions when the Applicant was warned about her shortcomings, although the Applicant disputes that any of these could be characterized as constituting negative feedback on her performance. These occasions were meetings on the following dates: sometime in the fall of 2013, 21 November 2013, 31 January 2014, and 16 April 2014.

68. Regarding the first instance, the parties contest that a meeting took place between the Applicant and a senior manager in the fall of 2013. The Bank contends that a senior manager advised the Applicant to seek assistance from a Respectful Workplace Advisor (RWA) to improve her communication with colleagues, after several colleagues complained about her behavioral issues. The Applicant claims that she met with this senior manager several times in 2012 on completely different issues, but never in 2013. She further claims that an RWA contacted her, apparently at this senior manager's request, and she met with the RWA in January 2014 to get advice as to how to deal with Mr. A's harassment. There is no contemporaneous documentary evidence that supports the Bank's contention.

69. Second, the substance of the 21 November 2013 team meeting is disputed by the Applicant and Mr. B in a subsequent email exchange documenting the meeting. It appears that the meeting was about the unit's work program, highlighting some issues and action points. However, it is not sufficiently clear from the notes whether specific attention was drawn to shortcomings in the Applicant's performance. Mr. B's email of 10 December 2013, summarizing the meeting, contains action points for various staff members, including the Applicant. For example, he highlighted the importance of having the Applicant's capacity building team develop a relationship with WBI

because a large majority of GFDRR's activities related to capacity building would shift to WBI. He noted that the Applicant needed to start on operations training for the regions, including coordinating with regional teams, and that the capacity building team needed to engage more actively with counterparts in GFDRR and the Bank, in particular, regional coordinators who have the final say on funding allocation. He also reminded the team that draft SMOs and Back to Office Reports (BtORs) needed to be cleared by team leaders.

70. The Applicant's response on 12 December 2013 also summarized the meeting of 21 November 2013 from her perspective, but disputed Mr. B's account. For example, she contends that: the guidance about close collaboration with regional teams applied to GFDRR and was not a specific comment limited to her team; there was no discussion about shifting a large part of GFDRR's activities related to capacity building to WBI; and there were no discussions related to the processes of SMOs and BtORs.

71. Mr. B responded by email dated 24 December 2013 commenting on the Applicant's notes indicating to her that he did not think her proposed strategy was connected with GFDRR operations and, as a result, remained essentially unfunded. According to him, the meeting discussed the need to improve communication with the rest of the secretariat and regional teams. Mr. B indicated that Mr. A would probably elaborate and proposed to meet again after the holidays. While the meeting and email exchange were not specific to the Applicant, the Tribunal finds that, at a minimum, it was communicated to the Applicant that management had issues with her proposed strategy and that she needed to improve her communication. On balance, the Tribunal finds that the Bank made its expectations of the Applicant clear in the meeting of 21 November 2013 but it cannot be said that the Applicant was on notice that she was failing to deliver or perform well at this point.

72. Third, the meeting on 31 January 2014 was described in the minutes as "an informal meeting to discuss and resolve HR concerns to which [the Applicant] informed [Mr. B] as they pertain to her work program and working relationship with [Mr. A]." While the meeting naturally touched upon the Applicant's work program, the Tribunal finds that the primary purpose of the meeting was to address the Applicant's allegation of harassment, which was resolved by

transferring the Applicant to another team. The Applicant cannot reasonably have taken this meeting as notice that management was not satisfied with her performance.

73. Fourth, the meeting on 16 April 2014 is disputed by the Applicant as constituting her mid-year review. She claims that she was not told that there were serious problems with her performance and that unless she improved, she would be placed on an OTI. The Tribunal notes that the Applicant prepared notes of the meeting, which she titled “Minutes of Mid-year meeting with [the Applicant] (April 16, 2014)” and which set out action points. She also thanked Mr. B “for the guidance provided yesterday on overall and specific aspects of DRM capacity development.” These notes are silent as to whether the Applicant was on notice about her shortcomings. They do confirm that some guidance was provided by Mr. B regarding the Applicant’s work.

74. The Tribunal finds that the instances cited above did not provide the Applicant with sufficient or clear notice that there were significant problems with her performance. Her performance rating of “2” means “below expectations”, and such rating is to be assigned only to approximately 4% of staff in a VPU. This rating is “for staff who often do not achieve the majority of objectives and do not demonstrate the competency expectations of the position.” The Tribunal expects that such a rating would have warranted clear and repeated notice. The Tribunal’s conclusion is consistent with the conclusion of the PRS Panel “that management did not provide sufficient feedback and notice to [the Applicant] during the performance period regarding the gravity of the concerns about her performance.”

75. The Tribunal finds that the 2014 OPE process did not comply with the requirements for a fair procedure.

Whether the 2014 OPE was arbitrary, unfair, or unbalanced

76. In her 2014 OPE, the comments on the Applicant’s performance are mixed. Her contribution to the Capacity Development agenda was recognized and the feedback from external providers about her performance on these tasks was positive. Feedback providers also recognized her commitment to her work and her timely delivery, notwithstanding personal issues. On the other

hand, she was criticized for “overlook[ing] her main mission as thematic lead, which was to develop and implement a new strategy to scale up GFDRR’s capacity building program.” Her strategy document was considered to be “not substantive enough, did not have the buy-in of the regional teams, and did not follow the advice and direction provided by the management team.” Finally, shortcomings were highlighted in respect of her lack of teamwork, failure to take management’s feedback positively, and lack of regard for organizational rules and procedures.

77. The record shows that, at the time of the OPE, Mr. B received formal feedback from four members of staff and Mr. A. The feedback from the four staff members was positive, and this is reflected in the OPE. The record shows that Mr. A’s feedback acknowledged the Applicant’s strength in managing relations with the European Union and the United Nations Development Programme, but noted that the Applicant worked on her own, without sharing information, so he usually did not know what she was doing. He stated that she “needs to respect organizational rules and procedures, especially related to leaves.”

78. While Mr. A’s comments are reflected in full in the overall comments section of the OPE, the OPE also reflects negative observations about the Applicant that are not found in the comments from any of the formal feedback providers. These include her failure “to develop and implement a new strategy to scale up GFDRR’s capacity building program”, the shortcomings in the strategy document that she drafted, and specific examples of her failure to abide by organization rules and procedures.

79. In her email of 30 August 2014, the Applicant disputes her OPE, and argues against the identified areas of deficiency: lack of leadership to scale up capacity building and having irrelevant activities; non-substantive strategy document; failure to follow management’s guidance; and disregard for organizational rules.

80. The Applicant attributes the decline of activities in her program to Mr. B’s denial of funding. However, Mr. B’s testimony to the PRS Panel was that the Applicant received more funding for her program than any other thematic program at GFDRR. With respect to the strategy document, the Applicant claims that it was never discussed with management or regional

colleagues. Finally, the claim that she did not follow organizational rules is solely attributable to Mr. A, and is contradicted by the record, which shows that she submitted, cleared, filed, and distributed her SMOs in advance, all of her family leaves were approved in time by her supervisor, and she notified the office within 24 hours when she was sick.

81. The Bank claims that the Applicant's OPE is supported by the negative reviews of the Applicant's performance by her clients and supervisors. The Bank also relies on written feedback provided in January 2015 by Mr. C and two DRM regional coordinators, as well as additional feedback from Mr. A. This feedback further supports the contents of the OPE that highlight the Applicant's shortcomings. The Bank submits that most of the feedback was received verbally during the course of regular business throughout 2014, and that Mr. B only thereafter requested the Applicant's clients and colleagues to put those comments in writing, which is the reason why the written feedback is subsequent to the OPE, dating from January 2015.

82. In the context of redundancies, the Tribunal has frequently observed that the Bank may not "only subsequently construct a business justification or otherwise 'invent post hoc rationalizations'". *Mahmoudi (No. 2)*, Decision No. 227 [2000], para. 27; *Prakas*, Decision No. 357 [2007], para. 37. It is poor practice to base an OPE on allegedly contemporaneous oral feedback, while only memorializing such feedback in writing many months subsequently. Such practice is not transparent, risks manipulation or at least a perception that the process is being manipulated, and denies a staff member due process, as was the case here.

83. Notwithstanding the *post hoc* nature of the feedback providers' comments, the Tribunal may still have regard to their substance in the absence of any suggestion or any evidence that they have been falsely created or that there was collusion between Mr. A, Mr. B, Mr. C or the two regional coordinators from different regions. Aside from Mr. A, the feedback of Mr. C and the two regional coordinators as well as the unfavorable view of the Applicant from one staff member from WBI are consistent with the negative assessments in the Applicant's 2014 OPE.

84. Bearing in mind the ongoing dispute between the Applicant, Mr. A, and Mr. B, the Tribunal will consider the assessments of Mr. C and the two regional coordinators, all of whom are

disinterested observers of the Applicant's performance. Mr. C's perspective is useful since he directly supervised the Applicant after she was transferred away from Mr. A, and the regional coordinators are from the two regions that hosted most of the Applicant's activities.

85. Mr. C cites three specific examples where the Applicant's performance, for the period during which she was under his supervision, "did not conform to the Unit's priorities and objectives" and where "she made no efforts to integrate her work program and deliverables in the overall work plan of the unit." First, the Applicant was responsible for creating a work plan to streamline the capacity building program, which should include the training of Bank staff on emergency operations and revising outdated external capacity building modules. Mr. C claims that the Applicant did not take any action. Second, the Applicant was tasked with collaborating with WBI to streamline the DRM training modules in a uniform set of courses and to update them, but the Applicant did not do this. Third, the Applicant failed to cooperate with colleagues in charge of the capacity building program component of the Japan-Bank DRM Mainstreaming Program. Mr. C also states that he observed the following behavioral issues: habitual absence from the office; reluctance to inform the office of her absence and to make arrangements for work coordination during her absence; reluctance to file critical work on the shared drive; and resistance to share her work program with colleagues or supervisors.

86. One regional coordinator commented that "our relationship with [the Applicant] has been minimal and we were not informed about her activities in the region." He states that her activities in one country with a partner "were not communicated or aligned to our country strategic plan." He was also informed that some of the Applicant's trips were questioned by the country management unit because it did not understand the link between her activities and the DRM country program.

87. Another regional coordinator noted positive contributions by the Applicant, but also highlighted some problems which echo those identified by Mr. C, the other regional coordinator, and which are set out in the 2014 OPE. For example, an external client complained that the Applicant's team was promoting training that was different to the one originally requested and the schedule was not being respected. He identified the biggest challenge in working with the

Applicant as being her “lack of effective coordination.” For example, she acted without taking into account the region’s feedback on proposed trainings or organized trainings that were different from what had been agreed with the regional team.

88. There are at least two contemporaneous documents in the record that illustrate the Bank’s contention that the Applicant’s teamwork and communication skills were deficient. One is an email on 22 January 2014 from a manager in WBI to Mr. B about working with the Applicant and the other is an email from Mr. A to the Applicant on 25 November 2013.

89. First, the Tribunal recalls that one of the Applicant’s tasks was to develop a relationship and work with WBI, since many of GFDRR’s activities related to capacity building would shift to WBI. The Tribunal takes note of an email from a manager in WBI on 22 January 2014 expressing concern about having to work with the Applicant because of “her lack of collaborative spirit” and “demonstrated uncooperative attitude.” It was also observed that the Applicant’s courses needed to be revised and updated, but the Applicant was not willing to discuss this.

90. Second, in an email dated 25 November 2013, Mr. A explicitly requests the Applicant to improve coordination, such as sharing draft mission reports. He pointed out the experience with the first draft of a Sri Lanka mission report, which was deficient but was improved as a result of meeting and further discussion, at Mr. A’s suggestion. However, the Applicant did not repeat this coordination with a draft report on the New Zealand mission, which she shared with the entire team before discussion. Mr. A indicated to the Applicant that this report could also have benefitted from a discussion, as had been done with the Sri Lanka report.

91. The Bank also contends that Mr. B urged the Applicant to “comply more strictly with the organizational and procedur[al] rules.” Before the PRS Panel, the Bank produced examples of the Applicant’s breach of the rules, while the Applicant produced evidence of her compliance with the rules.

92. A review of the totality of the evidence shows that the Applicant’s OPE was not arbitrary, unfair, or unbalanced. The assessments of Mr. C, the regional coordinators, and the manager from

WBI are consistently negative and identify similar shortcomings in the Applicant's lack of teamwork and failure to build her program.

Performance rating

93. Starting in FY 2014, the Bank changed from the dual OPE and SRI rating system to a single performance rating, based on a 5-point rating scale.

94. The process of establishing performance ratings is based on a comparative assessment of staff members within the same unit. The Tribunal has recognized that “[g]iven the various decisional elements that are properly taken into account in making such a comparative assessment, it is difficult to support a claim of abuse of discretion.” *Marshall*, Decision No. 226 [2000], para. 24. However, the Tribunal has in the past set aside SRI ratings where it was evident that the SRI was based on an arbitrary or procedurally flawed OPE process. *BY*, Decision No. 471 [2013], para. 31. As such, the SRI decision must have a “reasonable and observable” basis. *Desthuis-Francis*, Decision No. 315 [2004], para. 26.

95. The Tribunal finds that the Applicant's performance rating of 2 is not incommensurate with her OPE, which describes shortcomings in respect of her deliverables and behavior. Such a rating reflects performance that was below expectations in significant respects.

HARASSMENT, DISCRIMINATION, AND ABUSE

96. The Bank's policy is clear that staff members are required to treat one another with courtesy, dignity, and respect. In common with all employees, international civil servants have a right to be treated with dignity, and health and medical issues must be handled with sensitivity. *CL*, Decision No. 499 [2014], para. 79.

97. In *BI*, Decision No. 439 [2010], the Tribunal held at paras. 47-48:

As previously held by the Tribunal in *de Raet*, Decision No. 85 [1989], para. 57, when considering allegations of discrimination or abuse of power,

it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power – not, that is, until an Applicant

has made out a *prima facie* case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.

98. As set out in Staff Rule 3.00, para. 6.01(e), wrongful discrimination, including discrimination “on the basis of age, race, color, sex, sexual orientation, national origin, religion or creed,” is prohibited.

99. The Applicant claims that she was a victim of harassment by Mr. A and Mr. B. She claims that, under Mr. A, she was forced to work in a “hostile work environment where women were undervalued” and discriminated against based on gender, that she was constantly criticized by Mr. A, isolated, deprived of work, and not given the information needed to perform her job.

100. In her 4 December 2013 complaint to EBC, the Applicant claims that Mr. B “systematically creat[ed] an environment around [her] that tries to force [her] to quit.” She alleges that he created an unpleasant atmosphere during the 2012 final OPE meeting, going so far as to tell her that she should take early retirement; that he verbally abused her when she asked to work remotely in order to take care of her sick parents; that his treatment of her telecommuting request “was in line with his intention to make [her] quit; that he ignored her requests to be transferred to another team; that he cut her off from information flow; isolated, intimidated, and subjected her to insulting and/or cynical comments.”

101. In a follow-up email dated 14 April 2014 to EBC, the Applicant supplemented her complaints against Mr. B, claiming that he retaliated against her for flagging harassment and discrimination issues.

102. She also claims that Mr. B subjected her to an abusive, irregular, and unfair process by ordering Mr. D to conduct an inquiry into her allegations against Mr. A and by convening the meeting on 31 January 2014.

103. The Tribunal acknowledges that Mr. B discharged his managerial responsibility properly by escalating the Applicant’s claim of harassment and discrimination to the HR Business Partner

and his Director. However, the Tribunal is not satisfied by the Bank's explanation that the additional inquiry by Mr. D was for the purpose of gathering more facts, because Mr. B wanted "to make sure that staff members under his responsibility were working in a safe and respectful environment." The Tribunal questions the utility of conducting such an inquiry as it would be redundant, in light of a parallel EBC investigation. The Tribunal is troubled that such an inquiry could be conducted without the professionalism or safeguards of an EBC investigation. However, the Tribunal finds that this ill-advised inquiry does not rise to the level of harassment, discrimination, or abuse of the Applicant.

104. With respect to the meeting on 31 January 2014, the Tribunal does not find merit in the Applicant's contention that this meeting circumvented the mediation process and resulted in further harassment of the Applicant. The record does not suggest that this meeting was ever intended to be a mediation. The Tribunal recognizes that it was open to management to try to informally resolve the issues between the Applicant and Mr. A. While the Applicant complains of being forced to face her harasser, the minutes of the meeting suggest that the discussion was fair, with all parties having the opportunity to express their positions, and resulted in the Applicant's transfer to another team, as per her previous requests.

105. While it is evident that the Applicant had a difficult working relationship with Mr. A and Mr. B, the Tribunal finds that the Applicant has not made a *prima facie* case for claims of discrimination, harassment, or abuse.

RETALIATION

106. As the Tribunal has frequently observed, the Staff Rules are clear that retaliation against any person "who provides information regarding suspected misconduct or who cooperates or provides information in connection with an investigation or review of allegations of misconduct, review or fact finding, or who uses the Conflict Resolution System" is prohibited. *See* Staff Rule 3.00, paragraphs 6.01(g) and 7.05, and Staff Rule 8.01, paragraph 2.03. *See also* CS, Decision No. 513 [2015], para. 104; *Sekabaraga (No. 2)*, Decision No. 496 [2014], para. 60. This prohibition also extends to retaliation against any person who is believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken.

107. Staff Rule 8.02, paragraph 3.01, provides as follows:

Where a staff member has made a *prima facie* case of retaliation for an activity protected by this Rule (i.e. by showing that the staff member reported suspected misconduct under this Rule and has a reasonable belief that such report was a contributing factor in a subsequent adverse employment action), the burden of proof shall shift to the Bank Group to show – by clear and convincing evidence – that the same employment action would have been taken absent the staff member’s protected activity.

108. In *AI*, Decision No. 402 [2010], para. 41, the Tribunal stated that:

The burden of proof in the case of alleged retaliation is no different from the burden of proof in the case of alleged discrimination. The Tribunal stated in *O*, Decision No. 337 [2005], para. 47, that:

The burden lies with an applicant to establish facts which bring his or her claim within the definition of retaliation under the Staff Rules. An applicant bears the onus of establishing some factual basis to establish a direct link in motive between an alleged staff disclosure and an adverse action. A staff member’s subjective feelings of unfair treatment must be matched with sufficient relevant facts to substantiate a claim of retaliation, which in essence is that the allegation of poor performance is a pretext to mask the improper motive.

109. The Applicant contends that she engaged in a protected activity by reporting alleged misconduct by Mr. A and Mr. B. The Applicant further contends that within one month of her first complaint to EBC, both Mr. A and Mr. B accused her of taking leave without informing the office, of repeatedly taking leave without obtaining authorization, reported her to HR, and sought to impose sanctions. She also claims the following additional examples of retaliatory actions: her 2014 OPE, Mr. A’s 11 August 2014 complaint to EBC, her treatment while she was on STD, i.e., GFDRR packing up her office, removing her nameplate, deleting her name from the staff list on the website, and Mr. D’s request that she should perform some work tasks while on STD.

110. The Tribunal will first examine the Applicant’s claim that within one month of her first complaint to EBC, Mr. A and Mr. B “attacked” her for taking leave without informing the office and escalated the matter to HR. The record shows that the Applicant was on sick leave between 4

and 18 March 2014. On 5 March 2014, the Applicant asked a colleague to inform the unit's leave coordinator that she was sick and was likely to be out for the rest of the week, which the colleague did on 6 March 2014. Neither Mr. A nor Mr. B were copied on any of these emails. On 6 March 2014, Mr. A informed Mr. B that the Applicant had not come to the office that week and that there was no communication about her absence. He also noted that a colleague had told him that the Applicant was sick and observed that the Applicant may have informed Mr. B or Mr. C. The Tribunal observes that Mr. A's email is merely informative and actually gives the Applicant the benefit of the doubt, when he suggests to Mr. B that perhaps the Applicant had informed him or Mr. C about her absence.

111. The next series of emails are between Mr. B and the HR business partner on 6 March 2014, where Mr. B asks for HR's assistance and advice in dealing with the situation. HR responded by setting out the relevant staff rules and asked Mr. B to handle the matter, not Mr. A to avoid the perception of retaliation. The Tribunal notes that the Bank was sensitive to the issue of retaliation and clearly wanted to avoid any perception of retaliation.

112. On 7 March 2014, the unit's leave coordinator forwarded Mr. B an email exchange with the Applicant and others regarding the Applicant's notification that she was sick. Mr. B sent the Applicant an email that evening, which the Applicant claims was retaliatory, setting out the relevant staff rules about leave, and informing her that she should not take leave without notification. This is followed by email exchanges on 11 March 2014 as to the need for the Applicant to inform her manager as opposed to the "office" about her sick leave.

113. Looking at the totality of the email exchange, the Tribunal finds that it does not meet the threshold of a *prima facie* case of retaliation. Rather, there appears to have been a misunderstanding about exactly who should be notified when the Applicant takes sick leave and the "escalation" to HR was for the purpose of seeking advice and ensuring that management's actions would not be seen as retaliatory.

114. Although the Applicant's 2014 OPE and performance rating were procedurally flawed, for the reasons discussed above, the Tribunal finds that the Applicant has not established a direct link

between the Applicant's OPE and performance rating and her report of misconduct by Mr. A and Mr. B. As established by the PRS Panel, Mr. B did not know of the EBC investigation until after the OPE, and the Applicant's OPE and performance rating were set before.

115. The Applicant's claim that Mr. A's complaint of 11 August 2014 was retaliatory is not supported by evidence. The fact that the Applicant had complained about Mr. A does not preclude him from making a report to EBC.

116. The Applicant went on STD leave in July 2014 and complains of certain actions by the Bank while she was on leave as being retaliatory. The Tribunal is satisfied with the Bank's business rationales for the Applicant's treatment by the Bank while she was on STD leave, and finds that the Bank's actions do not constitute retaliation.

CONDUCT OF THE REVIEW OF APPLICANT'S COMPLAINTS

117. The relevant provisions governing the conduct of an initial review are as follows. Staff Rule 3.00, paragraph 8.01 provides:

If EBC receives an allegation within the scope of Section 6, "Allegations of Misconduct Addressed by EBC," of this Rule, or if the basis for any such allegation otherwise comes to EBC's attention, EBC shall undertake an initial review. Alternatively, EBC may request that line management (at the level of the manager of the supervisor of the staff member whose conduct is at issue or above) conduct the initial review. Based on the initial review, EBC may conduct a further review of the matter by:

- a. Assisting the parties concerned in reaching a resolution of the matter acceptable to all parties concerned, in accordance with paragraph 9.01 of this Rule;
- b. facilitating a process whereby a staff member whose conduct is at issue may voluntarily agree to a resolution of the matter in accordance with paragraph 9.02 of this Rule; or
- c. conducting a fact finding in accordance with Section 10, "Fact Finding," of this Rule.

The Staff Guide to EBC's Investigative Process states:

If an allegation is within EBC's mandate, EBC may undertake an initial review to determine whether there is sufficient factual basis to proceed with further

investigation. Alternatively, EBC may request that line management conduct the initial review, under the guidance of EBC.

During the initial review, EBC assesses the allegation to determine whether the evidence is sufficient, credible and verifiable. The initial review may involve interviews with witnesses and a review of documents. At this stage, the initial review is usually carried out without the involvement of the staff member who is the subject of the allegation.

Should EBC determine that the allegation is either unfounded or unsubstantiated, or that the evidence collected does not otherwise justify further investigation, the case may be closed at the initial review stage. The reporter of the allegation is notified of such a closure. A case closing memo is prepared for EBC's records; it is not shared with the reporter.

118. In *BB*, Decision No. 426 [2009], para. 73, the Tribunal held that the threshold “to justify the initiation of a formal investigation is low. All that it needs to find is that the allegation is sufficiently credible to merit a formal investigation.” The Tribunal further explained in *BB*, para. 76:

The outcome of a preliminary inquiry is a determination whether further investigation is warranted, not whether an investigation is substantiated. INT considered that through the interviews of six witnesses it was able to establish a *prima facie* case that the alleged instances of misconduct had occurred and that further investigation would be necessary to assess whether the charges were substantiated.

119. EBC closed the case at the initial review stage “as there was insufficient evidence to substantiate the allegations of harassment and gender discrimination against female staff members.”

120. EBC interviewed the Applicant four times. EBC also interviewed two other witnesses. One witness refuted the allegations on the basis that she had never observed Mr. B harassing anybody. The other witness informed EBC that the issues in the unit were due to lack of communication and that she had not seen any harassment or gender discrimination. She also suggested to EBC that the difference in management style from the Applicant's previous manager could also be a reason for the issues in the unit.

121. EBC noted that the Applicant's request to be transferred had been implemented and that the Applicant felt her work situation was improved under Mr. C, although she claims that Mr. B still micromanaged her. EBC also noted that the Applicant's initial complaint about her leave not being approved had been resolved because the leave in question had been approved.

122. The Tribunal finds that EBC reasonably exercised its discretion not to initiate an investigation in this case. The Applicant has not satisfied the low threshold, as the evidence of the witnesses, one of whom had been suggested by the Applicant, directly contradict her claims.

123. The Applicant also contends that a double standard was applied by EBC as between the treatment of her complaint and treatment of Mr. A's complaint. While no investigation was opened into her complaints, EBC did conduct an investigation into Mr. A's complaint about her.

124. The closure of the Applicant's case after the initial review is distinguishable from the decision to initiate an investigation into Mr. A's complaint. In the former case, the Applicant's allegations were contradicted by disinterested witnesses and not supported by any other witnesses. In the latter case, Mr. A's complaint was supported by another witness and contradicted by the Applicant. The record does not support the Applicant's contention that EBC applied a double standard as between the treatment of her complaint and the treatment of Mr. A's complaint.

INVESTIGATION INTO THE APPLICANT'S CONDUCT

125. The Applicant argues that EBC reached its conclusions based only on Mr. A's testimony, which it preferred to her testimony. On the other hand, the Bank argues that "EBC was able to verify that different individuals felt threatened by [the Applicant's husband]'s demeanor and his unexplained presence in GFDRR's office, even if such individual had not been part of the incident." The Tribunal observes that EBC only interviewed the Applicant and Mr. A, who are interested parties, and the unit's leave coordinator, who was present in the office but not at the meeting.

126. EBC did not interview "the one witness" who may have been able to corroborate the Applicant's version of events, namely, her husband. The Applicant's husband was the only other

person present at the meeting and was directly implicated as he was alleged to have verbally threatened Mr. A. The Bank explains that EBC offered to interview the Applicant's husband in February 2015, over six months after the complaint and only after the Applicant suggested that he be interviewed, by asking the Applicant to put them in touch to schedule an interview. But the Applicant did not respond.

127. The Tribunal questions why EBC made no attempt to interview the Applicant's husband until almost six months after sending the Applicant the Notice of Alleged Misconduct and only following a suggestion by the Applicant. The Tribunal acknowledges the Bank's contention that the Applicant never responded to EBC's offer to interview her husband, but the Tribunal notes that there is nothing in the record to indicate that EBC took any further steps, as it was obliged to do as part of a complete and fair investigation, to contact the Applicant's husband to arrange an interview. *See BB*, para. 79.

128. The EBC investigation report sets out the different versions of events from the Applicant and Mr. A about what happened at the meeting of 11 August 2014. Significantly, EBC's findings relate to the presence and conduct of the Applicant's husband at the meeting:

While [the Applicant] was not responsible for her husband's action, she did not exercise [a] good professional judgment when she brought him to the meeting with the Acting Manager.

[...] EBC finds that [the Applicant's] action of bringing her husband to the office and allowing him to attend a meeting with the Acting Manager fell short of the standard of prudent and professional conduct.

129. Given EBC's focus on the presence of the Applicant's husband and his alleged conduct at the meeting, the Tribunal finds that the Applicant's explanation for his presence (namely, that it was recommended by her physician due to her medical issues and was corroborated by the medical notes) should have cleared the Applicant of any wrongdoing in respect of his presence. In the face of this exculpatory information, the Tribunal finds no basis for EBC to have maintained that the Applicant was at fault for bringing her husband to the office and to the meeting.

130. As well, the Tribunal is not convinced that EBC could reasonably fault the Applicant for the disputed words allegedly said by her husband, in the circumstances where it is disputed as to whether he even said such words, and the Applicant's husband himself was never interviewed. The Tribunal recalls the HRVP's decision that the Applicant did not engage in misconduct.

131. In *G*, Decision No. 340 [2005], para. 73, the Tribunal observed that "the fact that the conclusions may ultimately be favorable to the person under investigation plainly does not mean that the inquiry should not have been conducted at all." The Tribunal finds that it was appropriate for EBC to investigate Mr. A's complaint. However, the omission of the Applicant's husband as a witness resulted in an unbalanced investigation, and EBC ignored exculpatory information by maintaining that the Applicant was at fault for bringing her husband to the office.

132. The Tribunal finds that the EBC investigation was flawed and its conclusions were not supported by the evidence. However, the Tribunal also notes that the HRVP found that the Applicant did not engage in misconduct.

CONCLUSION

133. The Tribunal concludes that the Applicant's 2014 OPE process was tainted by procedural irregularities and failed to comply with the requirements for a fair procedure. However, the Applicant's 2014 OPE and performance rating were not arbitrary, unfair, or unbalanced.

134. The Tribunal finds that the Applicant has not substantiated her allegations of harassment nor has she made a *prima facie* case that she was the subject discrimination or retaliation.

135. The Tribunal concludes that EBC conducted a proper initial review of the Applicant's complaints and, finding them to be unsubstantiated, correctly decided to close the case.

136. The Tribunal finds that the EBC investigation was flawed and its conclusions were not supported by the evidence. However, the Tribunal also notes that the HRVP found that the Applicant did not engage in misconduct.

DECISION

- (1) The Bank shall pay the Applicant three months' salary, net of taxes, based on the last salary drawn by the Applicant, for procedural irregularities in the Applicant's 2014 OPE process;
- (2) The Bank shall pay the Applicant three months' salary, net of taxes, based on the last salary drawn by the Applicant, for flaws in connection with EBC Case No. 2014-2542 and shall remove all records of EBC Case No. 2014-2542 from the Applicant's personnel file;
- (3) The Bank shall pay the Applicant the amount of \$27,719.71 in legal fees and costs; and
- (4) All other claims are dismissed.

/S/ Mónica Pinto
Mónica Pinto
Vice-President

/S/Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 4 November 2016