



World Bank Administrative Tribunal

2018

Decision No. 579

**EN,
Applicant**

v.

**International Finance Corporation,
Respondent**

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

**EN,
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Mónica Pinto (President), Andrew Burgess (Vice-President), Mahnoush H. Arsanjani (Vice-President), Ahmed El-Kosheri, Abdul G. Koroma, and Marielle Cohen-Branche.
2. The Application was received on 7 August 2017. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The International Finance Corporation (IFC) was represented by Ingo Burghardt, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 4 May 2018.
3. The Applicant challenges (i) her Fiscal Year 2016 (FY2016) Annual Review, (ii) her FY2016 performance rating of 2, and (iii) the Opportunity to Improve plan (OTI) dated 24 October 2016, and amended on 8 November 2016.

FACTUAL BACKGROUND

4. After having worked for 11 years at Pricewaterhouse Coopers, most recently as a Director, the Applicant joined the IFC on 17 September 2012 on a three-year term contract as a Senior Investment Officer, Level G2, in a country office. In 2015, the Applicant's appointment was extended until September 2017.
5. In the summer of 2015, the Applicant signed Mandate A for the IFC to finance a company's project. However, the deal was suspended at the end of FY2016, at the Applicant's recommendation, because of concerns about the company's financial stability.

6. In June 2015, Mandate B was assigned to the Applicant, but the Manager reassigned it to another Investment Officer on 16 December 2015 so that the Applicant could focus on Mandate A. By email dated 17 December 2015 to the Manager, the Applicant noted:

I have two commitments in my objectives for this year and I was expecting to do [Mandate A] and [Mandate B] based on our discussions. While there are a few other things I am following up on there isn't anything in the pipeline yet that I can be reasonably confident of completing or coming close to completion in FY16. Which means that I will actually need to spend more energy in new business development in the next couple of months to meet that objective, which seems counterproductive to your suggestion to focus on [Mandate A].

7. In December 2015, shortly after Mandate B was reassigned, the Applicant was assigned Mandate C. However, this deal was eventually put on hold because of imminent shareholder changes.

8. In mid-February 2016, the Applicant had her mid-year performance conversation, where it was anticipated that Mandate A “should result in commitment by end April,” although “[Mandate C] is unlikely to close.” The Manager positively recognized the Applicant’s work on Mandate A and her work on corporate initiatives, but also stated that the Applicant’s “productivity is below that of her peers and it will be important for [the Applicant] to achieve her commitment targets to close the gap.” The Manager suggested that the Applicant “should focus on making significant progress in other areas, such as sector mapping, winning mandates, proactive portfolio management, etc.”

9. In March 2016, the Applicant was given portfolio responsibility for a project, directed to take on review responsibilities for 10 of the Manager’s projects, and asked to assist in helping the team transition to a new credit rating system.

10. On 15 June 2016, the Applicant entered 10 feedback providers for her Annual Review, after they were approved by the Manager.

11. Management review meetings were held at the end of June and July 2016, when the performance rating of 2, which means “below expectations,” was proposed for the Applicant. This rating was agreed upon by management.
12. On 26 August 2016, the management team received a preliminary team performance rating curve, setting out the proposed performance ratings. Managers were instructed not to share the information with staff, as they were not final numbers.
13. On 29 August 2016, the Applicant was medically evacuated to another country, where she remained until 24 September 2016. She continued to work part time while on sick leave, and subsequently on Short Term Disability, working for up to 24 hours a week, with at least 50% of that time working from home. She continued to have regular contact with colleagues, including the Manager, during this time.
14. By email dated 30 August 2016, the Manager reminded the Applicant and her colleagues that the self-assessments for the Annual Review were due by 31 August 2016.
15. On 26 September 2016, the management team approved the proposed performance ratings. At this time, managers were permitted to share the proposed ratings with staff.
16. On 28 September 2016, the Applicant met with the Manager to discuss her Annual Review. The Manager informed the Applicant that her performance was below that of her peers, she would receive a performance rating of 2, and she would be placed on an OTI. In particular, the Manager highlighted the Applicant’s low productivity, as measured by the number of deals brought to mandate and committed over the past three years and her “lack of initiative in the area of deal origination over the past years particularly in the assigned [...] sectors.”
17. By email dated 29 September 2016, the Manager updated the reviewing manager about the status of the Applicant’s review, indicating that she was waiting until she could review all of the feedback about the Applicant before finalizing the review.

18. On 30 September 2016, the Manager met with the reviewing manager and the incoming manager of the Applicant's unit to discuss the Applicant's draft Annual Review. The same day, the Applicant's Annual Review and performance rating of 2 were finalized.
19. The Applicant's OTI was issued on 24 October 2016 by her new Manager. According to the OTI, the Applicant was required to complete five specific tasks by 31 March 2017, and her performance would be assessed against G2-level competencies.
20. On 27 October 2016, the Manager sent the OTI to the Applicant. The Applicant suggested that the OTI should acknowledge her reduced work schedule due to medical disability.
21. On 28 October 2016, the Applicant filed a Request for Administrative Review of her Annual Review, her performance rating, the OTI, and the terms of the OTI.
22. On 8 November 2016, the OTI was revised, such that an evaluation of the Applicant's performance on the specified tasks would "tak[e] into account [her] reduced work schedule due to medical disability, which will continue for the next 3-4 months and may be amended based on the doctor's recommendation at any time during the period and extended at the end of the period."
23. On 5 December 2016, the Administrative Reviewer concluded that there was nothing "untoward with how the process was conducted," but that there were extenuating factors that should be taken into account, namely that the guidance provided to the Applicant during her mid-year conversation was "surprising and confusing"; that, if there were external circumstances that prevented Mandate A from closing, then the Applicant should not be held solely accountable; and that her health should be taken into consideration when determining next steps.
24. On 6 December 2016, a Senior Manager accepted the recommendations and stated that she would work with the Manager and the Applicant "on next steps and providing the necessary support to [the Applicant]."
25. On 4 January 2017, the Applicant requested a Performance Management Review (PMR).

26. The Performance Management Reviewer concluded that, although there were “some shortcomings in how the performance management process was conducted,” the evaluation and performance rating were “observable and not manifestly unreasonable.” However, she identified failures in due process, such as the lack of “an adequate opportunity [for the Applicant] to present her views on the performance assessment and defend herself against the criticisms of her performance before management finalized the performance rating of 2” and the implementation of the OTI after the Applicant had been placed on Short Term Disability, which restricted her work hours, place of work, and operational travel. The Performance Management Reviewer recommended that the performance rating should be upheld. However, the Performance Management Reviewer recommended that the OTI should be rescinded and removed from the Applicant’s personnel file, noting that the OTI had been suspended and, “given the procedural irregularities associated with the performance rating, resumption of the OTI is not warranted.” Moreover, the Performance Management Reviewer suggested the payment of one month’s salary to the Applicant.

27. On 27 January 2017, the OTI was suspended until such time as the Applicant returned to full-time work.

28. By email dated 28 April 2017, the relevant Vice President, as the Designated Manager, informed the Applicant that he accepted the Performance Management Reviewer’s recommendations in their entirety.

29. By email dated 28 June 2017 to a Senior Human Resources (HR) Business Partner, the Applicant requested that the OTI should be removed from her personnel records. The Senior HR Business Partner agreed and undertook to follow up with HR Operations. Again, by email dated 22 July 2017, the Applicant reiterated her request to have the OTI removed from her records, as it still appeared in the system.

30. On 7 August 2017, the Applicant filed this Application with the Tribunal. She challenges (i) her FY2016 Annual Review, (ii) her FY2016 performance rating of 2, and (iii) the OTI dated 24 October 2016, and amended on 8 November 2016.

31. The Applicant requests the following relief: (i) rescission of her FY2016 Annual Review and removal of all record(s) of it from her personnel files, (ii) rescission of her FY2016 performance rating of 2 and removal of all record(s) of it from her personnel files, (iii) the award of a performance rating of at least 3 for FY2016, (iv) confirmation that all record(s) of the OTIs of 24 October and 8 November 2016 have been removed from her personnel files/records, (v) conversion to an open-ended contract, (vi) a retroactive salary increase consistent with a performance rating of 3 for FY2016, (vii) compensation “for the extraordinary stress caused by management’s unfair treatment [...] and the damage to her reputation,” and (viii) legal fees and costs in the amount of \$17,768.69.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant’s Contention No. 1

The FY2016 Annual Review was arbitrary and unfair

32. The Applicant claims that the Annual Review failed to give a balanced assessment, including many more negative comments and omitting significant achievements, such as her success in negotiating Mandate A. According to her, the Annual Review was also unbalanced because the Manager failed to recognize other aspects of the Applicant’s work, such as finding a solution for a special project on small and medium enterprises road contractors, where she successfully collaborated with the World Bank Group, and her work on the Africa Women in IFC Network. The Applicant asserts that the feedback from her feedback providers is “uniformly very positive,” but this was not reflected in her Annual Review.

33. The Applicant disputes the criticism that her “productivity was low compared to her peers.” Rather, she states that no one on her team completed any education deals in FY2016 and, of the three health care deals “committed,” “one ran into serious issues almost immediately”; the success of the second deal could not yet be assessed; and the third deal, which was a success, was comparable in size to Mandate A, which did not close because of external factors.

34. In response to the IFC's criticism that the Applicant failed to meet the objective of organizing two business development trips, including at least one to Country X, she states that she did organize and take a trip to Country X, but the Manager vetoed the second trip she had organized. The Applicant also asserts that, during the Tribunal proceedings, the IFC added false criticisms about her performance that were not reflected in the Manager's comments and that are contradicted by the feedback she received.

35. The Applicant contends that the Annual Review did not take into account important mitigating factors regarding her lack of deals. The Applicant acknowledges that her objectives included bringing two deals to closure and that she was assigned three deals but was not able to close any of them. However, she claims that her failure to bring deals to closure was a result of circumstances beyond her control. Specifically, the Manager reassigned Mandate B, before she was due to start work on it and over her objections; Mandate C was placed on hold because of shareholder changes; and Mandate A was suspended just before closure to protect the IFC's interests as a result of concerns about the company's financial stability. She states that, contrary to the IFC's assertion, she did not focus solely on Mandate A, but also worked on business development and portfolio management. As well, she points out that her focus on Mandate A was in accordance with the Manager's instructions.

36. The Applicant also points out that the Annual Review included "unfair and inaccurate criticisms." Regarding the statement that the Applicant had not met expectations in business development, the Applicant responds by stating that she had developed 11 different projects and that it was the Manager who had prevented the Applicant from making greater progress on sector mapping in Country X. Regarding the statement that the Applicant had not made progress on proactive portfolio management, the Applicant points out that, after the mid-year conversation, in March 2016 she was given portfolio responsibility for a project, assigned review responsibilities for 10 of the Manager's projects, and asked to assist in helping the team transition to a new credit rating system. According to the Applicant, her success in this area was recognized in the Individual Business Objectives Summary of her Annual Review, where the Manager noted:

She took on new portfolio responsibilities as CRR Reviewer for 10 projects and provided feedback to POs to improve the quality of their CRRs and to implement IRP. She played an active an[d] appreciated role in the IRP roll out.

Finally, regarding the statement that the Applicant had not signed any mandates in the past two years, the Applicant pointed out that she had signed Mandate A in the summer of 2015.

37. The Applicant contends that the Annual Review was arbitrary and unfair because its conclusions were based on facts outside FY2016, namely, her performance was assessed over three years instead of only for FY2016.

The IFC's Response

The Annual Review was reasonable and based on objective criteria

38. The IFC claims that the evaluation of the Applicant's performance balanced positive and negative comments.

39. The IFC argues that the Manager objectively compared the Applicant's performance against her objectives and found that the Applicant failed to meet the specified objectives, i.e., "win two mandates, take two business development trips, and commit two deals." The IFC also calls upon the Tribunal to defer to the Manager who concluded that the "Applicant's productivity was lower than expected, and lower than that of her peers. None of the Applicant's Annexes are evidence to the contrary."

40. According to the IFC, the "Applicant's single-minded focus on [Mandate A] seems unreasonable, given that Applicant knew even months before the end of fiscal year 2016 that it was likely that [Mandate A] would not close." According to the IFC, the Applicant's peers "were effective in working on more than one transaction at a time," as was expected of a Senior Investment Officer. The IFC also characterizes the Applicant as "largely passive and expects things to be told to her, or done for her. If there were problems on her deals, her tendency, and history, was to end the deals and give up."

41. Regarding the Applicant's claim that she engaged in business development efforts, the IFC notes that her objectives required her to do more, i.e., to organize two business development trips, including at least one to Country X, which she failed to do.

42. The IFC states that the "Applicant's other excuses and justifications for failing to meet any of her performance objectives are similarly unconvincing" and that the Applicant was held to the "same standards expected of all Senior Investment Officers." The IFC argues that the "Applicant's work, and her excuses for lack of work, can best be evaluated by her manager, who sets expectations for her unit, and understands what level of control Applicant and her peers have in completing projects."

43. Since the Administrative Review and the PMR confirmed the performance rating of 2, the IFC urges that the "Tribunal should follow suit."

The Applicant's Contention No. 2

The FY2016 Annual Review and performance rating were carried out in violation of fair procedures

44. The Applicant contends that she was not given fair notice of any performance issues. For example, she states that she was criticized for the first time either in writing in the Annual Review or at the Annual Review meeting on 28 September 2016 about not being "fully conversant with the project cycle," that her board papers were not at a satisfactory level, that she failed to meet her business development and portfolio management objectives, and that her sector mapping was unsatisfactory. The Applicant claims that the timing precluded her from discussing, understanding, or responding to any of the negative assessments to point out the errors or to defend herself from them.

45. The Applicant argues that her performance review discussion was not timely. She explains that she worked full time in the country office for almost the entire month of August and was medically evacuated only on 29 August 2016. She also points out that the Manager knew that the Applicant continued to work part time remotely in September and had regular contact with the

Manager and her colleagues on work matters. Therefore, there was no excuse for the Manager to delay the performance discussion until the end of September, especially since the timeline for performance discussions was July–August.

46. The Applicant contends that the performance discussion “was not only brief and therefore perfunctory, but was also so late in the process that it was not a discussion at all.” She claims that the part of the lunch that was spent discussing her performance lasted no more than 15 minutes. Regarding the observation that the Applicant failed to ask questions or make any comments at the meeting and thereafter, the Applicant notes that the Manager made it clear that her performance rating had already been finalized since July and that the decision to place her on an OTI had already been taken. As well, she observes that she could not have asked questions about the Manager’s comments because the Applicant did not see those comments until after the Reviewing Official had approved the Annual Review.

47. The Applicant claims that the performance rating was an abuse of power, first, because the rating was not based on her performance during FY2016. Rather, it was based on her alleged performance shortfalls over the past three years, thus constituting an abuse of the annual performance rating system. Second, the Applicant claims that the proper process was not followed because her performance rating was set well before she had an opportunity to discuss her evaluation. The Applicant states that “nowhere in the documents is there any indication at all that anyone was concerned about or had any intention of changing the sole ‘2’ rating – that of [the Applicant] – during the June and July management meetings” and that the Manager herself had told the Applicant at the year-end discussion that the rating of 2 had already been decided in July.

The IFC’s Response

The Applicant was treated fairly during the performance evaluation process

48. The IFC states that the same performance evaluation process was applied to the Applicant as to her peers.

49. According to the IFC, the Applicant “received adequate and clear notice of her performance problems with ample time to correct them, [...] received continuous performance feedback during her work, and knew that her manager considered her to require more supervision than other Senior Investment Officers.” The IFC also points to the Manager’s comments during the mid-year conversation as putting the Applicant on notice that she was not meeting expectations.

50. The IFC rejects the Applicant’s claim that her performance rating was finalized as early as June 2016 and wrongfully kept from her. It states that the management team did not provide performance ratings for any staff members until late September and that the Manager was not allowed to and did not share any performance ratings with staff until 26 September 2016.

51. The IFC also rejects the Applicant’s characterization of the Annual Review discussion as taking only 15 minutes. It states that the Applicant and the Manager met for lunch for over an hour and that the Applicant had full opportunity to discuss her performance for as long as she wanted, “but there is no evidence that she attempted to do so.”

52. The IFC contends that the onus was on the Applicant to ask any questions and to respond to the Manager’s comments during the year-end discussion. According to the Respondent, “if the Applicant did not speak up at the meeting, then her comments could not be discussed at the meeting. This is not the Manager’s fault, however, nor does it make the meeting ‘unfair.’” The IFC also noted that the Applicant did not make any comments or ask questions after the performance review meeting, so the Manager finalized the Annual Review by the deadline of 30 September 2016, having also considered all of the feedback received by that date. According to the IFC, the Applicant did not try to schedule any follow-up meetings or send any emails to the Manager after the meeting.

The Applicant's Contention No. 3

The OTI was unfair, based on an arbitrary Annual Review and performance rating, and imposed under intolerable circumstances

53. Since the Annual Review and performance rating violated the Applicant's due process rights, the Applicant contends that the consequent OTI was, therefore, arbitrary and unfair.

54. In addition, the Applicant claims that it was unfair to expect her to demonstrate improvement, by completing the specified tasks set out in the OTI, at a time when she was only supposed to work part time because of her Short Term Disability and reduced work schedule. She states that, "for almost three months, [she] had to labor under the extremely stressful situation of trying to improve her performance at a time when she was supposed to be working substantially fewer hours."

55. The Applicant argues that the rescission of the OTI, which management accepted on 28 April 2017, did not provide her with full relief because the OTI remained in her personnel records until 3 August 2017, it had damaged her professional reputation and caused her stress because she tried to fulfill management's demands while having health issues, and compensation of one month's salary was insufficient. The Applicant also states that her performance rating of 2 means that management could still impose an OTI in the future.

56. The Applicant rejects the IFC's contention that the OTI is moot because it was resolved through the PMR process. She claims that "the long period of time when it remained in force and in her files caused her enormous stress and unwarranted uncertainty about the future of her employment." According to her, for the three months that the OTI was in effect, she "had to live with the reality that she might not be able to fulfill the terms of the OTI because of her medical condition and knew that such failure could result in her termination."

57. Regarding the decision to award her one month's salary as compensation, the Applicant states that this amount is not sufficient to compensate her for her suffering and that it was only on 3 August 2017 that the OTI was actually removed from her records, despite her repeated requests.

The IFC's Response

The OTI-related claims are moot and do not entitle the Applicant to any additional compensation

58. The IFC argues that the OTI claim has already been resolved since the OTI was rescinded and has been permanently removed from the Applicant's personnel records. It also states that the OTI was never enforced, since it was formally suspended in January 2017, and the Applicant had never been held to the performance standards set out in the OTI. Finally, the IFC states that the Applicant "was not harmed by an OTI program that never actually went into effect, and that merely evaluated whether she was going to perform her job duties as expected."

59. Moreover, the IFC asserts that there is no reviewable discretionary decision that led to the OTI because the OTI is "required by the Staff Rules whenever a staff member is awarded a '2' SRI [salary review increase] rating."

60. The IFC also argues that, since the Applicant obtained the relief requested, i.e., rescission of the OTI, from the Administrative Review and PMR process, "the Tribunal should not undermine the PMR system and reduce [its] efficiency by re-evaluating issues already resolved in favor of the Applicant."

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

WERE THE FY2016 ANNUAL REVIEW AND PERFORMANCE RATING ARBITRARY AND UNFAIR?

61. The Tribunal's assessment of performance evaluations is centered on the determination of whether the decision was arbitrary, discriminatory, improperly motivated, or carried out in violation of a fair and reasonable procedure. *BY*, Decision No. 471 [2013], para. 33.

62. In *Marshall*, Decision No. 226 [2000], para. 21, the Tribunal further observed that, "[e]ven if the merit rating and SRI were not a product of intentional ill-will, they might still be overturned by the Tribunal if they were arbitrary or capricious."

63. The Tribunal has held that “the assessment of performance has ‘to take into account all relevant and significant facts that existed for that period of review’ (*Romain (No. 2)*, Decision No. 164 [1997], para. 19), so as to ensure a reasonable basis for the OPE ratings and comments.” *Prasad*, Decision No. 338 [2005], para. 28.

64. In *Lysy*, Decision No. 211 [1999], para. 68, the Tribunal emphasized that:

A performance evaluation should deal with all relevant and significant facts, and should balance positive and negative factors in a manner which is fair to the person concerned. Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable.

65. In the Applicant’s FY2016 mid-year review, the Manager wrote:

[The Applicant’s] write up reflects her activities to date this FY. As discussed her productivity is below that of her peers and it will be important for [the Applicant] to achieve her commitment targets to close the gap. [The Applicant] has demonstrated good analytics, deal structuring and negotiations on [Mandate A], dedicated focus should result in a commitment by end April. Since [Mandate C] is unlikely to close, she should focus on making significant progress in other areas, such as sector mapping, winning mandates, proactive portfolio management, etc. [The Applicant’s] work on corporate initiatives, e.g. MAS CAF PIE initiative and collaboration across the WBG, e.g. with CFS are well acknowledged and appreciated. However, this should be seen as supplementary to her core role of deal generation and execution.

66. The Manager listed the following strengths in the Applicant’s FY2016 Annual Review:

[The Applicant] has strong analytical, research and credit skills. She is able to structure and negotiate deals using a broad range of financing instruments. She pays attention to detail. Her multiraters commend her team work and junior staff appreciate her coaching.

67. However, in the areas of development, it was noted that:

[The Applicant] tends to get lost in the detail presenting a multitude of options, but hesitates to decide on the appropriate action to take. Her lack of a deal sheet means that she is not fully conversant with the project cycle and some of her documents (e.g. board paper) are not prepared at the level of a Senior IO [Investment Officer].

With only two deals closed since she joined IFC and no mandates won in the past 2 years, her productivity is low compared to her peers.

68. The Manager wrote in the Overall Supervisor Comments section:

[The Applicant] continues [...] to struggle with the pace and expectations of a senior IO at IFC. As discussed at the mid year review, in the absence of deals to execute, [the Applicant] was expected to work on other initiatives such as sector mapping, winning mandates and proactive portfolio management. This unfortunately was not achieved.

69. Six feedback providers provided comments, although none of them relate to the Applicant's productivity. The comments are generally positive, including:

[The Applicant] has done a great job on [Mandate A] [...]. She leads negotiation teams with clients and she strongly uses creativity and robust negotiation skills to develop and provide solutions to overcome impasses at the concept notes with management, and to bring negotiations to a successful "go" for the deal at the concept note and at the IRM levels. [...]

- Continue delivering on high impact projects [...] in line with M&S strategy[.]

70. In the areas of development, the only three comments she received from the feedback providers were the following: "[c]ontinue [to] lead AWIN and coaching younger ladies in IFC on career growth"; "[c]ontinue to work o[n] her business acumen, client understanding and synthesis capacity"; and "[s]hould provide guidance to other officers once and clearly (she tends to return to the same issue several times and changes comments, after initial guidance)." None of these comments support any of the Manager's criticisms about the Applicant's performance. *See BG*, Decision No. 434 [2010], para. 30.

71. According to the IFC, the Applicant failed to meet the objective of "contribut[ing] to implementing Africa M&S (Services) strategy," as measured by the metrics of "[w]in[ning] 2 mandates including [Mandate A], [c]omit[ting] 2 deals, [o]rganis[ing] 2 BD [business development] trips including at least 1 to [Country X]."

72. With respect to the metric of “[w]in[ning] 2 mandates,” the Applicant did win Mandate A in FY2016.

73. With respect to the metric of “[c]omit[ting] 2 deals,” the Applicant acknowledges that all three of the deals that she worked on during FY2016 did not close, but explains that this was due to external circumstances. The IFC asserts that the Applicant focused on Mandate A, which was unreasonable since it was unlikely to close. The Tribunal will examine whether it was reasonable to hold the Applicant fully responsible for failing to achieve this metric.

74. The Tribunal observes that Mandate B was reassigned to another investment officer in December 2015 so the Applicant could focus on Mandate A. In response to this reassignment, the Applicant brought to the Manager’s attention her expectation that Mandate A and Mandate B would satisfy the two commitments in her objectives and that the reassignment would make it unlikely for her to be able to complete another transaction in FY2016. She also indicated to the Manager that the reassignment would mean that she would need to “spend more energy in new business development [...] which seems counterproductive to your suggestion to focus on [Mandate A].” This suggests to the Tribunal that the Applicant was diligent about trying to meet her objectives and actively engaged the Manager to ensure that her objectives would be met, while still trying to follow the Manager’s instructions to focus on Mandate A.

75. The Tribunal also notes that, as part of this email exchange with the Manager, when the Manager pointed out to the Applicant that “it’s a pity that your BD efforts haven’t resulted in any new mandates,” the Applicant responded that “[p]art of the reason for the lack of mandates is that in [Country X] the opportunities tend to be either too small or greenfield (or both). The market lacks depth and to be honest I see few if any prospects there in the short term.” The record does not contain any response from the Manager. The Tribunal finds that this is another instance where the Applicant appears to explain her lack of new mandates due to external circumstances, which is not rebutted by the IFC.

76. Second, the Applicant was assigned Mandate C in mid-December 2015, but by mid-February 2016, during the Applicant's mid-year conversation, the Manager recognized that it was "unlikely to close." The record supports the Applicant's explanation that this transaction was placed on hold because of shareholder changes.

77. Third, Mandate A, which took up a great deal of the Applicant's time in FY2016, was put on hold in early June 2016 "due to its increased risk profile," with the agreement of a Director who noted that "this is the best decision at this time" and was one that "protects IFC's interests." The Tribunal finds that it would have been reasonable for the Manager to take this into account when evaluating the Applicant's performance and notes that the Applicant's recommendation to place the transaction on hold was actually praised by management at the time.

78. Regarding the Applicant's goal of two business development trips, the record shows that the Applicant undertook one trip to Country X but, when she tried to organize a second trip, the Manager instructed her to postpone the trip because she wanted the Applicant to do a detailed mapping of the market players and "because of the focus we need on [Mandate A], CRRs, and IRP."

79. On balance, the Tribunal does not find it reasonable to criticize the Applicant for the lack of deals, when she did work on three deals in FY2016 but they did not close because of circumstances beyond her control. In this respect, the Tribunal agrees with the Administrative Reviewer who noted, as an extenuating factor:

[T]he feedback providers mentioned that for [Mandate A] the staff member worked really hard and provided creative solutions in order to bring the deal to closure but it seems the "client was not ready to close[.]" The staff member mentions "external circumstances" that forced the deal to be put on hold. If this is true then the staff member should not be held solely accountable as there were extenuating circumstances that contributed to the outcome.

80. In the Overall Supervisor Comments section, the Manager states, "[I]n the absence of deals to execute, [the Applicant] was expected to work on other initiatives such as sector mapping, winning mandates and proactive portfolio management. This unfortunately was not achieved."

81. The Applicant counters this statement by claiming that she worked on business development, to the extent possible, especially after the mid-year conversation when she was told that she was not performing at the level of a Senior Investment Officer. She claims that the Manager told her that, when other Senior Investment Officers have difficulties in deal commitments, they should contribute in other ways, such as business development. The Applicant lists 11 business development opportunities that she was “monitoring/developing or otherwise contributing to.” Her work on these projects is not disputed by the IFC.

82. Regarding proactive portfolio management, the Applicant submits that she increased her efforts in this area, after the comments in her mid-year review, for example, by assuming portfolio responsibility for a project, taking over review responsibilities for 10 projects on the Manager’s behalf, and assisting in the transition to the new credit rating system. The Applicant asserts that these achievements were recognized by the Manager in the “Individual Business Objectives Summary” section of the Annual Review, but contradicted by the Manager’s comments in the “Overall Supervisor Comments.” The IFC has not addressed how to reconcile these comments, which the Applicant claims are contradictory.

83. On the basis of the feedback from her mid-year review, the Tribunal understands why the Applicant concentrated on Mandate A. At the same time, the Tribunal has regard to the fact that, at the mid-year review, the Applicant was reminded of the need to meet her commitment targets. The Tribunal accepts the Applicant’s explanation that she tried to address these concerns from the mid-year review by increasing her business development efforts and portfolio management activities. The Tribunal finds that the Applicant acted upon the feedback from her mid-year conversation.

84. The IFC urges the Tribunal to defer to the Manager’s assessment of the Applicant’s performance, including her lower productivity as compared to her peers, as set out in the mid-year review and Annual Review. However, when the Tribunal ordered the IFC to produce “[f]urther explanation, with supporting documentation” of the Manager’s comments in the Annual Review, the IFC failed to give any explanation or supporting documentation.

85. In *Desthuis-Francis*, Decision No. 315 [2004], para. 23, the Tribunal considered, *inter alia*, certain adverse comments made by the director in the applicant's performance evaluation. The Tribunal observed that the negative comments

themselves do not attempt to identify the basis on which such conclusions rest. This by itself is not necessarily a ground for complaint, so long as the reviewing Director is able to adduce outside the four corners of the PEP a reasonable and objective basis for his 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.

86. In *Yoon (No. 5)*, Decision No. 332 [2005], para. 59, the Bank was unresponsive to the Tribunal's order to provide the feedback from all of the reviewers in the applicant's Overall Performance Evaluation (OPE), and the Tribunal held:

In light of this unresponsiveness to the Tribunal's directions, it is appropriate to draw the adverse inference that these three individuals did not make a meaningful contribution to the Applicant's evaluation. Accordingly, the sum total of the record before the Tribunal is singularly unimpressive as concerns the feedback from reviewers other than Ms. X [...].

87. On the basis of the record, the Tribunal is not persuaded that the IFC provided a reasonable and observable basis for its performance evaluation of the Applicant. The Tribunal cannot sustain the IFC's adverse performance evaluation of a staff member when the IFC fails to provide a reasonable basis for such an evaluation.

88. The Applicant argues that "performance ratings that are based on arbitrary performance evaluations will be set aside" and that, in this case, her Annual Review "was arbitrary and fatally flawed."

89. It is well established that performance ratings must have a reasonable and observable basis, and there is obviously a link between the performance evaluation and the performance rating. *See BG*, para. 57 and *BY*, para. 31. In *DC (No. 2)*, Decision No. 558 [2017], para. 73, having found the

performance evaluation to be unfair and unbalanced, the Tribunal found “that the [a]pplicant’s 2.2 SRI was not detached from the flawed OPE [...]”

90. The Tribunal finds that the Applicant’s performance rating of 2 similarly cannot be sustained, as her Annual Review did not have a reasonable and observable basis.

DID THE ANNUAL REVIEW AND PERFORMANCE RATING VIOLATE FAIR PROCEDURES?

91. The Tribunal has recognized the importance of respecting the requirements of due process in relation to performance evaluations.

92. In *Samuel-Thambiah*, Decision No. 133 [1993], para. 32, the Tribunal held that:

Two basic guarantees are essential to the observance of due process in this connection. First, 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. Second, the staff member must be given adequate opportunities to defend himself.

93. The first principle was reiterated in *Garcia-Mujica*, Decision No. 192 [1998], para. 19, where the Tribunal stated that the staff member affected should “be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work.” *See also DC (No. 2)*, para. 68.

94. Furthermore, the Tribunal held in *Prasad*, paras. 25 and 30, that:

[D]iscussion of performance does not replace the need for ongoing feedback throughout the year in question, which should be provided so that the staff member “should be able to anticipate the nature of this year-end discussion and resultant ratings on the OPE.”

[T]he obligation [is on] the Respondent to fully respect due process rights and conduct a fair and reasonable process of performance evaluation and accordingly to provide an opportunity to correct the mistakes that any staff member has made [...].

Sufficient Notice

95. The IFC claims that the Applicant “received continuous performance feedback during her work, and knew that her manager considered her to require more supervision than other Senior Investment Officers.” However, the IFC has not produced any emails, memoranda, or any document from the Manager to the Applicant comparing the Applicant to other Senior Investment Officers, in terms of the need for more supervision.

96. The Tribunal has held that “[o]ngoing feedback is necessary so as to avoid any surprises at the end of the review period. Ongoing feedback should be clear and specific so that the staff member can ‘anticipate the nature of this year-end discussion and resultant ratings on the OPE.’” *BG*, para. 45.

97. In an order from the Tribunal, the IFC was asked when the negative assessments in the Applicant’s Annual Review were brought to the Applicant’s attention. The IFC advised that “[t]hese comments were entered into the on-line Performance Evaluation system by Applicant’s manager at the time,” i.e., they were entered into the system on 30 September 2016 at 10:59 a.m. and would have been accessible by the Applicant immediately thereafter. The Tribunal finds this timing to be belated and would have expected such feedback to have been given throughout the year, as appropriate, and not on the deadline for the Reviewing Official’s sign-off on FY2016 performance evaluations.

98. The IFC relies on the Manager’s comments during the mid-year conversation as constituting notice. On one hand, the Manager wrote, “As discussed her productivity is below that of her peers and it will be important for [the Applicant] to achieve her commitment targets to close the gap” and the Applicant was reminded of “her core role of deal generation and execution.” On the other hand, the Manager anticipated that Mandate C was “unlikely to close” and instructed the Applicant that “dedicated focus [on Mandate A] should result in a commitment by end April.”

99. On the basis of the record, the Tribunal finds that the Applicant was not given sufficient notice about criticisms in her performance so that she would have an opportunity to address such concerns.

Year-end discussion

100. Staff Rule 5.03, paragraph 2.01(a) states:

At least once in a twelve month period, the Manager or Designated Supervisor and the staff member shall meet and discuss the staff member's performance, achievements, strengths, areas for improvement, and future development needs. In exceptional circumstances, for World Bank staff, the Vice President, Human Resources or Director, Human Resources, Client Services and for IFC staff, the Vice President for Human Resources or the Director, Human Resources may require that performance evaluations be completed by the Manager or Designated Supervisors more or less frequently.

101. The Tribunal has emphasized the importance of conducting a formal performance discussion in accordance with the Staff Rules and in the past has awarded remedies where this rule was breached. *See BY*, para. 29; *Prasad*, paras. 25–27; *Yoon (No. 5)*, para. 65; and *Mpoy-Kamulayi (No. 4)*, Decision No. 462 [2012], para. 46. In *Yoon (No. 5)*, para. 67, the Tribunal drew a clear distinction between “informal feedback sessions” during the year and “the year-end formal discussion,” noting that informal discussions or e-mail correspondence are not a substitute for a formal performance discussion held prior to establishing performance ratings.

102. In *Mpoy-Kamulayi (No. 4)*, where the applicant's 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. Similarly, in *BY*, 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 Applicant'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.”

103. In *DP*, Decision No. 547 [2016], para. 61, the applicant's performance rating was finalized in June 2014, her year-end discussion took place on 16 July 2014, and she was sent the final, signed OPE on 24 July 2014. The Tribunal found:

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 [...].

104. In this case, the IFC deadline for finalizing performance ratings was 7 September 2016, and managers were reminded that "you must have a performance conversation with your staff member before finalizing their performance rating." Final performance ratings were to be communicated to staff no later than 10 October 2016. The IFC claims that the Manager was not allowed to and did not share any performance ratings with staff until 26 September 2016; therefore, the Applicant could not have been informed about her performance rating before this date.

105. The Applicant's year-end discussion was held on 28 September 2016, after her performance rating had been set. There is nothing in the record that indicates that the Manager tried to have a year-end discussion with the Applicant before 7 September 2016, when performance ratings were finalized. The Tribunal finds that the Applicant was deprived of any opportunity to address management's concerns about her performance, since the year-end discussion took place after the performance ratings were set. Although the IFC contends that the onus was on the Applicant to ask questions and speak up during the year-end discussion and after this meeting, the Tribunal finds that the Applicant was effectively faced with a *fait accompli* on 28 September 2016.

106. The Tribunal finds that the lack of sufficient notice and the finalization of the performance rating before the year-end discussion did not comply with the requirements for a fair procedure.

WAS THE OTI UNFAIR, BASED ON AN ARBITRARY ANNUAL REVIEW AND PERFORMANCE RATING,
AND IMPOSED UNDER INTOLERABLE CIRCUMSTANCES?

107. Staff Rule 5.03, paragraph 3.02(b) provides that a staff member whose performance is not satisfactory may be placed on an OTI. This consists of "discuss[ing] and shar[ing] with the staff member in writing: i. the aspects of performance that are not satisfactory, ii. guidance on what improvement is expected and by when, and iii. the possible consequences of failure to improve."

108. Staff Rule 5.03, paragraph 3.03 sets out the potential outcomes of an OTI as follows:

In the case of failure to achieve or sustain satisfactory performance following a documented opportunity to improve under sub-paragraph 3.02(b), a Manager or Designated Supervisor may recommend, with the concurrence of the HR Team Manager, further actions consistent with that documented discussion. The recommendation shall be in writing, to the next in line manager at Level GI or above, and may include; (i) reassignment to another position under Rule 5.01; (ii) assignment to a lower level position under Rule 5.06, or (iii) termination in accordance with Rule 7.01, Section 11, Unsatisfactory Performance. The staff member will be given a copy of the recommendation and at least 14 calendar days to comment prior to a decision on the recommendation.

109. The IFC argues that the OTI issue has already been resolved since the OTI was rescinded, was never enforced, and did not cause any harm to the Applicant since it would have “merely evaluated whether she was going to perform her job duties as expected.”

110. Where the Tribunal has found that a performance evaluation was arbitrary, it has also concluded that the decision to place an applicant on a performance improvement plan (PIP), based on the outcome of such performance evaluation, is also arbitrary. *BG*, para. 52, and *DC (No. 2)*, para. 80. Therefore, having found that the Applicant’s Annual Review and performance rating were arbitrary, the Tribunal also finds that her placement on an OTI was arbitrary.

111. While the OTI was suspended and ultimately rescinded, after the Applicant challenged the decision to place her on the OTI, it is important to examine the chronology of events in this case. The Applicant was approved for Short Term Disability on 28 September 2016. The OTI was issued on 24 October 2016 and was to last for five months, until 31 March 2017. On 27 October 2016, the Applicant emailed her supervisor to suggest that “the OTI acknowledge the fact that I am currently on a reduced work schedule due to medical disability, which will continue for the next 3-4 months [...]” The OTI was subsequently revised on 8 November 2016, to take into account her reduced work schedule for the purposes of evaluating her performance. However, the tasks she was required to complete did not change. The OTI was then suspended on 27 January 2017, and the Applicant was informed on 28 April 2017 that the OTI would be rescinded and removed from her personnel file. However, despite the Applicant’s inquiries, the OTI remained in her personnel file until 3 August 2017.

112. The Tribunal takes note that the OTI was in effect for three months, until it was suspended, and was not rescinded and removed from the Applicant's personnel file until over nine months after the OTI was instituted, notwithstanding the decision of 28 April 2017 to rescind the OTI. The Tribunal finds that placing the Applicant on an OTI, while she was on Short Term Disability for three months, i.e., more than half of the planned OTI period, and then failing to remove the OTI from her personnel file for nine months was unreasonable and not consistent with Principle 2.1 of the Principles of Staff Employment, which states that the IFC "shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members." In *DC (No. 2)*, para. 83, the Tribunal compensated the applicant for management's "failure to treat the Applicant fairly pursuant to [...] Principles 2.1 and 9.1 of the Principles of Staff Employment, [which resulted in] [...] an impact on the Applicant's wellbeing."

113. The IFC also claims that there is no reviewable discretionary decision that led to the OTI because the OTI is "required by the Staff Rules whenever a staff member is awarded a '2' SRI rating." Such an argument is contrary to the existing body of Tribunal case law. The Tribunal's jurisprudence is clear that it will examine the reasonableness of placing a staff member on an OTI, as it did in the case of its precursor, the PIP. *See, for example, DC (No. 2); BI (Nos. 6 and 7)*, (preliminary objection), Decision No. 574 [2017]; and *DC*, (merits), Decision No. 530 [2016]. The Tribunal rejects the IFC's contention that the placement of the Applicant on an OTI, after receiving a performance rating of 2, is not reviewable by the Tribunal.

114. The IFC also claims that the Tribunal should not review this issue because the Applicant obtained rescission of the OTI through the Administrative Review and PMR process. The IFC states that "the Tribunal should not undermine the PMR system and reduce [its] efficiency by re-evaluating issues already resolved in favor of the Applicant."

115. In *BG*, the applicant succeeded before the Appeals Committee, which found that the performance evaluation and SRI rating were arbitrary and there was no reasonable and observable basis to place the applicant on a PIP. The Human Resources Vice President accepted the Appeals Committee's recommendations in their entirety. However, the fact that the applicant obtained relief from the Human Resources Vice President, acting on the Appeals Committee's

recommendations, did not exclude the Tribunal's jurisdiction. The Tribunal, instead, stated that "management must take decisions relating to performance evaluation and PIPs seriously and must give them thorough consideration because decisions relating to them have implications for a staff member's career in the World Bank Group." *BG*, para. 63. The Tribunal awarded compensation, in addition to the compensation already recommended by the Appeals Committee.

116. The Tribunal holds that conducting a *de novo* review of the Applicant's challenge of the OTI is consistent with the judicial function of the Tribunal. The Tribunal remains the only judicial body to which an aggrieved staff member can file an application, and, under Article II, paragraph 1 of the Statute of the Tribunal, the Tribunal's role is to review decisions taken by the World Bank Group alleged to violate a staff member's contract of employment or terms of appointment, including performance management decisions.

DECISION

- (1) The IFC shall pay the Applicant compensation in the amount of one year's net salary based on the Applicant's salary at the time of the contested decisions, plus \$25,000.00, for the reasons set out in paragraphs 90, 99, 106, 110 and 112 above;
- (2) The IFC shall pay the Applicant's legal fees and costs in the amount of \$17,768.69;
and
- (3) All other claims are dismissed.

/S/ Mónica Pinto

Mónica Pinto

President

/S/Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., 18 May 2018