



**World Bank Administrative Tribunal**

**2017**

**Decision No. 563**

**EB,  
Applicant**

**v.**

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

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

**EB,  
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 26 July 2016. The Applicant was represented by Nat N. Polito of the Law Offices of Nat N. Polito, 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 21 April 2017.
3. The Applicant challenges the Bank's decision not to hire her for the position of Program Assistant, level GC.

**FACTUAL BACKGROUND**

4. The Applicant joined the Bank in 1995 and was most recently employed as a Program Assistant, level GC, in one of the units of the Bank.
5. The Applicant's performance evaluations since 1995 demonstrate that she has a consistent record of strong performance. Her Overall Performance Evaluation (OPE) forms from 2000 onward show that she consistently received positive ratings that include Fully Successful, Superior, and Outstanding/Best Practice. The Applicant's Supervisor from fiscal years 2013 to 2015 provided yearly OPE feedback of the Applicant's work. In the Applicant's 2014 OPE, the Applicant's Supervisor wrote:

[The Applicant] is a good team player, reliable and communicates well with others. She is engaged and works well with everyone in her unit and other ACS staff in

delivering the VPU's work program. She is cooperative and nurtures good relationships with her colleagues and external clients. She has good knowledge of SAP, processes transactions in a timely manner and is willing [to] provide guidance to other staff. She volunteers most of the time to help out organizing major events such as the [...] picnic, Halloween and Holiday parties. She attended all of the ACS trainings held this year in ITS and was an active participant. [The Applicant] needs to be a bit more proactive, and communicate more when she is working on something that has hit a delay. She would benefit from attending a time management course. Overall, it has been great working with [the Applicant] this year. She is really nice, easy to get along with and easy to approach. She is a good team player and I appreciate her efforts to help the team this year.

6. In the performance review for fiscal year (FY) 2015, the Applicant also received a positive evaluation. In the Strength and Areas of Improvement section of the Applicant's 2015 OPE, the Supervisor noted: "[The Applicant] has an excellent attitude and I always appreciate her willingness to try. She is always a pleasure to work with. She is very responsive to requests and makes sure I get needed information in a timely fashion." The Supervisor also noted that "[the Applicant] could enhance her attention to detail and ensure she fully understands requests to her. She should ensure that she stays on top of changes in the [Resource Management] processes in order to be able to assist staff." In the Overall Supervisor Comments section, the Supervisor wrote:

[The Applicant] is very pleasant to work with. She always offers to help team members and assists in setting up meetings. Colleagues report that she is always helpful, approachable and professional. She is very good at following up on missing TRS entries and is available to help each month when TRS freezes. Another colleague says she has been always helpful anytime they asked her for help. We all really appreciate her willingness to pitch in and her pleasant smile. Thanks for your contributions to [...] [the Applicant]!

7. On 30 January 2015, after serving the Bank for 20 years with a consistent record of good performance, the Applicant's employment was declared redundant. This redundancy was not because of any faults in the Applicant's performance, but the record shows that the redundancy was due to the fact that her position had been abolished. On 15 June 2015, she entered into a mutually agreed separation (MAS). Under the terms of the MAS, she was placed on administrative leave on 1 July 2015, was subsequently separated from the Bank on 31 December 2015, and received a lump sum severance payment of 15 months' net salary in addition to a 1.5 months' lump sum payment in lieu of training.

8. The Applicant states that subsequent to signing the MAS and after leaving her employment, she learned that the Supervisor had hired a Program Assistant with nearly identical functions to the Applicant's position in August 2015, two months after signing the MAS. In support, the Applicant submits an email dated 4 August 2015 from her Supervisor to the unit members introducing a Program Assistant as a new team member. However, the validity of the redundancy and the MAS are not before the Tribunal in the current proceedings. What is before the Tribunal is the non-selection of the Applicant for a Program Assistant position, which was advertised on 17 June 2015 while the Applicant was still at the Bank in a job-search period with a notice of redundancy.

*Non-selection for the Program Assistant position*

9. On 17 June 2015, a Program Assistant position, level GC, was advertised. The position was in the Web, ERP Systems Management Department of the Information and Technology Solutions Vice Presidency (ITSEI) of the Bank. On 18 June 2015, the Applicant applied for this position.

10. The position was available only to internal candidates of the Bank and 27 candidates applied for the position. After the shortlisting process, the Applicant was one of three candidates selected to interview for the position.

11. The interview panel consisted of the Hiring Manager for the position, and two other staff members. On 7 August 2015, the Applicant interviewed for the position. Of the three candidates, the Applicant scored highest in the interviewers' evaluations. The interview panel used a point system and out of a total maximum point award of 360, the Applicant received 325 points. The record shows that of the other two candidates, one received 275 points and the other 216 points. The interview panel noted that the Applicant was "[v]ery strong over all in terms of personality and technical skills."

12. On 12 August 2015, the Hiring Manager for the ITSEI Program Assistant position recommended the Applicant for a follow-up interview with the director of ITSEI (Director). The

Director declined to interview the Applicant and instead advised the Hiring Manager to proceed with the next step of the selection process. According to the Director, he did not interview the Applicant because he “places a lot of trust in his managers to make staffing decisions,” and because it was a position in the Hiring Manager’s department, the Director felt that the Hiring Manager was a “good judge to decide.”

13. On 12 August 2015, the Hiring Manager informed the Applicant that management was proceeding with her reference checks, indicated that the final selection decision would be made afterwards, and asked about her availability to start.

14. Following the Hiring Manager’s conversation with the Applicant, the Hiring Manager initiated an HR Action for the creation of a Personnel Action Form (PAF) to move her from her current unit to the Hiring Manager’s unit. On 13 August 2015, the Applicant received an email reflecting the HR Action. The email subject line read: “Pending processing with HR Operations: Self-Service Action – [the Applicant]” and the body of the email stated that the HR Action “Reassignment Competitive, effective 24-Aug-2015, last acted by [the Hiring Manager] was sent for final review and processing to HR Operations.”

15. The Hiring Manager personally contacted all four references provided by the Applicant. The record suggests that the Hiring Manager completed the reference checks verbally on 13 August 2015. The conversations with the reference providers were not documented in writing. Three of the four references provided positive feedback and one reference provided mixed feedback. The mixed feedback came from the Applicant’s then Supervisor.

16. On 13 August 2015, the Supervisor sent an email to the Hiring Manager requesting an in-person meeting with the Hiring Manager to discuss the Applicant’s performance. In the meeting on the same day, the Supervisor described the Applicant’s positive attributes as well as areas that could be improved upon.

17. Later that day, the Hiring Manager sent an email to the Supervisor informing her that he would like to proceed with onboarding the Applicant. The Hiring Manager proposed 24 August

2015 as a release date for the Applicant. He asked the Supervisor if she was in agreement with the proposed release date. The Supervisor responded that she was fine with the arrangement.

18. Therefore, as of 13 August 2015, the selection process appeared complete and the Applicant was ready to commence her new position. As of that day, the Applicant had been judged to be the best candidate for the position by the interview panel, the Hiring Manager had received the approval of the Director to go ahead with the process of hiring the Applicant, the reference checks had been completed, the Hiring Manager gave consideration to the positive feedback received from three references as well as the mixed feedback from the Supervisor, and the Hiring Manager told the Applicant's then Supervisor that he would proceed with the hiring of the Applicant and they agreed to a release date.

19. Yet, things did not turn out that way. The Director on the next day, 14 August 2015, intervened and sent an email to the Hiring Manager stating "[w]e need to talk about your GC position" and asking "[d]id you notify [the Applicant] yet?" What prompted the Director to intervene at this stage is not clear. The Director and the Hiring Manager thereafter discussed the Applicant's candidacy. There is, however, no contemporaneous documentation of the discussion between the Hiring Manager and the Director in the record. It appears that given the mixed feedback from the Supervisor, the Director felt that it was an "unnecessary risk" for the Hiring Manager and one that the Hiring Manager should not take.

20. The Hiring Manager accordingly on 17 August 2015 instructed HR to cancel the PAF.

21. On 28 August 2015, the Hiring Manager verbally notified the Applicant that she was not selected for the position.

22. On 23 September 2015, the Applicant filed a Request for Review with Peer Review Services (PRS) challenging the Bank's decision not to select her for the position. In its report of 1 April 2016, the PRS Panel concluded that

management had a reasonable and observable basis for making the non-selection decision and acted in good faith in making the decision. The Panel determined

further, however, that management did not follow the applicable procedures in making its decision. The Panel therefore concluded that management did not act consistently with [the Applicant's] contract of employment and terms of appointment.

To compensate [the Applicant] for the Panel's finding that management did not follow the applicable procedures in making the non-selection decision, the Panel recommends that the Bank award compensatory damages to [the Applicant] in the amount of one month of her former net salary.

23. By a letter of 11 April 2016, the Bank informed the Applicant that it accepted the Panel's recommendation.

24. The Applicant petitioned the Tribunal on 26 July 2016 contesting: (1) the Hiring Manager's decision not to hire the Applicant for the position of Program Assistant, level GC, with ITSEI; (2) the Bank's decision to accept the PRS Panel's recommendation that the relief requested – to be reinstated to her former position – be denied, and that she be awarded compensatory damages amounting to one month of her former net salary; and (3) the PRS Panel's failure to determine that the Applicant's due process rights were violated because she did not have reasonable notice of issues with her performance.

25. The Applicant seeks placement in the position of Program Assistant with ITSEI, level GC, or an equivalent position, or damages for lost career opportunity, reputational damage, inconvenience, emotional distress, and physical/mental stress, "assessed as two years' net salary, and such other and further relief as this Tribunal deems just and appropriate" in addition to legal fees and costs in the amount of \$42,320.

## SUMMARY OF THE CONTENTIONS OF THE PARTIES

***The Applicant's Contention No. 1***

*The non-selection decision was an abuse of discretion because it lacked a reasonable and observable basis, lacked contemporaneous documentation, and caused confusion for the Applicant*

26. In the Applicant's view, the non-selection decision was made without a reasonable and observable basis. The Hiring Manager, having the benefit of all of the applications, the interviews, and the Applicant's references, was in the best position to weigh the Applicant's suitability for the position. The Applicant asserts that the HR Action initiated by the Hiring Manager, even after the mixed reference, shows he was not concerned by the mixed reference. In the Applicant's view, the ultimate decision not to hire the Applicant was simply an abuse of discretion.

27. The Applicant argues that the Bank failed to provide any reasonable basis for why the Bank suddenly found the Applicant to be a "risky" hire after determining her to be the best candidate during the interview process. This assessment lacks support in the Applicant's 20 years' worth of performance evaluations and fails to take into account the uniformly positive views of her previous supervisors.

28. The Applicant states that out of four references, the record indicates that one of the references was "mixed." The record does not indicate whether the candidate who was ultimately hired had uniformly positive reviews. While the Applicant may have had one "mixed" reference, there is nothing to indicate that any other candidate had better references. It cannot be enough to point out one lone negative in the Applicant's application without showing that another candidate had fewer negatives and thus was a more appropriate hire than the Applicant. The record is void of any such showing.

29. The Applicant points to the behind-the-scenes, undocumented conversation between the Hiring Manager and the Director as the turning point for her non-selection. The Applicant concludes, and the Hiring Manager admits, that the non-selection decision was influenced by the

Director who did not interview the Applicant or participate in the reference checks. In the Applicant's view, such an "extreme step" should not have been taken without the Director having at least interviewed the Applicant.

30. The Applicant states that the Bank's standard, to ensure an objective and transparent selection process, requires documentation to support the selection or rejection of candidates. Although there was contemporaneous documentation to support the selection of the Applicant based on the interview evaluations and written performance reviews, there was a lack of contemporaneous documentation to support her non-selection. The Applicant points to the Hiring Manager's failure to document critical conversations which influenced the selection decision, namely his failure to document (1) the verbal reference from the Applicant's Supervisor as well as (2) his conversation with the Director.

31. The Applicant further asserts that the Hiring Manager's actions were not in line with the Bank's standard because he misled the Applicant to believe she had been selected for the position. The Applicant supports this assertion with the automated email she received from HR, sent to her as a result of the Hiring Manager initiating the onboarding process, as well as the email from the Hiring Manager asking when she could start. This, the Applicant contends, caused undue stress and confusion, and thus did not satisfy the Bank's standard.

#### ***The Bank's Response***

*The mixed reference and preclusion from a probationary period were reasonable and observable as bases for the non-selection decision and no substantial harm was suffered by the Applicant*

32. The Bank asserts that there was a reasonable and observable basis for non-selection, because although the Applicant was qualified for the position, qualification is but one element of suitability. The mixed reference provided by the Supervisor was a reasonable and observable basis for non-selection.

33. The Bank explains that reference checks are a very critical component of the recruitment process. It is the gathering of confirming information from knowledgeable and reliable sources

who are thoroughly familiar with parts of a candidate's background. It gathers information about a candidate's past performance and can be used to verify reliability or assess qualification, experience, skills or personal suitability. According to the Bank, it is "well known [that] the best indicator of how someone will perform in the future is his or her past performance."

34. The Bank states that the Hiring Manager personally contacted all four references provided by the Applicant and the feedback from one of them was somewhat mixed. The Hiring Manager shared with his Director the reference feedback. After their consultation, they were disinclined to select the Applicant for the position because of the mixed feedback. The concern from the feedback was the Applicant's reliability and suitability for the position, and there is nothing impermissible about a hiring manager placing more or substantial weight on a particular reference in making a selection decision.

35. The Bank argues that the record shows why the Hiring Manager decided not to select the Applicant for the position. It was because of the mixed feedback from the reference checks and the Hiring Manager's business judgment that the Applicant lacked the skills, i.e. attention to details and reliability, to discharge the functions of the position effectively. Based on the feedback he received, the Hiring Manager eventually did not want to take the risk of hiring the Applicant even though he had considered hiring the Applicant on a probationary basis before HR advised him that it was not permissible under the Staff Rules. There is, therefore, a basis for the non-selection decision, even though the Bank and the Applicant may disagree as to whether that basis was reasonable and observable. The Bank adds that it is the province of the Tribunal to rule and resolve this disagreement.

36. The Bank concedes that the Hiring Manager "may have been too proactive and jumped the gun" in his premature communication with the Applicant, but, it maintains the conduct was done in good faith, was not intended to be malicious, and did not cause substantial harm to the Applicant. In this respect, the Bank explains that the automatically generated HR email the Applicant received could not reasonably have been interpreted as a binding offer of appointment. Additionally, the Hiring Manager sent the Applicant a direct email duly informing her that the selection decision would be made after the reference checks were complete. While the Bank understands how the

Applicant's hopes may have been raised, it contends that the Applicant suffered no substantial harm to warrant compensation.

***The Applicant's Contention No. 2***

*The Supervisor violated the Applicant's due process rights when she did not give the Applicant adequate notice that the Applicant's performance was unsatisfactory or an opportunity to respond*

37. The Applicant contends that the verbal mixed reference provided by her Supervisor should be discredited because it is inconsistent with the written feedback she received from her Supervisor. According to the Applicant, "staff members have certain due process rights with regard to performance evaluations, including the right to prompt and adequate notice from management about the staff member's perceived performance problems." The Applicant argues that because she was not given adequate notice of unsatisfactory performance or an opportunity to perform satisfactorily, her Supervisor's failure to accurately document the alleged performance concerns was a violation of her due process rights.

***The Bank's Response***

*The Applicant's due process rights were not violated because a reference check does not require notice or an opportunity to respond, and in any event, the reference was consistent with the written feedback the Applicant received from her Supervisor*

38. The Bank argues that this Application contests a non-selection decision, not a performance appraisal and therefore the Applicant's claim regarding due process rights is misguided. In contrast with a formal performance appraisal from a supervisor, here, there is no requirement for notice or opportunity to respond. The Applicant nominated her Supervisor as a reference and, as requested, the Supervisor provided that reference. Further, the Supervisor's reference was honest, comprehensive, and, as the Bank points out, not inconsistent with her written performance evaluations of the Applicant.

## THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

39. The Tribunal has consistently held that it will not overturn a discretionary managerial decision, unless it is demonstrated that the exercise of discretion was “arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack[ed] a reasonable and observable basis, constitute[d] an abuse of discretion, and therefore a violation of a staff member’s contract of employment or terms of appointment.” *See de Raet*, Decision No. 85 [1989], para. 67; *AK*, Decision No. 408 [2009], para. 41; *DO*, Decision No. 546 [2016], para. 33.

40. This is particularly true in decisions concerning the selection and recruitment of staff members. As was held in *Riddell*, Decision No. 255 [2001], para. 23,

no staff member has a right to be selected to a particular position or to be included in a list of candidates for a position. The decision to select an applicant for a particular position, or to include him or her in a list of candidates, is discretionary and the Tribunal will not overturn such a decision unless it finds that it is tainted by bias or abuse of discretion.

41. Furthermore, in *Jassal*, Decision No. 100 [1991], para. 37, the Tribunal held:

It is not for the Tribunal, in assessing the validity of the selection or non-selection of a staff member, to undertake its own examination of that staff member’s record, or a criterion-by-criterion assessment of his or her qualifications. That is for the Bank to do in the first instance, subject to review by the Tribunal only for abuse of discretion. But the Tribunal is charged with determining whether the Bank’s decision was the product of bias, prejudice, arbitrariness, manifest unreasonableness, or unfair or improper procedure. Thus, if the Bank’s conclusion regarding the Applicant’s qualifications for selection [...] altogether lacks support in factual evidence or reasonable inference, that conclusion must be found to be an abuse of discretion.

42. In the present case the position of Program Assistant, level GC, was advertised, and as such, it was expected to be filled through competitive recruitment guided by principles of “objectivity,” “transparency,” “rigor,” and “diversity.” In *BK*, Decision No. 444 [2010], at paras. 46 and 56, the Tribunal observed that:

Principle 4.1 of the Bank's Principles of Staff Employment states that the purpose of the Bank's "recruitment policy shall be to seek to attract staff members of the highest caliber appropriate to job requirements." In this regard, the Tribunal notes that the Bank's Shortlisting Guidelines state that the shortlisting process should be guided by principles such as "objectivity," "transparency," "rigor," and "diversity." [...]

These objectives in recruitment are realized if the Bank makes its shortlisting process uniform with clear guidelines and when the composition of a shortlisting committee is diverse. Furthermore, staff members' confidence in the shortlisting process will be enhanced by the Bank's proper and contemporaneous documentation of the deliberations of the SLC [Shortlisting Committee] in as much detail as practicable. Contemporaneous and detailed documentation of SLC deliberations is also a guarantee of a transparent, sound and fair recruitment process.

43. The Tribunal ruled in *BK (No. 2)*, Decision No. 452 [2011], paras. 41 and 42 that the same criteria and principles identified in the shortlisting process were also applicable in the interview process.

44. The Applicant's main claim is that the Bank's non-selection decision was an abuse of discretion because there was no reasonable and observable basis for the decision.

45. In determining whether the Applicant's non-selection was an abuse of discretion, the Bank's guidelines, such as the Non-Managerial Recruitment Guide for Open-Ended and Term Staff, the Bank's own practice, and the parties' submissions demonstrate that three factors are relevant: the assessment of the interview panel, the assessment of the hiring manager, and reference checks.

46. The assessment of the interview panel is considered central in a recruitment process and generally a hiring manager is expected to follow the recommendation of an interview panel because such panel, in practice consisting of three or more individuals, is expected to carefully and objectively assess the suitability of a candidate against the job description and the selection criteria. The Bank's Non-Managerial Recruitment Guide for Open-Ended and Term Staff states that: "Conducting interviews is the central method to evaluate and assess candidates. Through the interview the Hiring Manager obtains information about the candidates that expands on a job application/resume in order to assess the suitability for the position." The Tribunal's own

jurisprudence also shows that the assessment of the interview panel is a significant factor in determining the reasonableness of a non-selection decision. *See BK (No. 2)*, Decision No. 452 [2011] and *DO*, Decision No. 546 [2016].

47. In the present case, the interview panel, which included the Hiring Manager, interviewed three candidates. The Applicant was ranked highest by every panel member. The record shows that the panel used a point system, and out of the 360 total maximum points, the Applicant received 325 points while the other two candidates received 275 and 216 points respectively. The interview panel noted that the Applicant was “[v]ery strong over all in terms of personality and technical skills.” Thus, in the assessment of each of the panel members, the Applicant was the top candidate.

48. The second relevant factor in the recruitment process is the hiring manager’s assessment of the candidate recommended by the interview panel. In the Bank’s recruitment practice, the hiring manager reviews the assessment or report provided by the interview panel and determines the best candidate for the position. Generally, the hiring manager accepts the recommendation of the interview panel. The Non-Managerial Recruitment Guide for Open-ended and Term Staff states that: “In cases where the Hiring Manager decides not to accept the [interview panel’s] recommendation, s/he should explain to the [interview panel] the reason behind her/his final choice.” In *DO*, at para. 55, the Tribunal took into account the testimony of an HR Manager stating “that though the recommendation of the interview panel is purely a recommendation, there has to be a ‘business case’ for not accepting its recommendation.”

49. In the present case, the interview panel consisted of the Hiring Manager and two other members. The Hiring Manager agreed with the assessment of the other members of the panel and also concluded that the Applicant was the top candidate. The Hiring Manager testified before the PRS proceedings and, as noted in the PRS Report, stated that the Applicant “performed well during her interview and appeared to be a good fit for the position.”

50. Accordingly, consistent with the Bank’s guidelines and practice, the Hiring Manager proceeded to the next stage of the selection process. The Hiring Manager recommended a follow-up interview of the Applicant with the Director, who is the next-in-line manager of the Hiring

Manager. Notably, under the Non-Managerial Recruitment Guide for Open-Ended and Term Staff, it was not necessary for the Hiring Manager to have the Applicant undergo an interview with the Director, as the position was for a GC-level Program Assistant. The Recruitment Guide states that: “For GH-GI technical positions Hiring Manager recommends his/her selection decision to his/her next in line [manager].”

51. Though it was not necessary, the Hiring Manager decided to have the Director interview the Applicant. The Tribunal finds nothing wrong with the Hiring Manager’s decision to take this extra step. The Director, however, did not interview the Applicant and instead advised the Hiring Manager to proceed with the next step of the selection process. According to the Director, he did not interview the Applicant because he “places a lot of trust in his managers to make staffing decisions,” and because it was a position in the Hiring Manager’s department, the Director felt that the Hiring Manager was a “good judge to decide.” Therefore, the Director was in effect in agreement with the Hiring Manager to proceed with the selection of the Applicant.

52. The next relevant factor in determining the reasonableness of the Applicant’s non-selection is the reference checks. The Bank’s guidelines are not clear as to what stage the reference checks are to be completed. It appears that a hiring manager can make a conditional offer of employment before reference checks or can do the reference checks before any offer is made.

53. In the present case, on 12 August 2015, the Hiring Manager informed the Applicant that management was proceeding with her reference checks, indicated that the final selection decision would be made afterwards, and asked about her availability to start. Following the Hiring Manager’s conversation with the Applicant, the Hiring Manager initiated an HR Action for the creation of a PAF to move her from her current unit to the Hiring Manager’s unit. On 13 August 2015, the Applicant received an email reflecting the HR Action.

54. The Hiring Manager personally contacted all four references provided by the Applicant. The record suggests that the Hiring Manager completed the reference checks verbally on 13 August 2015. The conversations with the references were not documented in writing. Three of the four

references provided positive feedback and one reference provided mixed feedback. The mixed feedback came from the Applicant's then Supervisor.

55. The Bank's guidelines recommend that the result of the reference checks be documented in writing. The Bank's internal document, Reference Checking 101 states: "Write a reference report that is organized, easy to read and is formatted in the same way for each referee. Quote the referee and avoid rewriting." The Tribunal considers that this recommendation is indeed a good practice to follow, and as the Tribunal has stated before, contemporaneous written documentation provides the best transparency in the recruitment process. In *BK*, Decision No. 444 [2010], para. 56, the Tribunal stated that: "Contemporaneous and detailed documentation of SLC deliberations is also a guarantee of a transparent, sound and fair recruitment process." The same holding applies to the reference checks.

56. In any event, in the present case, out of the four references listed, three provided positive feedback. The Hiring Manager spoke with the Supervisor on 13 August 2015 and she provided mixed feedback verbally. As there is no contemporaneous documentation of this feedback, the Tribunal notes the Supervisor's explanation of her feedback, summarized by the PRS Panel, as follows:

With respect to the position at issue, [the Supervisor] explained that she was aware that the [new] job would be "very similar" to the position that [the Applicant] held previously, but with a larger team of 75 staff, including 35 staff in Washington, D.C. in [the Hiring Manager's] unit. She was concerned with how [the Applicant's] skills would "translate" to a team significantly larger than what [the Applicant] had worked with in her previous position. [The Supervisor] noted that [the Applicant] had shown improvement after she had brought to [the Applicant's] attention the areas of concern. However, she did not believe there was sufficient improvement such that [the Applicant] could take on a team of the size in the new position. [The Supervisor] clarified during the hearing that she did not tell [the Hiring Manager] that she "would not hire" [the Applicant] or that she "did not recommend" her for the position.

57. Under the Bank's practice, the best person to evaluate and make a judgment about the result of the reference checks is the hiring manager. The hiring manager is directly involved in setting the selection criteria for the job advertisement, knows the requirements of the unit, and would be

working with the new recruit. Thus, the assessment of the hiring manager regarding reference checks is crucial. In this case, based on the positive feedback from three references and the mixed feedback from the Supervisor, the Hiring Manager made the determination that the Applicant still would be the suitable candidate and accordingly decided to proceed with hiring the Applicant.

58. After giving due consideration to the mixed feedback from the Supervisor, later that day, the Hiring Manager sent an email to the Supervisor informing her that he would like to proceed with the onboarding process to hire the Applicant. The Hiring Manager proposed 24 August 2015 as a release date for the Applicant. He asked the Supervisor if she was in agreement with the proposed release date and the Supervisor responded that she was fine with the arrangement.

59. If the Bank's guidelines and the recruitment practice were followed in the present case, the Applicant should have received her new appointment and started working in the Hiring Manager's unit on 24 August 2015. Instead, on 14 August 2015, the Director intervened and sent an email to the Hiring Manager stating "[w]e need to talk about your GC position" and asking "[d]id you notify [the Applicant] yet?" There is nothing in the record to explain what prompted the Director, who previously told the Hiring Manager to proceed with the recruitment of the Applicant, to then intervene in the selection process. Following the Director's email, the Director and the Hiring Manager apparently met to discuss the Applicant's suitability for the position. There is, however, no contemporaneous documentation of the discussion between the Hiring Manager and the Director in the record. It appears that given the mixed feedback from the Supervisor, the Director felt that it was an "unnecessary risk" for the Hiring Manager to hire the Applicant and one that the Hiring Manager should not take. Accordingly, the Applicant was not selected.

60. Therefore, the crucial issue is whether the Director had any reasonable and observable basis to conclude that the Applicant was an "unnecessary risk" for the unit to take and whether the ultimate non-selection was justifiable.

61. The most relevant precedent in this regard is the case of *DO*, Decision No. 546 [2016]. The applicant challenged the decision of the Vice President of his unit not to appoint him to the level GG position to which he was selected by the hiring manager of his unit based on the

recommendation of the interview panel. The Vice President attempted to justify his decision stating that in his view the Applicant lacked level GG leadership skills and knowledge of the Bank's culture. The Tribunal then reviewed the Vice President's decision, finding that his assessment was subjective and did not conform to the advertised criteria for the position. At para. 56, the Tribunal concluded that:

Mr. X's [the Vice President's] assessment criteria was subjective and did not conform to the advertised criteria. He was unable to substantiate his assessment that the Applicant lacked Level GG leadership skills and knowledge of the Bank's culture with concrete examples or by objective standards. He further based his assumption that the Applicant lacked requisite knowledge of the Bank's operations and culture on generalizations, rather than on the Applicant's actual knowledge, the assessment of the interview panel, the views of the Hiring Manager, or the views of the other Level GG senior officer, Mr. AB. Mr. X was also expressly informed by the short-term consultant that the Applicant and the other recommended candidate were "very strong [officers] and are considered the 'go to' persons for assistance." By not giving weight to any of the foregoing and instead relying on his own perceptions, Mr. X's decision did not comport with the advertised selection criteria. Based on the totality of the record, the Tribunal finds that the Bank has not shown that Mr. X had a reasonable and observable basis for failing to comply with best practices by overruling the decision of the Hiring Manager and declining to follow the recommendation of the interview panel.

62. In the present case as well the Tribunal finds no reasonable and observable basis for the assessment of the Director that the Applicant was an "unnecessary risk." The Director provided no clear explanation or basis for this assessment. It appears that based on the mixed feedback received from the Applicant's Supervisor as part of reference checks, the Director made his conclusion. There is nothing in the record to suggest that the Director even spoke with the Supervisor. The record suggests that the Hiring Manager shared with the Director the feedback he received from the Supervisor. But the Hiring Manager told the Director that he was comfortable with the decision to move forward with hiring the Applicant despite the mixed feedback from the Supervisor. The record does not provide any clear basis as to why the Director disregarded the view of the Hiring Manager despite having previously expressed the view that he trusts his managers and has confidence in the recruitment decision of the Hiring Manager. In fact, the opinion of the Hiring Manager should be given more consideration given that it was a GC-level

position, and it was the Hiring Manager who would be directly working with the new recruit and therefore was in the best position to determine the most suitable candidate for his unit.

63. The Tribunal finds the Director's assessment, that the Applicant was an "unnecessary risk," to be subjective, as it was not based on the observable record. The Director substituted the well-documented assessment made by the interview panel and the Hiring Manager with his own subjective assessment, despite having never interviewed the Applicant or contacted her references. Further, classifying a candidate as an "unnecessary risk" should not be based on assumption. The Bank's internal document Reference Checking 101 states that: "The best indicator of how someone will perform in the future is his or her past performance." In the present case, what could be the best predictor of whether the Applicant would be an "unnecessary risk" than the Applicant's well-documented 20 years' record of consistent good performance? If for 20 years the Applicant was not a risk for the Bank, how did she suddenly become an "unnecessary risk" on 14 August 2015? The Bank has also failed to provide supporting evidence to show whether and how the candidate ultimately selected for the Program Assistant position was less risky. As a minimum level of fairness, why did the Director not interview the Applicant before making his judgment and making the decision not to hire the Applicant? These essential questions remain unanswered. The Bank's internal document, Reference Checking 101, states: "When in doubt about a person's qualifications, check other references. [...] Remember that negative information is not sufficient to eliminate a candidate." Here, the Director does not appear to have given due consideration to other references and it does not appear that he even spoke with any references. It does not appear that the Director gave balanced consideration to the feedback received from the Supervisor.

64. The Bank points out that another factor for the non-selection was that management realized, though belatedly, that if appointed, the Applicant would not be subject to a probationary period. However, this factor was not stated in the selection criteria. If management had concerns about how to deal with the Applicant if she did not perform well, the performance management tools including placing a staff member on an Opportunity to Improve Unsatisfactory Performance plan and subsequent termination options were available to management under the Staff Rules. Therefore, to deny the Applicant the appointment she competitively won appears to be

unreasonable given that the Staff Rules provide other options to management to deal with poor performance of staff members.

65. Based on the record, the Tribunal concludes that the Director's assessment that the Applicant was an "unnecessary risk" has no reasonable and observable basis and as such the Tribunal cannot sustain the Bank's decision not to hire the Applicant.

66. Given that the Tribunal has upheld the main claim of the Applicant, that the non-selection decision was an abuse of discretion, it is not necessary to deliberate in detail the other subsidiary claims. As noted before, it is sufficient to observe that the non-selection decision lacked transparency and the Applicant did not receive fair treatment in this matter.

67. As for remedy, the Tribunal is guided by its jurisprudence in *DO*, Decision No. 546 [2016]. In that case, having found that the Bank's non-selection decision was an abuse of discretion, the Tribunal ordered the following remedies:

(1) The non-selection decision is rescinded. The case is remitted to the Vice President of the unit in question, to consider appointing the Applicant to a Grade Level GG position in the unit, if appropriate, via an *in-situ* promotion process retroactive to 10 March 2015, the date the Applicant was formally informed by Human Resources that the position was cancelled. If the Applicant is not so promoted, the Bank shall pay the Applicant two years' net salary;

(2) The Bank shall pay the Applicant compensation in the amount of three months' net salary;

(3) The Bank shall pay the Applicant the amount of \$13,903.05 in legal fees and costs.

68. Compared with the applicant in *DO*, the Applicant's non-selection had more adverse consequences because she had to leave the Bank, whereas the applicant in *DO* was still at the Bank. The Applicant in the present case was under a notice of redundancy when the non-selection occurred. The Applicant explains the damages she suffered for the non-selection as follows:

Under Staff Rule 4.01, paragraph 8.04 and the terms of her Mutual Separation Agreement, Applicant had until December of 2015 to apply for a full-time position

before she would only be able to take on brief, 30-day Short Term Consultant appointments for the following two years. Therefore, the [Bank]'s revocation of the selection of the Applicant was more damaging than just a "disappointing" non-selection. The non-selection resulted in Applicant being barred from full-time employment pursuant to Bank rules. Applicant is now limited to Short Term Consultancy for brief periods until December 2017 but such short-term consultancy lacks the benefits and other perquisites of full-time employment. Thus, in order to compensate Applicant for the [Bank]'s actions, Applicant is entitled to an award of monthly salary and benefits she would have received if she were hired from the date of non-selection to the present and to be selected for the position or comparable position for which she applied and was selected before the wrongful conduct.

69. Accordingly, the Applicant's circumstances will be taken into account in the award of the remedy.

#### DECISION

- (1) The non-selection decision is rescinded. The Bank shall reinstate the Applicant to a GC-level Program Assistant position or similar, retroactive to 24 August 2015, the date on which the Applicant would have formally been appointed. In the event the Bank decides not to reinstate the Applicant, it shall compensate her for damages resulting from the non-selection decision, in an amount equivalent to three years' net salary based on last regular salary drawn;
- (2) The Bank shall contribute to the Applicant's legal fees and costs in the amount of \$20,000; and
- (3) All other pleas are dismissed.

/S/ Mónica Pinto

Mónica Pinto

Vice-President

/S/Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 21 April 2017