



World Bank Administrative Tribunal

2016

Decision No. 543

**Fabrice Houdart,
Applicant**

v.

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

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

**Fabrice Houdart,
Applicant**

v.

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.
2. The Application was received on 2 September 2015. The Applicant was represented by Marie Chopra of James & Hoffman, P.C. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency.
3. The Applicant challenges *inter alia* the Bank's decision to impose disciplinary measures against him.

FACTUAL BACKGROUND

4. The Applicant began his open-ended employment with the World Bank as a Level GE Operations Analyst in January 2005, following several years as a consultant. He was promoted in May 2009 to Level GF Country Officer in the Central Asia Region, and again in April 2013 to Level GG Senior Country Officer in the Middle East and North Africa Region.
5. The Applicant has consistently been given very good performance evaluations. His Overall Performance Evaluations (OPEs) from 2011 to 2014 included a number of "Outstanding/Best Practice" ratings, as well as many "Superior" ratings, while his supervisors noted his "excellent work" and that he is "a great team player" and "incredibly professional." The Applicant's high level of performance has also been recognized in a number of Bank awards received between 2011 and 2014, including three Vice-Presidency Unit (VPU) Team Awards.

Work on behalf of sexual minorities

6. In September 2010, the Applicant was elected as President of GLOBE, the WBG Employee Resource Group representing the interests of Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) staff. In this role, he attended conferences on LGBTI issues abroad. He remained in this position until April 2015.

7. The Applicant also became increasingly interested in the plight of LGBTI individuals in the developing world. In 2012, he and another staff member organized an event on LGBTI issues in the South Asia Region. Also, in 2012, the Applicant and two other staff members decided to apply for a grant from the Nordic Trust Fund for Human Rights. In November 2012, the Trust Fund gave the Bank \$250,000 to explore the interconnection between the Bank's work and SOGI (sexual orientation and gender identity). A manager for Social Development in the South Asia Region agreed to host the grant and the Applicant became the Task Team Leader (TTL) for the Fund. The Applicant stayed in this role until the grant expired in March 2015.

8. As part of his advocacy for the rights of LGBTI individuals, the Applicant wrote numerous blog posts on the Bank's Intranet site (The New Frontier/Spark). The Applicant adds that the importance of his work on behalf of sexual minorities was frequently recognized by senior Bank management and by his own managers.

The Applicant's activities in 2014

9. According to the Applicant, partly as a result of his work on LGBTI issues he increasingly became a leader in debating political issues in the Bank. He also began using his Intranet Spark blog, "The New Frontier," to discuss issues of interest to staff beyond LGBTI issues.

10. The Applicant states that in early 2014 he worked with the Bank Information Center (BIC), a Washington-based civil society organization that "partners with civil society in developing and transition countries to influence the World Bank and other international financial institutions to promote social and economic justice and ecological sustainability." The Applicant adds that in

2014 he worked with BIC to bring political pressure on the Bank's governing bodies regarding the signing into law of an Anti-Homosexuality bill in Uganda as well as a reported police raid on a HIV research project in Kampala. In June 2014, in a GLOBE email, the Applicant criticized the appointment of a government minister from a country in Africa as Senior Director for the Bank's Fragility, Conflict and Violence Unit on the basis that while serving as a minister she had failed to oppose the Anti-Homosexuality bill. According to the Applicant, "senior Bank management – including President Kim – were very displeased with this public questioning of the appointment."

11. The Applicant claims that he also engaged in whistleblowing activities in 2014. He adds that on several occasions in 2014 he used his Spark blog to criticize Bank management and/or to highlight what he perceived as misconduct or financial improprieties. In July 2014, he wrote a blog criticizing the proposal to cut staff benefits, which included a comparison of the salaries and benefits of senior management and more junior staff. According to the Applicant, this blog "caused a storm," became the most read blog post in the history of the Bank, "led to widespread staff protests, Town Hall meetings, and demands for collective action," and "[r]eportedly, senior management was outraged, including President Kim." In this and other blog posts, the Applicant highlighted the fact that the Chief Financial Officer (CFO) of the Bank had been paid a \$95,000 recruitment bonus as well as a \$94,000 Scarce Skills Premium. The Applicant states that following a Town Hall meeting where Bank management "felt the full force of the staff's anger," President Kim announced that the CFO would relinquish the Scarce Skills Premium. According to the Applicant, "there can be little doubt that senior management blamed [the Applicant] for the turmoil."

12. In November 2014, the Applicant wrote further blog posts in which he questioned many elements of the Bank's Change Process and analyzed the Bank's expenditures.

13. On 15 March 2015, the Applicant wrote a blog post with further criticisms of the Change Process, including questioning the cost of an investigation carried out by the law firm of Edwards Wildman (renamed Locke Lord after a January 2015 merger – hereinafter Locke Lord) into a Bank loan to China. On 1 April 2015, the Applicant posted an April Fool's Day satire regarding Bank

management, the Change Process, and certain senior officials, including the CFO and the Vice President of Human Resources (HRVP).

The Applicant's filing of complaints with EBC

14. The Applicant states that he did not restrict his whistleblowing to public denunciations. He states that he also filed complaints against various senior managers with the Bank's Office of Ethics and Business Conduct (EBC). On 15 September 2014, the Applicant filed a complaint with EBC against the Vice President for Latin America, for allegedly using the Bank's resources to provide training to a Bank staff member who was about to retire. EBC closed the case on 16 October 2014, noting that "although this may have been a poor use of Bank resources, it nevertheless did not constitute a violation of any Bank rules or procedures."

15. On 2 October 2014, the Applicant filed an EBC complaint against the HRVP alleging that the latter had engaged in unethical behavior by pushing for the reform of the Scarce Skills Premium so as to benefit senior management, misleading the Board of Directors regarding the use of this Premium, and misusing the Premium by awarding it to the CFO. Following an initial review, EBC concluded that the allegations were unfounded, and closed the case on 4 February 2015. EBC did not interview the HRVP during the initial review. The Bank states, and the HRVP confirms, that he was not made aware of the Applicant's complaint and the initial review.

16. On 17 October 2014, the Applicant filed another complaint with EBC against the CFO. The Applicant complained that the CFO had misused Bank resources by using Bank missions for activities unconnected with his official duties, and by using his Executive Assistant to organize personal trips. EBC closed the case on 10 February 2015 concluding that the "allegations were determined to be unfounded." EBC concluded that "at all material times, [the CFO] was promoting the Bank's activities during the mission." EBC also concluded that "although EBC's investigations revealed that [the CFO] had used his Executive Assistant to arrange his private travel as contained in the allegations, Investigators determined that this was a one-off event and did not find a consistent pattern of such behavior to warrant a misconduct charge."

17. On 15 December 2014, the Applicant filed a fourth complaint with EBC against a Senior Communications Officer and the Vice President of External and Corporate Relations (ECR). The Applicant alleged retaliation, harassment, and disclosure of non-public information. On 29 April 2015, EBC closed the case as there was insufficient evidence to substantiate the allegations.

The Safeguards Review

18. The Bank's Environmental and Social Safeguards Policies (the Safeguards Policies) are considered by the Bank to be "the cornerstone of its efforts to protect the people and the environment and to achieve its goals to end extreme poverty and promote shared prosperity in a sustainable manner in all its partner countries." These policies guide the Bank Group's operations throughout the world, and require borrowing governments to address environmental and social risks if they are to receive financing for development projects.

19. In 2012, the Bank launched a comprehensive review of the Safeguards Policies, the goal of which was to strengthen their effectiveness and enhance the development outcomes of the Bank's projects. According to the Bank, the Safeguards Review "is probably the most sensitive and controversial activity undertaken by [the Bank] in recent years and touch upon such sensitive and emerging areas in safeguards such as human rights, climate change, labor standards and Indigenous Peoples." The Bank states that many civil society organizations have been actively engaged in the consultation process, "lobbying the Bank concerning the Safeguards Review, and attempting to bring public pressure on the Bank to influence the content of the final policy." In 2013, the Bank solicited input from staff members regarding the new policy.

20. The Applicant states that in his roles as President of GLOBE and TTL of the Nordic Trust Fund grant he worked with BIC and other organizations to try to ensure that the revised Safeguards Policies included protection for sexual minorities.

21. Following extensive internal consultations, the Safeguards Review Team drafted a confidential document entitled "Review and Update of the World Bank's Safeguards Policies – Proposed Environmental and Social Framework (First Draft)" (the Draft Safeguards Policy). This

document was to be submitted to the Executive Board's Committee on Development Effectiveness (CODE) for discussion by the Executive Directors on 30 July 2014, and to be released to the public thereafter (after approval by CODE).

22. A meeting of the Bank's Operational Vice Presidents (OVPs) was planned for 12 May 2014 to discuss the Draft Safeguards Policy in advance of the CODE meeting. In preparation for that meeting, the Vice President for Operations Policy and Country Services (OPCS) on 2 May 2014 sent an email to all OVPs requesting that they submit comments on the Draft Safeguards Policy.

23. The Bank states that because of the sensitivity of the Draft Safeguards Policy and to protect the confidentiality of the draft, copies were marked as "Strictly Confidential" and were individually numbered and delivered by hand to the office of each Vice President. The email of 2 May 2014 further advised the recipients that:

These documents are 'strictly confidential' and are being individually numbered and named. Its use is restricted for the purpose of internal discussions at the VP's meeting on operational matters.

24. Between 8-12 May 2014, twelve emails containing the Vice Presidents' comments (OVP Comments) on the "Strictly Confidential" Draft Safeguards Policy were circulated among the Vice Presidents, Senior Management and the Safeguards Review Team. Each OVP Comment email responded to and included the 2 May 2014 email of the Vice President of OPCS. The Bank states that the OVP Comments were frank and critical, and in many cases highlighted perceived weaknesses in the Draft Safeguards Policy.

25. Administrative assistants in the respective Vice Presidencies then uploaded the OVP Comments into the Bank's internal document management system, WBDocs. In two cases, the assistants marked them as "Official Use Only." According to the Bank, this was an incorrect designation as they should have been marked as "Strictly Confidential."

Leaks of Safeguards-related documents

26. Beginning in May 2014 the documents relating to the Safeguards Review were leaked. The Bank cites four leaks in this regard. First, between 29 and 30 May, a PDF document containing 30 pages of OVP Comments was leaked to BIC. Second, the confidential Draft Safeguards Policy was also leaked to BIC following the leak of OVP Comments. The Bank adds that the Draft Safeguards Policy became a subject of newspaper articles and was published on a public website, Scribd.com. Third, a confidential draft of the June 2014 Internal Audit Department Report on the Bank's "Safeguards Risk Management" was leaked to BIC and became the subject of a Reuters article in mid-July, 2014. Finally, the Bank explains that the fourth leak occurred when comments by the Bank's Inspection Panel on the Draft Safeguards Policy were leaked to BIC less than a day after they were completed on 25 July 2014.

27. The Bank states that these leaks generated negative publicity. The Bank explains that immediately following the leak of the OVP Comments, various BIC personnel sent emails commenting on the OVP Comments and circulated the leaked 30-page PDF file of the OVP Comments to various World Bank staff, Executive Directors and Advisors. The emails criticized the Draft Safeguards Policy (based on the OVP Comments) and sought to influence the Bank Group staff and Board Officials' positions on the Draft Safeguards Policy.

28. The Bank states that BIC also forwarded the OVP Comments to the media, and between 16 June and 5 July 2014, at least three media outlets published stories about the OVP Comments, which were then picked up and recirculated by other media outlets. The OVP Comments were selectively quoted to highlight internal criticism and doubts about the Draft Safeguards Policy.

29. On 16 June 2014, a publication called ClimateWire published an article entitled "Tension mounts within World Bank over climate change priorities," which stated that ClimateWire had obtained the OVP Comments, and which quoted several of the OVP Comments. The article also included a comment from a staff member at BIC.

30. On 17 June 2014, an article entitled “Leaked World Bank documents reveal risk of serious weakening of safeguards for forests, natural habitat and biodiversity” was posted on a website called www.redd-monitor.org. The article quoted several of the OVP Comments.

31. On 20 June 2014, a journalist from The Guardian newspaper sent emails to various Bank communications staff, indicating that he had in his possession 30 pages “of emails sent from all bank Vice Presidents [...] with their comments on the still-secret draft of the new WB environmental and social safeguards,” and asking for comment.

32. On 5 July 2014, The Guardian published an article on its website, entitled “World Bank email leaks reveal internal row over ‘light touch’ \$50bn loans,” and which quoted several of the OVP Comments.

The EBC investigates the leaks

33. On 23 June 2014, a member of the Safeguards Review Team at OPCS reported to EBC an allegation of misconduct regarding the apparent leak of the OVP Comments. EBC with the help of the Bank’s Information and Technology Solutions (ITS) commenced an investigation. According to the Bank, the investigation began “with no specific actual or potential leakers having been identified.”

34. In the Bank’s view, it was a complex investigation. It explains that: “Because no potential suspects of the leak had been identified as the investigation progressed, the extent of the search was unprecedented by the Bank Group’s standards. Both the ITS forensic team and EBC investigators struggled to sift through an enormous amount of metadata records and emails of individuals who had received the OVP Comments and, subsequently, the leaked [Internal Audit Department] Report, the Draft Safeguards Policy, and the [Inspection Panel] Comments. The total amount of electronic traffic that was sent and received during the timeframe of the leaks was approximately 65 million, which made the search process (and the review of search results) extremely time-consuming. The investigation engaged over 2,500 hours of five EBC investigators and over 2,000 hours for five ITS experts.”

35. The Bank states that despite this review of the electronic records, EBC investigators were unable to identify any staff member who sent the OVP Comments to BIC using the WBG email system, and by early October 2014 no staff member had been identified as the source of the leak.

36. The Bank states that on 3 October 2014, ITS located, for the first time, a PDF document containing the leaked OVP Comments. This PDF had been forwarded in an email by BIC to members of the Executive Directors' offices and to at least one staff member. By examining this PDF file, ITS established that it had been created on 30 May 2014, by using a particular Toshiba scanner, and that the material had originally been downloaded from WBDocs.

37. ITS then reviewed the logs of WBDocs and determined that only two individuals had accessed the OVP Comments: the staff member who had uploaded the comments in early May 2014, and the Applicant (on 29-30 May 2014). ITS also established that the Toshiba scanner identified in the log files was located near the Applicant's office. According to the Bank, however, at this point it was not yet clear to ITS whether the PDF file sent from the scanner to the Applicant's personal email account was the same file subsequently obtained by BIC.

38. On 14 October 2014, the ITS forensic team took possession of the hard drive of the Toshiba scanner near the Applicant's office.

39. On 17 October 2014, the Applicant wrote a note on his blog, entitled "I am under investigation," in which he mentioned the removal of the hard disk and print logs from the scanner, stating that "whatever the pretext is to this investigation, it is obvious that it is about the names of the people who helped me to blow the whistle on unethical behavior." He also referred to a previous statement in which President Kim stated that he had "zero tolerance" for retaliation, and commented that "it will be difficult for this statement to remain credible if such investigations are not stopped."

40. On 26 October 2014, the Applicant posted another blog (titled "There is nothing to fear but fear itself") stating that: "At this stage, I am not worried about myself, nor about my sources whom I will continue to protect. I know I did nothing wrong (well, I did use the Bank-owned scanner to

copy some of my kids' G5 Nanny medical bills as well as a check to the company that cleaned my oversized windows [...] which I suspect was wrong). [...] I just wish someone high up would get back to their senses, realize how damaging this can be for the change process and the organization, and call the investigation off [...]"

Locke Lord Investigation

41. On 21 October 2014, the HRVP informed EBC and ITS that he had decided to outsource the investigation of the four Safeguards-related leaks to Locke Lord. In turn, Locke Lord hired Stroz Friedburg, a forensic firm, to carry out a digital forensic analysis. According to the Bank, given the complexity of the investigation, the unprecedented nature of the leaks, the volume of work that EBC investigators had to deal with in addition to their regular duties, outsourcing the investigation to an outside reviewer was necessary.

42. Locke Lord with the help of Stroz Friedburg continued its own review of data and other forensic evidence and on 18 March 2015, Locke Lord sent a Notice of Alleged Misconduct to the Applicant. On 23 March 2015, Locke Lord interviewed the Applicant in the presence of a representative from EBC and a representative from the Staff Association. The Applicant admitted to the interviewers that he had found the OVP Comments on WBDocs, and had "printed them, scanned them, and [...] shared them with the Bank Information Centre [BIC]." The Applicant further admitted that he was not authorized to share these documents with BIC. The Applicant also admitted sending an email to the senior advisor at UNAIDS regarding the Draft Safeguards Policy and which included a quotation from the OVP Comments.

43. On 7 April 2015, the Government Accountability Project (GAP), a non-profit public interest organization, who had been retained by the Applicant for the purposes of the investigation, submitted a letter to Locke Lord. On 24 April 2015, Locke Lord provided a draft report to GAP for review. GAP submitted a written response on 11 May 2015.

Final Locke Lord Report and HRVP Decision

44. On 12 May 2015, Locke Lord submitted its Final Report of investigation to the HRVP. The Report concluded that:

Based on the facts [...], Locke Locke has specifically determined that on May 30, 2014, [the Applicant]:

1. Accessed 10 unique emails constituting the leaked OVP Comments, which had been uploaded as separate documents in the WBDocs system and designated as Official Use Only;
2. Printed out the 10 emails, which totaled 57 pages, using a World Bank printer near his office;
3. Created and then transmitted a 30 page subset of the 57 pages of OVP Comments to his personal Gmail address using a scanner near his office;
4. Forwarded the OVP Comments from his personal Gmail address to [Mr. A] at BIC, a civil society organization that is not a part of the World Bank Group; and
5. Took no steps to advise [Mr. A] about the confidentiality of the OVP Comments or to otherwise prevent [Mr. A] from further disseminating the OVP Comments.

Also, on June 25, 2014, [the Applicant] sent an email to a senior advisor at the United Nations Program on HIV/AIDS (“UNAIDS,” an international organization outside of the World Bank) in which he disclosed an excerpt from one of the OVP Comments (comments drafted by the Vice Presidency for Poverty Reduction and Economic Management Network, “PREM”).

Our investigation uncovered that the file [the Applicant] sent to [Mr. A] on May 30, 2014 was further disseminated to additional recipients by [Mr. A] and other BIC staff members. Specifically, between May 30, 2014 and June 10, 2014, [...] of BIC emailed the OVP Comments file that [the Applicant] sent to [Mr. A] on May 30, 2014 to at least fourteen (14) other individuals.

Lastly, our investigation has revealed that, on June 20, 2014, a reporter from THE GUARDIAN informed the World Bank that he had obtained 30 pages of OVP Comments. The facts that [the Applicant] (a) was the only World Bank staff member to access the OVP Comments in WBDocs prior to June 20, 2014 (other than the administrative assistants who uploaded the emails in the first place) and

(b) [the Applicant] compiled and scanned a specific 30 page subset of the full OVP Comments that he accessed on May 29-30, 2014 to create a new 30 page document, is consistent with THE GUARDIAN obtaining the same 30 page document that [the Applicant] forwarded to [Mr. A] on May 30, 2014 and [the Applicant] being, therefore, at least the indirect source of the leak to the THE GUARDIAN.

45. The Report further stated that:

These conclusions were reached based on the attached digital forensic data, World Bank Group emails, and witness interviews, including [the Applicant's] interview during which, among other things, [the Applicant] admitted to sending the OVP Comments to [Mr. A] on May 30, 2014, despite (a) having no authority to do so, (b) his understanding that his communications with [Mr. A] were not part of his Terms of Reference at the World Bank, and (c) the sensitive and deliberative nature of the OVP Comments.

46. On 20 May 2015, the HRVP issued his decision. He found that the Applicant had engaged in misconduct, as defined under Staff Rule 3.00, paragraphs 6.01(a) (disclosure of non-public information), 6.01(b) (failure to observe generally applicable norms of prudent professional conduct), 6.01(c) (failure to conduct himself in a manner befitting his status as an employee of an international organization), and Rule 3.01, paragraph 5.01 (disclosure of non-public information to a third party). Specifically, the HRVP found that the Applicant, without authorization to do so, "disclosed non-public information about deliberative comments from WB Vice-Presidents on a strictly confidential draft document, to an external party."

47. The disciplinary letter noted that the Applicant had no prior adverse disciplinary findings, a record of good performance and had made positive contributions to the WB's diversity and inclusion agenda, as well as the considerations that he admitted sharing the documents with BIC and had no personal gain from his conduct. The letter also noted the Applicant's arguments that "others have leaked information in the past and that senior managers and other officials (may) at times share documents to invite commentary; and that in any case the harm was not to be considered substantial." The letter further noted the Applicant's comments on the classification of the emails from various OVP's as "Official Use Only", rather than as "Strictly Confidential."

48. The letter, however, stated that

you were not in a position authorized to share the confidential information you disclosed; you had a clear indication that the OVP Comments were made in response to a document considered strictly confidential as explicitly stated and as was clear from the communication from the VP of OPCS to the OVPs; and documents classified 'For Official Use Only' are still not available for sharing with external parties without authorization to do so; and, while the confidential nature of the documents involved and the deliberative process was clear from the letter from the VP OPCS and the classification, you made no effort to ascertain whether it was appropriate to share the information you disclosed. In fact, you admitted in your interview to being aware that this was not the case. You also made no attempt to advise or request BIC to respect the confidential nature of this information and not to share this any further. As for the harm done: [...] violating this space for confidential deliberation is a serious matter in itself. It impinges on fundamental thrust among participants in such a process necessary to have a frank exchange of information and views before presenting this, in context, to third parties. In this case, various articles and commentaries based on the OVP comments were published even before the Bank's Board of Directors could release the draft documents, properly presented, for public commentary.

49. The letter also observed that the Applicant claimed that the investigation had occurred in response to his whistleblowing. In this respect, the letter stated that

your claim of Whistleblower status for disclosing non-public information is unavailing in this case. You do not claim 'whistle blower protection' in relation to your unauthorized disclosure of the OVP documents. In addition, I note that you did not claim not to have had any other option than to proceed as you did. Furthermore, the criteria for external reporting – assuming for argument's sake that this is how you would characterize your unauthorized disclosure to BIC – under the Whistleblower Rule as stipulated in Staff Rule 8.02 Protection and Procedures for Reporting Misconduct (Whistleblowing), paragraph 4.02 are not applicable here: (a) a significant threat to public health or safety; or (b) substantive damage to Bank Group operations; or (c) a violation of national or international law. In sum, Whistleblower protections are not applicable in your case.

50. The letter further maintains that:

Moreover, contrary to your bringing allegations to the proper channels as you did in other instances, in this case you did not seek guidance from World Bank Group officials as to how to best handle your concerns. Instead, you disclosed non-public information in direct violation of the Staff Rules and without considering the interests of the World Bank Group while taking care not to be identified as doing

so by using a private email address. I note that you explicitly and publicly denied your unauthorized disclosures, for example, by claiming in your blog of October 26, 2014 – close to five months after the actions at issue here – that there was a retaliatory investigation underfoot and that you had done nothing wrong; that you had used the scanner involved only in copying your children’s nanny’s medical bills and the invoice of a window cleaning company, meanwhile inviting your readers to consider you to be the victim of baseless allegations, before you admitted to having undertaken the actions summarized [...] during the interview of March 23, 2015. This in itself can be considered damaging as it suggested to a wider audience that you were the innocent victim of gratuitous action. It would be hard for anyone to consider this to be a good faith representation in the interests of the WB and it is not compatible with the trust invested in you as a staff member of the World Bank Group.

51. Considering the factors stated in his letter, the HRVP imposed the following disciplinary measures:

- (a) Demotion from grade level GG to grade level GF, with a change in title to Country Program officer and ineligibility for a promotion for a period of three years.
- (b) A reduction in salary of 5% of your current salary.
- (c) This letter will remain on your staff record for a period of three years.
- (d) You will no longer be provided with access to WBDocs.

52. On 11 June 2015, the Vice President and Chief Ethics Officer issued a statement entitled “Investigation into Leaks: Update,” which confirmed that three staff members had been found to have engaged in leaks – one regarding comments on the Draft Safeguards Policy and two regarding the travel records of a Bank official. It stated that these actions contravened the obligations imposed on all staff members, that none of the disclosures constituted whistleblowing, and that each of the staff members had therefore been found to have committed misconduct and had been “disciplined appropriately and similarly, given the nature of their violations.” The staff members concerned were not named in this statement.

53. On 16 July 2015, the Bank’s Staff Association wrote an article raising a number of questions regarding the 11 June 2015 EBC statement, which it described as an “unprecedented decision.” The article questioned the basis on which an outside investigator was engaged by the Bank and the cost thereof, and called for the creation of a disciplinary board to include participation from the Staff Association.

54. On 20 July 2015, the HRVP wrote to the Applicant, copying the Applicant's Country Director and the Chair of the Staff Association. In the letter, the HRVP stated his wish to "correct the record on a number of assertions [the Applicant had] made in internal blog posts over the past year, as well as in the media." The letter recalled the findings against the Applicant, and then addressed a number of the claims the Applicant had made with respect to the reason for the investigation and the disciplinary measures imposed on him. The letter concluded by noting that the Applicant had admitted wrongdoing, that the Bank had determined appropriate disciplinary action, and stating that "it's time to turn the page."

55. On 10 August 2015, Locke Lord informed the Applicant that it wished to interview him again. The email from Locke Lord stipulated that they wished to speak to the Applicant as a witness "whom we believe has information bearing on who leaked the Draft Safeguards Policy," that they were "not investigating [his] potential misconduct into these other leaks at this point" and that he was not a target of their investigation into the other leaks.

The Application

56. The Application was filed with the Tribunal on 2 September 2015. The Applicant challenges the 20 May 2015 decision of the HRVP to impose disciplinary measures, as well as the 20 July "written reprimand," as retaliatory and discriminatory actions taken against him because of his whistleblowing, as well as the ongoing Locke Lord investigation which "was and is abusive and contrary to due process."

57. The Applicant seeks the following remedies: reinstatement to the position of Senior Country Officer, Maghreb, at Level GG; confirmation of the possibility of further promotion at any time in the future; reinstatement of his salary to its level prior to the HRVP's decision; removal of all records of the Locke Lord investigation and of the HRVP's decision from the Applicant's staff records; reinstatement of his access to WBDocs; "[a] public announcement to all World Bank staff that the disciplinary measures formerly imposed on him have been rescinded"; and removal of the HRVP's 20 July 2015 "written reprimand" from the Applicant's staff records. He further requests that the Tribunal award him legal fees and costs in the amount of \$46,201.25.

58. The Bank filed its Answer on 16 December 2015. In its Answer, the Bank requested that the Tribunal issue a Confidentiality Order “preventing Applicant’s (or his lawyers’) disclosure or release of any information relating to his Application or the investigation into the Safeguards leaks.” The Bank acknowledged that this particular relief was not specifically provided for in the Rules of the Tribunal but explained that it was necessary because:

Since Applicant was made formally aware of the investigation into his involvement into the leaks related to the Safeguards Review, Applicant (and his lawyers) have been making various public statements concerning the investigation and the disciplinary measures imposed on him as a result of the investigation. The statements have been made via Applicant’s public Facebook account, an internal blog authored by Applicant, “The New Frontier”, his Twitter profile, and various interviews that Applicant gave to internet news outlets. Applicant made the statements despite his knowledge of the Bank’s rules and specific admonishments he had received that the investigation and the disciplinary measures are strictly confidential. Applicant has also publicized the filing of his Tribunal Application by posting pictures of the Application on his Facebook and Twitter pages and using the posts to fundraise for his legal representation, having set up a crowdfunding site. To make matters worse, many of Applicant’s posts contain misleading or outright false information, such as (i) accusing Respondent of directing the investigation into Applicant because of his LGBT activism; and (ii) his purported exoneration on other aspects of the leak investigation.

59. On 12 January 2016 the Tribunal received the Applicant’s comments opposing the Bank’s request for a Confidentiality Order.

60. By a letter of 11 February 2016, the Tribunal rejected the Bank’s request for such an order but stated that:

The President of the Tribunal nevertheless takes this opportunity to remind the Applicant that he remains subject to the general obligations of Bank Staff Members as described in Principle 3.1 of the Principles of Staff Employment, as well as other applicable Staff Rules including Rule 3.01, paragraph 5.01 pertaining to the disclosure and use of non-public information.

The President of the Tribunal further reminds the Applicant that materials filed by the Respondent before the Tribunal are to be used for the sole purpose of preparing submissions in the present proceedings, and are not to be disclosed to any third parties.

61. In this letter of 11 February the Tribunal also addressed the Applicant's request for documents and ordered the Bank to produce certain documents.

SUMMARY OF THE MAIN CONTENTIONS

The Applicant's Main Contentions

62. The Applicant contends that the investigation and the "very harsh penalties" imposed on him were improper. They were retaliatory for his outspoken criticisms of senior Bank management. According to the Applicant, the "massive investigation into his conduct," by an outside law firm which was "clearly on a fishing expedition to gather as much against him as it could," was retaliatory for his whistleblowing which had embarrassed senior management.

63. The Applicant submits that the investigation denied him certain due process rights, in failing to give him timely notice, searching his laptop "apparently without any of the required authorizations," while the law firm which conducted the investigation was "potentially biased" against him given his criticism of the firm, published just days before his interview. The Applicant further submits that the HRVP, whom the Applicant had "publicly attacked – and sometimes ridiculed" should have recused himself from the case.

64. The Applicant argues that the disciplinary measures imposed on him were unprecedented, "completely disproportionate to the offence," failed to give sufficient weight to mitigating factors, and were "contrary to the way the Bank usually treats leaks." He characterizes the 20 July 2015 letter from the HRVP as an "additional discipline" which was imposed "without any due process protections at all." The Applicant also claims that he is a victim of discrimination.

The Bank's Main Contentions

65. The Bank maintains that, contrary to the Applicant's contentions, this case is not about the Applicant's political activism within the WBG or his advocacy on behalf of the LGBTI community.

66. The Bank submits that the Applicant admits releasing to an outside party “Official Use Only” information which he was prohibited from releasing, and that this constitutes misconduct under the Bank’s Access to Information Policy. The Bank contends that the Applicant thereby caused significant damage to the Bank.

67. The Bank maintains that the investigation was not discriminatory, was consistent with the Bank’s past practice, and that there were good reasons for outsourcing the investigation to Locke Lord. The Bank also maintains that the investigation was not retaliatory, and that in leaking the OVP Comments the Applicant was not acting as a whistleblower.

68. The Bank maintains that there were no procedural flaws in the investigation, and that the sanctions imposed on the Applicant were proportionate. The Bank also argues that the 20 July 2015 letter from the HRVP was not a disciplinary measure.

The Staff Association’s Main Contentions

69. The Staff Association filed an *amicus curiae* brief on 5 April 2016. The Staff Association states that the punishment given to the Applicant was far too severe given the gravity of the offense. It adds that rather than look only at the offense itself, and the mitigating factors that should have been considered, the decision was driven, on the one hand, by the Bank’s campaign to appear strong in its response to what it perceived as an epidemic of leaks, and on the other hand, by retribution for its displeasure with the Applicant’s filing of EBC charges and his unwavering critique of the Bank’s Change Process and senior management’s role therein. Accordingly, it requests that the Tribunal reduce the punishment imposed upon the Applicant and award him damages for the harm caused by the inappropriate punishment.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

70. The Applicant in essence claims that: (i) the investigation and the “very harsh penalties” imposed on him were improper; (ii) the investigation and the misconduct decision were unfair, violated his due process rights and were riddled with conflicts of interest; and (iii) the investigation

and the misconduct decision were discriminatory and retaliatory (as a result of his whistleblowing activities). The Tribunal will address each claim in turn.

THE FINDING OF MISCONDUCT AND THE DISCIPLINARY MEASURES IMPOSED

71. The scope of review by the Tribunal in disciplinary cases is well-established. In *Koudogbo*, Decision No. 246 [2001], para. 18, the Tribunal stated that this review

is not limited to determining whether there has been an abuse of discretion. When the Tribunal reviews disciplinary cases, it “examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.”

72. The Tribunal has also held that its review in such cases “is not limited to determining whether there has been an abuse of discretion but encompasses a fuller examination of the issues and the circumstances.” (*Cissé*, Decision No. 242 [2001], para. 26, citing *Mustafa*, Decision No. 207 [1999], para. 17, and *Planthara*, Decision No. 143 [1995], para. 24.)

73. It is also well-established, as stated in *Dambita*, Decision No. 243 [2001], para. 21, that:

In disciplinary matters, strict adherence to the Staff Rules is imperative and a conclusion of misconduct has to be proven. The burden of proof of misconduct is on the Respondent. The standard of evidence in disciplinary decisions leading [...] to misconduct and disciplinary sanctions must be higher than a mere balance of probabilities.

74. The Tribunal will consider the present case in accordance with these standards.

The existence of the facts

75. The essential facts relating to the charge of misconduct are not in dispute. The Applicant admits that between 29-30 May 2014, he conducted several searches in WBDocs “to find anything related to the draft Safeguards policy.” He found the OVP Comments and printed them out. He

then, in his own words, “selected those which seemed most interesting in terms of giving insight into what the draft Policy might say” and copied them on the scanner next to his office. He sent the scanned document to his personal email address. On 30 May 2014 he forwarded the scanned OVP documents to Mr. A of BIC. The Applicant also admits that he was not authorized to forward these documents to BIC, and that he did not instruct Mr. A to refrain from disclosing the material to any third parties. The Applicant admits further that “Mr. [A] forwarded the OVP Comments to various sources.” He admits that Mr. A subsequently forwarded the documents to various recipients within the World Bank, and was “probably” also the source for the OVP Comments which were leaked to the press and resulted in several articles regarding the Draft Safeguards Policy.

76. The HRVP’s letter of 20 May 2015 makes it clear that the HRVP made his decision based on the above undisputed facts. Therefore the Tribunal finds that the essential facts are established; there is no need to address other disputed facts.

Whether the facts legally amount to misconduct

77. In his decision of 20 May 2015, the HRVP found that the Applicant disclosed the OVP Comments to BIC, which constituted misconduct as defined under:

- (a) Staff Rule 3.00, paragraph 6.01(a) – Misconduct includes a failure to observe obligations relating to [...] disclosure of non-public information.
- (b) Staff Rule 3.00, paragraph 6.01(b) – Misconduct includes a failure to observe generally applicable norms of prudent professional conduct.
- (c) Staff Rule 3.00, paragraph 6.01(c) – Misconduct includes acts or omissions in conflict with the general obligations of staff members set forth in Principle 3 of the Principles of Staff Employment including the requirements that staff [...] conduct themselves at all times in a manner befitting their status as employees of an international organization and to avoid any action [...] that would adversely or unfavorably reflect on their status [...] (Principle 3.1(c)).
- (d) Staff Rule 3.01, paragraph 5.01 – Staff members and former staff members in possession of non-public information obtained in the course of Bank Group employment shall not, without written authorization from a senior manager,

disclose to any third party for any reason or otherwise use such information in furtherance of a private interest or the private interest of any other person or entity. These obligations continue after separation from Bank Group service. “Non-public information” is defined as information generated by the Bank Group that has not been approved for release outside the Bank Group in accordance with the Bank Group’s Rules.

78. The Applicant’s position on whether his actions constituted misconduct is not entirely clear. The 11 May 2015 letter from the Government Accountability Project (then representing the Applicant) to Locke Lord stated that the Applicant “has never denied his role in disclosing the [OVP Comments] without authorization.” The letter stated that the Applicant “does not dispute that his conduct violated official Bank policy, but he asserts that it is not at odds with Bank practice. The relevant facts omitted from the Report provide the context necessary for an accurate assessment of [the Applicant’s] action in light of the Bank’s historical and well-documented treatment of unauthorized leaks.”

79. Before the Tribunal, the Applicant points out that the Bank admitted that the OVP Comments should never have been made available through WBDocs. He adds that: “Having them filed in this database meant that any Bank employee – a driver in a Bank County Office for example – could access them, read them, and print them out.” He also points out that the administrative assistants who uploaded the documents classified them as “Official Use Only,” and not as “Strictly Confidential.” He adds that the “administrative assistants who misclassified them and uploaded them should also bear at least part of the blame for their leak.”

80. The Tribunal finds that as a staff member of the World Bank, the Applicant was obligated not to disclose non-public information to any third party. The obligation was imposed by the clear terms of Staff Rule 3.01, paragraph 5.01 cited in the HRVP’s decision letter. This Rule states: “Staff members and former staff members in possession of non-public information obtained in the course of Bank Group employment shall not, without written authorization from a senior manager, disclose to any third party for any reason or otherwise use such information in furtherance of a private interest or the private interest of any other person or entity.”

81. Staff Rule 3.01, paragraph 5.01 states that: “‘Non-public information’ is defined as information generated by the Bank Group that has not been approved for release outside the Bank Group in accordance with the Bank Group’s Rules.” It is not in dispute that the OVP Comments were non-public information when the Applicant leaked them because they were not approved for release outside the Bank Group. The Applicant obtained them in the course of his employment with the Bank. He admits that he disclosed them to BIC, a third party, and that he was not authorized to do so. These undisputed facts are sufficient to conclude that the disclosure was a breach of his obligation under Staff Rule 3.01, paragraph 5.01, and therefore constitutes misconduct.

82. The Tribunal need not decide whether such disclosure was carried out for a “private interest” (the HRVP noted that the Applicant had no personal gain from the leak, and the Applicant asserts that his action was motivated by his professional concerns) as disclosure “for any reason” suffices for the purposes of the application of the Rule. Moreover, the Applicant has clarified that he “never claimed that sending the OVP Comments to BIC was a whistleblowing activity.”

83. Differences in the meaning of the classifications “Strictly Confidential” and “Official Use Only” need not be addressed in determining the question of the Applicant’s misconduct. The Bank’s AMS Policy 6.21A (Information Classification and Control) effective as of March 2010 as well as the Bank’s July 2010 Policy on Access to Information make it clear that both types of documents – whether classified as “Strictly Confidential” or “Office Use Only” – are restricted documents and cannot be disclosed to an outside party without proper authorization.

84. The Bank’s AMS Policy 6.21A confirms that, first, information should be classified as public or restricted based on the relevant disclosure policy of the WBG entity. Second, within the “restricted” category are three sub-categories: Strictly Confidential, Confidential, and Official Use Only. In respect of Official Use Only material, the Policy states as follows:

Information of this type, if disclosed, may in the judgment of the relevant WBG entity cause harm to well defined interests of the WBG entity or stakeholders. Sharing “Official Use Only” information with the general public or the press is not permitted. This is the default classification level for restricted information.

Access to information classified as Official Use Only must be restricted to WBG Entity Staff of the relevant WBG entity. Official Use Only information may be disclosed to External Parties if the disclosure, on a prudent basis, is in the interest of the WBG entity and the receiving External Party is notified that the information so disclosed may not be further disclosed without the prior consent of the disclosing WBG entity, or is otherwise under an obligation of confidentiality.

85. The Policy defines “External Party” to include non-governmental organizations.

86. In recounting the leak of the OVP Comments the Applicant notes that the administrative assistant who had uploaded the Comments (with the incorrect designation) had herself not taken the Access to Information training. The Applicant himself – who by May 2014 had been working for the Bank for more than ten years – had taken this course. He must be held to have been aware of the Bank’s policies in this area, as indeed he acknowledged in his interview with Locke Lord. In any event, he admitted that he was not authorized to disclose the Comments to BIC and that “his conduct violated Official Bank Policy.”

87. In view of the above, the Tribunal finds that the Applicant’s actions constitute misconduct under Staff Rule 3.01, paragraph 5.01. The Tribunal finds that the Applicant’s actions also constituted misconduct under the other provisions cited by the HRVP: Staff Rule 3.00, paragraphs 6.01(a), (b) and (c).

Whether the sanction is not significantly disproportionate to the offence

88. The Applicant does not dispute that each of the sanctions imposed were provided for in the law of the Bank. He claims, however, that the sanctions imposed were disproportionate.

89. The Tribunal notes that Staff Rule 3.00, paragraph 10.09 states that:

Upon a finding of misconduct, disciplinary measures, if any, imposed by the Bank Group on a staff member will be determined on a case-by-case basis. Any decision on disciplinary measures will take into account such factors as the seriousness of the matter, any extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures [...] may be imposed.

90. After finding that the Applicant had committed misconduct, the HRVP took into account the above factors and noted in his decision letter that the Applicant had no prior adverse disciplinary findings against him, a record of good performance, and had made positive contributions to the Bank's diversity and inclusion agenda. He also took note of the Applicant's admission of the leak, the fact that he had no personal gain from the leak, and the Applicant's argument (as expressed in the GAP letter) that leaks were commonplace, and that the material in question had been classified as "Official Use Only" rather than "Strictly Confidential."

91. Conversely, the HRVP observed that the Applicant was not authorized to share the material, was aware that the OVP Comments related to a document itself considered strictly confidential, and that violating the space needed for confidential deliberation "is a serious matter in itself." Further, the HRVP noted that the Applicant had "explicitly and publicly denied [his] unauthorized disclosures" in his various blog posts, action which, according to the HRVP, "in itself can be considered damaging as it suggested to a wider audience that you were the innocent victim of gratuitous action." In light of these circumstances, the HRVP imposed the following disciplinary measures:

- (a) Demotion from grade level GG to grade level GF, with a change in title to Country Program Officer and ineligibility for a promotion for a period of three years.
- (b) A reduction in salary of 5% of your current salary.
- (c) This letter will remain on your staff record for a period of three years.
- (d) You will no longer be provided with access to WBDocs.

92. The Applicant submits that the HRVP imposed a punishment on him "that was far heavier than his offense merited and which failed to appropriately weigh numerous mitigating factors." He contends that the HRVP combined a number of sanctions "to create a uniquely heavy punishment." The Applicant insists that he was "only guilty of leaking 'Official Use Only' documents which had been wrongly classified as 'corporate/administrative'." He notes that he leaked the documents not to the press but to two organizations (BIC and UNAIDS) with which he and the Bank worked closely. He argues that both Locke Lord and the HRVP failed to acknowledge that the leak was "in furtherance of legitimate LGBTI and Bank goals." The Applicant stresses that there has been no showing of actual harm to the Bank, and that due to the timeline the OVP Comments "became

completely irrelevant very shortly after they were released.” He also argues that the imposition of sanctions on him was “completely out of line with the way that leaked information has been treated in the past,” and that the “brief listing” of mitigating factors in the HRVP’s decision letter did not give them sufficient weight.

93. In *S*, Decision No. 373 [2007], para. 50, the Tribunal stressed that whether the disciplinary measures imposed pursuant to Staff Rule 3.00 are significantly disproportionate is to be determined considering the factors stated in paragraph 10.09.

94. In *Gregorio*, Decision No. 14 [1983], para. 47, the Tribunal held that:

The Tribunal has the authority to determine whether a sanction imposed by the Bank upon a staff member is significantly disproportionate to the staff member’s offense, for if the Bank were so to act, its action would properly be deemed arbitrary or discriminatory.

95. The Tribunal is mindful that in addressing the issue of proportionality, its job is not to decide what sanction the Tribunal would impose or whether the HRVP chose the best penalty, but, rather, whether the HRVP reasonably exercised his discretion in this matter. The Tribunal also notes that the sanction imposed on the Applicant in the present case, though serious, was less severe than termination. This consideration must affect any assessment of its proportionality. The Tribunal also notes that the HRVP’s decision letter shows that he considered the factors stated in Staff Rule 3.00, paragraph 10.09 and gave consideration to any other aggravating or mitigating factors in determining the sanction imposed. The Tribunal observes that there is no mechanical formula on how to weigh these considerations. The selection of the sanction in a given case requires a judgment of balancing the relevant factors by the HRVP. That discretionary judgment is for the HRVP to make, and as long as HRVP’s decision was not unreasonable, the Tribunal will not interfere.

96. With respect to aggravating factors, the Applicant here argues that the harm from the leak is not as severe as the HRVP and the Bank portray. He states as follows:

The discipline imposed should have been proportionate to the degree of harm caused by [the Applicant's] action. Both Locke Lord and [the HRVP] claimed that the leak caused harm to the Bank's deliberative process. Neither have managed to show any actual harm, however, and their general assessment of the harm caused is out of all proportion to the Bank's policies which assess the level of harm from the release of the Official Use Only documents as – at most – “moderate.” [The Applicant] was punished for a greater degree of harm than his action actually caused.

97. The HRVP, however, noted in his letter that:

Violating the space for confidential deliberation is a serious matter in itself. It impinges on fundamental trust among participants in such a process necessary to have a frank exchange of information and views before presenting this, in context, to third parties. In this case, various articles and commentaries based on the OVP comments were published before the Bank's Board of Directors could release the draft documents, properly presented, for public commentary.

98. In a declaration filed with the Tribunal, the Vice President of OPCS, who had initially circulated the Draft Safeguards Policy itself to the Operational Vice Presidents on 2 May 2014, stated that the leak of the OVP Comments “was particularly damaging.” He stated *inter alia* that:

The comments that were submitted by the OVPs were detailed and candid. They were sometimes critical of the proposed Safeguards Framework. In late June, 2014, I learned that the OVP Comments were leaked to the media. After the comments were leaked to the press, several articles in global news outlets appeared describing the contents of the leaked documents and portraying the internal disagreement on some of the provisions of the draft. The articles selectively quoted verbatim several of the Vice Presidents' comments. Because the quotes were very selective and not representative of the whole, they portrayed an imbalanced and negative view of management's perspectives as well as of the proposed framework.

The leak also caused more lasting damage to the internal deliberative process. The Bank has developed a long-standing culture of vigorous, high-level, internal consultations and deliberations over matters of high operational significance and visibility. It is crucial to that process and to our effectiveness for management to be able to freely and frankly discuss proposed policies and share uncensored views before a proposal is shared publicly or presented to the Board. Several Vice Presidents expressed to me their concerns about the internal deliberative process. Not only because their words were taken out of context and portrayed in an unbalanced way in the media, but also because it made them quite wary of participating as candidly in the future. As a consequence, I have observed that the vice presidents are more guarded and less candid in their written comments. We've

also had to institute a number of extraordinary measures and internal safeguards to ensure secure distribution of comments and documents, especially on sensitive matters, which add time and complexity to the process. In addition, stakeholders in the third round of consultations on the safeguards proposal continue to raise information from the leaked OVP Comments.

While three other leaks of safeguards-related documents followed, the leak of the OVP Comments was particularly damaging because of the internal and deliberative nature of that collection of perspectives. I cannot recall an instance where such highly confidential and sensitive views were shared in such a manner.

99. The Communications Advisor and the Spokesperson for the World Bank Group states in his written declaration before the Tribunal that the release of internal comments critical of the new Safeguards Policy undermined management's ability to advise governments on the new Safeguards Policy regime:

Imagine if a regional VP were to travel to a capital and ask the leader of that country to comply with the new safeguards, only to have the leader say, "But I saw in your comments that you don't believe these safeguards are implementable." This is the potential effect of this leak, and I consider it devastating to our credibility as an institution.

100. The Tribunal takes note of the Bank's view that "[t]he assessment that the leaks were highly detrimental to the institution was management's to make, and it is not for the Applicant to question management's assessment of the damage caused by the leaks." Considering the circumstances of the case, and taking the views of the senior officers quoted above, the Tribunal is satisfied in this case that the Bank's assessment of the harm caused by the leak was not unreasonable, and nor was it improper for the HRVP to consider the harm caused as an aggravating factor. It is not difficult to imagine how unauthorized leaks could adversely affect the internal deliberative process and decision making in a public institution like the World Bank. It is understandable that the policymakers in the Bank would be hesitant to provide frank views if they have no confidence in the security of the confidential documents. It would be difficult for the Bank to cohesively function if it cannot trust their staff to protect the confidentiality of documents.

101. Turning to mitigating factors, the HRVP noted that the Applicant had never been the subject of disciplinary proceedings or measures, that he had a record of good performance, and that he made a positive contribution to the Bank's diversity and inclusion agenda.

102. The Applicant argues that proper consideration should have been given to the facts that "his conduct, while inappropriate, was in a good cause and part of his Bank responsibilities as President of GLOBE and TTL of the Nordic Trust Fund Grant – to obtain more protections for sexual minorities."

103. The Tribunal observes that the HRVP's letter acknowledged that the Applicant had no personal gain from the leak. The Applicant claims that "the leak in question was in furtherance of the legitimate LGBTI and Bank goals and was given to organizations which were closely allied with the Bank." Nevertheless, the fact remains that the Applicant was not authorized to so act with respect to Bank documents that had been designated "Official Use Only." Moreover, the Applicant's submission on this point ignores the fact – of which he must have been aware – that public consultation on the Draft Safeguards Policy was always scheduled to take place after the Draft was publicly released on 30 July 2014, two months after the Applicant's leak. Indeed the OVP Comments that the Applicant leaked included the remark that "while the substance and wording will surely go through much debate with civil society and governments, [the Draft] provides a good starting point for discussion." Had the Applicant not leaked the OVP Comments, NGOs such as BIC would still have had the opportunity to review and comment upon the Draft Safeguards Policy. Instead, by acting as he did, the Applicant caused harm to the deliberative process of the Bank.

104. Another mitigating factor, according to the Applicant, is his admission of being the source of the leak. The Applicant argues that "the fact that he admitted that he was the source of the leak at the first opportunity should have been given greater weight." This assertion is belied by the record. The Applicant leaked the OVP Comments to BIC and then UNAIDS on 30 May and 25 June 2014, respectively. His admission came during his interview by Locke Lord on 23 March 2015. In the intervening period, the Applicant made a number of public statements regarding the investigation, none of which supports the contention he now makes.

105. In a blog post of 17 October 2014, he stated that “whatever the pretext is to this investigation, it is obvious that it is about the names of the people who helped me blow the whistle on unethical behavior,” and that it would be difficult for President Kim’s statement on zero tolerance for retaliation to remain credible “if such investigations are not stopped.”

106. On 26 October 2014, he posted a more detailed statement, to the effect that he appeared to be under investigation regarding the leaking of the Draft Safeguards Policy, but “this is only a pretext” as he had had no access to the highly confidential document that had been leaked. The Applicant has since stressed that here he was referring to the leak of the Draft Safeguards Policy itself, rather than the OVP Comments. Be that as it may, his post continued as follows:

I am not worried about myself, nor about my sources whom I will continue to protect. I know I did nothing wrong (well, I did use the Bank-owned scanner to copy some of my kids’ G5 nanny medical bills as well as a check to the company that cleaned my oversized windows [...] which I suspect was wrong). [...] I just wish someone high up would get back to their senses, realize how damaging this can be for the change process and the organization, and call the investigation off.

107. On 26 November 2014, he posted further comments, referring to the need for “staff rights to some level of e-mail privacy and protection from rogue investigations,” and suggesting that the firm recently recruited by the Bank’s General Counsel to carry out an investigation was “the perpetrator” that carried out the search on his unit’s scanner the previous month.

108. At best, these statements gave no indication that the Applicant was in any way involved in the leaks. At worst, these statements flatly asserted his innocence, questioned the motivation and legality of the investigation, and called for the investigation to be called off. In these circumstances, the Tribunal rejects the contention that the Applicant’s belated admission was not given weight by the HRVP.

109. In light of the foregoing considerations, the Tribunal finds no grounds to conclude that HRVP improperly exercised his discretion in deciding on the appropriate sanctions. The Tribunal concludes that the sanctions imposed on the Applicant were not significantly disproportionate to the misconduct.

UNFAIR PROCEDURE, DUE PROCESS AND CONFLICTS OF INTEREST

110. The Applicant claims that the investigative procedure was unfair, violated his due process rights, and the investigation and the decision were riddled with conflicts of interest.

111. The Tribunal observes the Applicant's complaints in this respect must be examined bearing in mind that the Bank's disciplinary proceedings are administrative rather than criminal in nature. In *Kwakwa*, Decision No. 300 [2003], para. 29, the Tribunal observed that the Bank is not required to accord a staff member accused of misconduct "the full panoply of due process requirements that are applicable in the administration of criminal law." The Tribunal in *Rendall-Speranza*, Decision No. 197 [1998], para. 57, explained the nature of disciplinary proceedings in the Bank as follows:

In order to assess whether the investigation was carried out fairly, it is necessary to appreciate the nature of the investigation and its role within the context of disciplinary proceedings. After a complaint of misconduct is filed, an investigation is to be undertaken in order to develop a factual record on which the Bank might choose to implement disciplinary measures. The investigation is of an administrative, and not an adjudicatory, nature. It is part of the grievance system internal to the Bank. The purpose is to gather information, and to establish and find facts, so that the Bank can decide whether to impose disciplinary measures or to take any other action pursuant to the Staff Rules. The concerns for due process in such a context relate to the development of a fair and full record of facts, and to the conduct of the investigation in a fair and impartial manner. They do not necessarily require conformity to all the technicalities of judicial proceedings.

112. The Tribunal further observes that even though it takes "a fuller examination of the issues and circumstances" in misconduct cases, it does not micromanage the activity of investigative bodies. In *G*, Decision No. 340 [2005], para. 73, the Tribunal stated that

the Tribunal has no authority to micromanage the activity of INT. What is required of INT is not that every inquiry be a perfect model of efficiency, but that it operates in good faith without infringing individual rights.

Lack of timely notice

113. The Applicant claims that he was not given a Notice of Alleged Misconduct in a timely manner. He contends that, whereas in line with Tribunal jurisprudence a staff member who is the

subject of a preliminary inquiry should be informed of this at the earliest reasonable moment, Locke Lord delayed informing him for months. He argues that the “critical evidence” was found on the scanner/printer on 14 October 2014, thus investigators (whether EBC or Locke Lord) must have known “at least by the end of October 2014” that he had been the one responsible, yet he was not given any notice of the investigation until five months later in March 2015. According to the Applicant:

There can be no excuse for this delay which naturally added to [the Applicant’s] stress. He had guessed correctly that he was being investigated. Yet he was left hanging, not knowing exactly what was going on, for a long period of time. It certainly appears as if it was [the Applicant’s] March 15, 2015, blog which finally goaded Locke Lord into action. The delay in informing [the Applicant] was inexcusable, and frankly, incomprehensible.

114. The Bank responds to this allegation as follows:

Applicant ignores the complexity of the investigation that EBC first undertook, which spanned not just the leak of the OVP Comments but also of the other three Safeguards-related documents. Between June 23, 2014 when the complaint to EBC was made and October 6, 2014, when ITS finally pointed to Applicant as the probable leaker of the OVP Comments, both EBC and ITS forensic teams were busy conducting the complex investigation, with no success. Even with the breakthrough of locating the scanner from which the OVP Comments document was likely scanned, EBC was not able to definitively conclude that the May 30, 2014 transmission to Applicant’s Gmail address contained the OVP Comments. What Respondent had at that point were “excessively broad, computer-generated red flags” that connected Applicant to the leak, but not sufficient evidence to warrant issuing a Notice of Alleged Misconduct.

Moreover, by early October, 2014, the investigation into the other leaks was stalled. It was unclear whether Applicant, or others, were involved in the other three leaks of Safeguards related documents. At that point, the universe of potential leakers numbered in the hundreds. It was therefore reasonable for HRVP to conclude that it was time to bring in an outside investigator with the expertise and the technological capabilities to conduct a comprehensive and independent investigation. Once the decision was made to have an independent firm to get involved, it was reasonable to hold off on issuing a notice to Applicant until Locke Lord either confirmed or refuted EBC’s preliminary findings.

Neither was the period of time that Locke Lord took to conduct its inquiry before issuing the Notice of Alleged Misconduct unreasonable. Locke Lord was engaged at the end of October, 2014; it then had to obtain the necessary authorizations to

conduct the searches. It then had to identify and then retain a digital forensics firm, Stroz Friedberg. Because Locke Lord was conducting an independent investigation without relying on EBC's preliminary findings, Stroz Friedberg had to obtain, process and search through a large amount of data; it had to gain access to and search various logs on the WBG network, including WBDocs logs. Locke Lord had to review a considerable amount of potential evidence prior to determining whether to conduct further fact-finding, who should be interviewed, and to whom notices of misconduct should be issued. Additionally, until Stroz Friedberg accessed the Toshiba scanner onsite in February, 2015, Stroz Friedberg and Locke Lord could not confirm that the document that was sent from the Toshiba scanner to Applicant's email address was indeed, the document containing OVP Comments. Until then, Locke Lord had not obtained sufficient evidence to warrant issuing a Notice of Alleged Misconduct. Therefore, a period between November, 2014 when Locke Lord initiated its investigation and March 18, 2015 when the Notice was provided to Applicant is entirely reasonable, considering the breadth and complexity of the entire investigation.

115. The Tribunal notes that Staff Rule 3.00, paragraph 8.02 states that: "A staff member whose conduct is at issue will be notified in writing of the allegations against him or her." The Guide to EBC's Investigative Process (May 2012) clarifies that: "At the conclusion of an initial review, if a decision is made to proceed with an investigation, EBC will send a Notice of Alleged Misconduct to the staff member who is the subject."

116. The Tribunal finds that neither Staff Rule 3.00 nor any other rules dictate a strict timeline for providing a Notice of Alleged Misconduct. The Tribunal's jurisprudence, however, requires that a Notice of Alleged Misconduct should be given "at the earliest reasonable moment." *See D*, Decision No. 304 [2003], para. 65. What is the earliest reasonable moment, of course, depends on the circumstances of each case.

117. The Tribunal has frequently observed that "misconduct investigations should be completed without unreasonable delay" (*CH*, Decision No. 489 [2014], para. 86). At the same time, the Tribunal has accepted that a lengthy investigation is not "*per se* an interference with due process if the investigation is reasonably proportionate to the complexity of the facts of the case" (*L*, Decision No. 353 [2006], para. 31). This reflects the consideration, noted in *Koudogbo*, Decision No. 246 [2001], para. 43, that "[t]he initiation of investigations, preliminary or otherwise, on the basis of rumors and allegations by questionable sources, clearly does not comport with the basic

elements of due process.” As the Tribunal stated in *N*, Decision No. 362 [2007], paras. 25 and 28, allegations of misconduct should not be based on “unverified inference or suppositions”, and a Notice of Alleged Misconduct “is to be issued only when there is sufficient evidence to warrant an investigation.”

118. Given the complexity of the case and the circumstances of the case as explained by the Bank above, the Tribunal does not find that there was undue delay in providing the Applicant with a Notice of Alleged Misconduct.

The display of legal force designed to intimidate the Applicant

119. The Applicant claims that Locke Lord “put on an extraordinary display of force” when it interviewed him. He notes that there were four Locke Lord lawyers present, as well as an investigator from EBC and another individual from the digital forensic team. According to the Applicant, “only one lawyer asked the questions; the other three can have had no purpose except to outnumber and intimidate” the Applicant. He argues that this was “neither fair nor consistent with due process.”

120. The Bank responds that a lawyer from the Staff Association accompanied the Applicant during the interview. The Bank submits that at no point did the Senior Counsel from the Staff Association Counsel lodge any objections or raise any concerns about the interview. As for having four lawyers present during the interview, the Bank explains that the amount of information that Locke Lord was amassing during its investigation was large, and it was entirely reasonable for the interviews to include lawyers who were taking notes and assembling a large number of exhibits used during the interview.

121. The Tribunal does not micromanage matters such as the number of lawyers that should be present during an interview. That is a matter for the investigative body to decide. The Tribunal notes that a Senior Counsel from the Staff Association accompanied the Applicant to the interview. The Tribunal finds no violation of the Applicant’s rights here.

The legality of the search of the Applicant's laptop

122. The Applicant argues that the search of his Bank-issued laptop violated fair procedures. He notes that whereas Bank Rules require that the review of electronic information be authorized by the EBC Vice President and Chief Ethics Officer, a Managing Director and the Vice President and General Counsel, in this case Locke Lord “maintained that the Notice of Alleged Misconduct was sufficient.” According to the Applicant, the search of his computer was “clearly a fishing expedition” by Locke Lord, looking for evidence of wrongdoing other than that which the Applicant had admitted. The Applicant states that the search of his laptop resulted in “two separate specific harms”: first, he missed a major deadline for his work; second, “it resulted in a breach of the confidentiality provisions of an investigation because EBC had to contact his managers to explain that they had confiscated the computer.”

123. The Bank responds that Locke Lord and Stroz Friedberg were given the requisite authorizations in November 2014, and that the Applicant’s submissions regarding the harm occasioned by the search of his laptop are contradicted by the transcript of his interview.

124. The Tribunal notes that the Bank’s *Information Security Policy for Information Users (AMS 6.20A)*, dated December 2007, provides in relevant part that:

Privacy is not guaranteed by the Bank Group for anyone using its infrastructure, specifically the internet. Information Users must be diligent when surfing the internet using Bank Group equipment and facilities.

[...]

The World Bank Group reserves the right to, but will not screen, monitor or examine the content of computer files, electronic mail messages, voice mail messages, telephone records, or similar stored electronic activities, or the record of usage of such electronic activities of Information Users with access to such facilities unless there is a genuine business justification or there is a reasonable basis to suspect a violation of World Bank Group policy, a criminal act, or other misconduct.

125. On the subject of misconduct investigations, the Policy states that:

In the event that there is a reasonable basis to suspect a violation of Bank Group policy, a criminal act, or other misconduct, then all instances of staff activity

screening or monitoring must be pre-approved by (1) the senior manager responsible for the investigation, (2) a Managing Director, and (3) the Vice President and General Counsel. Such staff activity screening or monitoring must be stopped as soon as the investigation is complete. The senior manager responsible for the investigation must ensure that screening or monitoring facilities are not abused and that only necessary information has been captured.

126. In *D*, Decision No. 304 [2003], para. 58 and *Kim (No. 1 and No. 2)*, Decision No. 448 [2011], para. 64, the Tribunal considered these policies and found that they “carefully balance the Bank’s interest in electronic files as employer and property owner with the staff members’ interest in a reasonable measure of privacy.”

127. An 11 December 2014 Kiosk Announcement by EBC, *Addressing Staff Questions on EBC’s Investigative Process*, included the following Question and Answer:

Can investigators look into email records, search computers or WBG portable devices? What protections exist for staff?

EBC only reviews electronic information in the course of an investigation if there is reasonable basis and after obtaining the relevant approvals. Approval must be given by all of the following individuals before access can start: (1) the senior manager responsible for investigation, EBC’s Vice President and Chief Ethics Officer; (2) a Managing Director; and (3) Vice President and General Counsel.

128. Between 2 July 2014 and 5 August 2014, five separate memoranda were sent from the Bank’s Vice President and Chief Ethics Officer to the Bank’s Chief Information Officer, requesting that the Bank’s Office of Information Technology provide to EBC data resulting from various searches of WBG computer networks relating to the Safeguards-related leaks. Each of these memoranda were approved by the Senior Vice President and General Counsel, and the Bank’s Managing Director. These memoranda authorized network-wide searches for specified terms, within different date ranges, and then searches of the WBG email accounts of identified staff members. These memoranda did not expressly authorize the seizure or copying of staff members’ work computers.

129. On 5 November 2014, the Bank’s Senior Vice President and General Counsel sent an email to Locke Lord confirming “that all authorizations given to EBC to access email and other

electronic media to carry out the investigations described in your letter of engagement now extend” to Locke Lord and to the forensic firm of Stroz Friedberg.

130. On 17 November 2014, a memorandum from the Bank’s Senior Vice President and General Counsel and its Managing Director to Locke Lord, expanded the authorizations for access to electronic data previously given with respect to the Safeguards investigations. The memorandum noted that, at the direction of the HRVP, Locke Lord “has been engaged to continue the investigation [...] as alternative reviewer.” The memorandum continued that “the undersigned are confirming that [Locke Lord], Stroz Friedberg, and [EBC] are each granted all of the authorizations sought herein, and that the undersigned have the authority to exercise such authorizations.” The authorizations included:

Seizing, securing, making a forensic copy of, and/or reviewing all electronic data on the hard-drives of computers issued by the WBG to WBG personnel who (i) are known to use or work in close proximity to any scanning device that may have been used to improperly transmit WBG documents or information concerning the [Safeguards] review, or (ii) may have probative information on their hard-drives concerning the potential unauthorized or otherwise improper disclosure of WBG documents or information concerning the [Safeguards] review.

131. Considering all the memoranda that are part of the record before the Tribunal, the Tribunal finds that the procedure followed was not unreasonable and there was no unauthorized search of the Applicant’s laptop.

132. The Tribunal notes that the 18 March 2015 Notice of Alleged Misconduct included the following:

[P]lease bring your WB-issued laptop computer to the interview. We expect your current laptop to be returned to you at the conclusion of the interview. Between now and the interview do not delete any emails, files, or other electronic data from the laptop.

133. During the interview, when the Applicant asked to see written authorization for the search of his laptop, the lawyer from Locke Lord responded that “you have received the Notice [of Alleged Misconduct]. There is no additional written authorization required.” The lawyer made no

mention of the earlier written authorization given by the senior Bank management (of which the Applicant was then unaware, but which had provided the legal basis for the request included in the Notice of Alleged Misconduct that the Applicant bring his WB laptop with him to the interview). This was unfortunate, and may have contributed to the Applicant's concern on this point. As the Tribunal similarly concluded in *Kim (No. 1 and No. 2)*, para. 72, the Applicant should have been provided with proof of the authorization when he requested it: "there is no justifiable reason for the Bank to require staff members to pursue their grievances as far as the Tribunal in order to be provided with a copy of the authorization."

134. The Applicant also claims that the search of his computer was "clearly a fishing expedition" by Locke Lord, looking for evidence of wrongdoing other than that which the Applicant had admitted. This contention is not supported by the record. Both the drafting of the Notice of Alleged Misconduct (including the request that the Applicant produce his laptop), and the request by Locke Lord at the interview that he hand over his laptop for it to be copied, took place before the Applicant admitted to leaking the OVP Comments. Moreover, the extent of the Applicant's involvement in the leaks was not evident at this stage. In the circumstances of the case, the search of the Applicant's laptop was not unreasonable.

135. The Tribunal observes, moreover, that it was the Applicant himself who, at the end of the interview, requested that EBC contact his manager to explain the situation. When the Locke Lord lawyers queried whether this would violate the Applicant's confidentiality in any way, the Applicant confirmed his request. The Bank cannot now be criticized for acceding to the Applicant's request.

136. In *Kim (No. 1 and No. 2)*, para. 70 the Tribunal "stresse[d] the need for the Bank to undertake targeted searches so that it carefully balances its interest in electronic files as an employer and property owner with the staff members' interests in a reasonable measure of privacy." In the present case, the Tribunal is satisfied that the Bank – through EBC and then Locke Lord – conducted the investigation by way of a series of targeted electronic searches, in which the search terms, date ranges and list of staff members whose Bank email accounts were to be reviewed

were repeatedly refined as the scope of the investigation evolved. In so doing, the Bank acted consistently with the Tribunal's jurisprudence.

Locke Lord presumed that the Applicant was guilty of leaking the Draft Safeguards Policy

137. According to the Applicant, it "seems clear" from the interview transcripts that Locke Lord was "convinced" that the Applicant was guilty of leaking not only the OVP Comments but also the Draft Safeguards Policy, that the Locke Lord lawyers were "frustrated that they could not pin this particular misconduct on [the Applicant]," and that "rather than giving him the benefit of a presumption of innocence, they presumed [he] was guilty and then tried to prove it."

138. The Bank states that the Applicant's allegations here are baseless. According to the Bank, the investigators asked relevant questions designed to identify the leakers of all four Safeguards-related documents. At the time of the interview, the identity of the leaker of the Draft Safeguards Policy itself was not determined. Moreover, according to the Bank, "considering Applicant's record of leaking the OVP Comments and his close connections with BIC, to which the Draft Safeguards Policy was leaked, it was reasonable for the investigators to consider whether the Applicant was, indeed, connected to the leak of the Draft Safeguards Policy or had any relevant information regarding it."

139. The Notice of Alleged Misconduct had placed the Applicant on notice that he would be interviewed regarding both the leak of the OVP Comments and the leak of the Draft Safeguards Policy itself. Given the circumstances of the case and the record in particular the interview transcript, the Tribunal does not find anything improper or inappropriate in the questions which Locke Lord put to the Applicant regarding the leak of the Draft Safeguards Policy itself.

The HRVP's letter of 20 July 2015

140. According to the Applicant, the HRVP's letter of 20 July 2015 "completely ignored all disciplinary procedures." While the Applicant concedes that the HRVP had the right to respond to

the Applicant's assertions "and to correct any facts he perceives as wrong," nevertheless the HRVP "couched his response in a way that made it appear to be additional discipline." The Applicant notes that other managers who disagreed with him had posted their responses on the Bank's Spark page. He contends that this letter from the HRVP "was identical in appearance to all of his disciplinary letters," and clearly implied "that what [the Applicant] wrote on his blogs constituted misconduct." The Applicant further notes that the letter was copied "to the people who could most harm [his] future in the Bank." He asserts that this constituted "a separate and distinct disciplinary letter" the issuance of which grossly violated his due process rights.

141. The Bank maintains that this letter was not a disciplinary measure. It notes that the Applicant had posted multiple times on social media in spite of the confidentiality obligations stated in his Notice of Alleged Misconduct and the Confidentiality and Non-Disclosure Agreement he signed at the end of his interview. According to the Bank, these posts criticized the investigation, "flagrantly misstat[ed] the reasons for and the outcome of the investigation," disclosed the disciplinary measures against him, and thereby "perpetuated the false myth of persecution." The Bank states that it would not have been appropriate for the HRVP to "engage in a public debate on Applicant's blog," so the HRVP wrote to the Applicant directly. The Bank emphasizes that no disciplinary sanction was imposed by the letter, which was not placed in the Applicant's personnel record.

142. The Tribunal disagrees with the Applicant's characterization of the 20 July 2015 letter. In the first line of the letter the HRVP states a wish "to correct the record on a number of assertions you have made in internal blog posts over the past year, as well as in the media." After recalling the investigation which had taken place, and the Applicant's admission, the HRVP stated that "now you have admitted to the misconduct [...] and yet you continue to propagate misinformation, we feel the need to remind you of the facts." The letter then addresses a number of assertions made by the Applicant, and gives the HRVP's account of the facts in relation to each. The letter ends as follows:

These facts speak for themselves. You have admitted wrongdoing that compromised the reputation of our institution. The institution responded as it would

with any staff member, and, after careful deliberations determined appropriate disciplinary action. It's time to turn the page.

143. Rather than being “identical in appearance,” as the Applicant contends, the letter was significantly different – both in content and in form – to the disciplinary letter which the Applicant had received on 20 May 2015. In terms of content, the 20 July letter did not allude to any additional investigation, any new finding of fact or law, or indeed any new decision at all by the HRVP. In terms of form, unlike the 20 May 2015 letter, the letter of 20 July was not marked “strictly confidential,” did not cite a case number, did not reproduce a list of Staff Rules which the Applicant was stated to have violated (beyond recalling those pertaining to the leak of the OVP Comments which, as the letter noted, the Applicant had already admitted), did not refer to any aggravating or extenuating circumstances, did not state that any particular disciplinary measures were being imposed, and did not state the Applicant’s right to appeal the decision of the HRVP. Noting also that it was not placed in the Applicant’s personnel record, the Tribunal finds that the letter of 20 July 2015 did not constitute an additional disciplinary measure.

144. Moreover, the Tribunal observes that the Notice of Alleged Misconduct which the Applicant received on 18 March 2015 and the verbal reminder given to him at the beginning of his interview with Locke Lord on 23 March 2015, instructed him not to discuss the investigation with anyone outside of family members, the Staff Association and his lawyers. Similarly, under the Confidentiality and Non-Disclosure Agreement he signed at the end of that interview he agreed not to disclose any information discussed during the interview, or any information which became known to him in connection with the investigation to anyone inside or outside the WBG, without the written permission of Locke Lord. Contrary to those instructions and undertakings, however, the Applicant did indeed write/speak publicly about a) the fact that he was under investigation, b) the fact that he admitted leaking the OVP Comments, c) his view that the investigation had cleared him “unequivocally” of the leak of the Draft Safeguards Policy itself, d) the disciplinary measures imposed on him, e) his view that those measures and indeed the entire investigation constituted retaliation for his whistleblowing and/or pursuit of the LGBTI agenda, and f) that he had filed an Application before the Tribunal.

145. The Tribunal finds that, given the confidentiality requirements relating to any investigation of misconduct, it would not have been appropriate for the HRVP to engage in a public debate with the Applicant regarding the pertinent facts and the need to preserve the confidentiality of the investigation. In view of the circumstances of this case, the Tribunal is satisfied that sending this letter was a reasonable step for the HRVP to take.

Conflicts of interest

146. The Applicant contends that the investigation and the misconduct decision were “riddled with conflicts of interest.” He highlights four instances of such alleged conflicts, relating to the HRVP, Locke Lord, an EBC Investigator, and the possibility that the Applicant would soon become Chair of the Staff Association. The Applicant submits that these conflicts of interest “tainted the whole process and deprived [him] of a fair and impartial investigation.” The Bank maintains that neither the HRVP nor the investigators had any conflict of interest that would have precluded them from conducting the investigation or deciding on the appropriate disciplinary sanctions.

147. In previous cases where applicants have alleged bias or conflicts of interest in the context of investigations for misconduct, the Tribunal has looked to the manner in which the investigations were conducted. In *CH*, Decision No, 489 [2014], paras. 77-78, the Tribunal noted that the transcript of the applicant’s interview did not show that the investigators “had arrived with a pre-determination of guilt or that the interview was just a formality,” that there was “no evidence in the record that the investigators acted improperly,” and that another staff member had been investigated for a related matter. In contrast, in *P*, Decision No. 366 [2007], paras. 66-70, the Tribunal noted that the INT Report at issue included “subjective evaluations of the Applicant” and relied on “farfetched” deductions and “impressionistic” evidence, and concluded that “one gets the sense that the INT investigators had little sympathy for the Applicant.” Later in the same judgment, the Tribunal noted that INT’s exposition of the witness evidence was thorough and reliable, “and in this respect there is no shadow of bias.” (para. 70). In *Marshall*, Decision No. 226 [2000], para. 31 the Tribunal found the applicant’s allegations of bias in a redundancy decision to be

“significantly undermined” by the fact that the same decision had been taken with respect to two other staff members.

148. In the present case, as outlined above, the Tribunal has determined that the investigation into the leak of the OVP Comments was thorough and well-documented. As will be discussed further below, the Tribunal is also satisfied that the investigation did not, in fact, target the Applicant. It is also true that investigations into the leaks of the other Safeguards-related documents were undertaken at the same time as that pertaining to the OVP Comments. These considerations weigh against the Applicant’s claims that the investigation and imposition of disciplinary measures were in any way affected by conflicts of interest. Against this background, the Tribunal turns to the specifics of his allegations here.

149. First, the Applicant argues that it was “impossible” for the HRVP to be an impartial decision-maker “when he had been attacked by [the Applicant] who had reported him to EBC” and who had “mocked him repeatedly in his blogs.” The Applicant asserts that “the depth of [the HRVP’s] anger can be gauged by his furious assault on [the Applicant] on July 20, 2015.” The Applicant submits that the HRVP should have recused himself from the Applicant’s case. The Tribunal disagrees. First, the record indicates that the HRVP was not aware of the Applicant’s EBC complaint against the HRVP. Staff Rule 3.00, paragraphs 8.01-8.02, indicates that the subject of an investigation will be notified of the allegations only after the initial review has been conducted and a further review is being initiated. EBC closed this case at initial review, on 4 February 2015, on the basis that the allegations were unfounded. The Bank has produced a statement from the HRVP, which supports the Bank’s contention that he was unaware of the Applicant’s complaint at the material time. Second, the Tribunal disagrees with the Applicant’s assessment of the likely effect of his blogs. Third, as detailed above, the Tribunal disagrees with the Applicant’s characterization of the HRVP’s letter of 20 July 2015. Fourth, the Tribunal notes evidence of the HRVP approving the Applicant’s request for the Bank to fund his participation in a conference; this approval was given in December 2014, that is after the Applicant filed his complaint with EBC (and indeed after two of the three blog posts he cites here). This undermines his assertion of ill animus on the part of the HRVP.

150. Second, the Applicant contends that Locke Lord issued the Notice of Alleged Misconduct “just three days after [the Applicant] had questioned their fees for the investigation of the China loan.” The Applicant states that he was “frankly astounded that this particular law firm had been chosen to investigate him.” The Tribunal rejects the claim that a conflict of interest existed as alleged. The law firm’s involvement in the investigation preceded the first blog post cited by the Applicant by almost five months. As will be discussed further below, the records of that investigation counter the Applicant’s suggestions that he was somehow targeted by the firm. The firm analyzed the available evidence in a thorough manner, and this evidence led them to the Applicant who, when interviewed, admitted that he had indeed leaked the OVP Comments. The second blog post which the Applicant cites here dates from 1 April 2015, i.e. after the Notice of Misconduct, his interview by Locke Lord, and his admission. The Tribunal does not discern any evidence – in the Notice of Alleged Misconduct, the interview transcripts, or the Final Report issued by the firm on 12 May 2015 – to support the Applicant’s claims.

151. Third, the Applicant describes as “startling” the fact that the EBC investigator, was “in charge of advising Locke Lord on its investigation of [the Applicant].” The Applicant states that that investigator was “the very same investigator” who had been in charge of investigating the complaints previously raised by the Applicant. The Tribunal notes that the Applicant does not point to any particular manifestation of the alleged bias. Moreover, the Bank has produced evidence that that investigator was one of seven investigators involved in investigating the Applicant’s complaints, and in fact had no involvement in two of the four cases.

152. The Applicant’s fourth contention is that “the process was likely affected by the possibility that [he] might soon become Chair of the Staff Association – an outcome that senior management certainly did not want.” The Applicant submits that the HRVP and others in senior management “who were certainly aware of and probably complicit in the outcome of this case – must have hoped that a finding of guilt would deter staff from voting for him.” This contention is unsupported; once more, the Applicant has not demonstrated any particular manifestation of the alleged bias. Moreover, given that the Applicant has admitted leaking the OVP Comments, the Tribunal finds it difficult to understand the suggestion that senior management were somehow “complicit” in the “finding of guilt.”

153. Finally, the Applicant complains that the HRVP failed to consult the Applicant's manager regarding the sanction to be imposed. However, it is clear from the record that the HRVP consulted the appropriate managers.

THE CLAIM OF RETALIATION

Relevant Staff Rules and jurisprudence

154. Retaliation is prohibited in the Bank. Staff Rule 3.00 considers retaliation as a form of misconduct. Under Staff Rule 3.00, paragraph 6.01(g), misconduct includes:

Retaliation by a staff member against any person who provides information regarding suspected misconduct or who cooperates or provides information in connection with an investigation or review of allegations of misconduct, review or fact finding, or who uses the Conflict Resolution System, including retaliation with respect to reports of misconduct to which Staff Rule 8.02, & "Protections and Procedures for Reporting Misconduct (Whistleblowing)", applies.

155. In 2008, the Bank enacted a whistleblowing policy resulting in the enactment of Staff Rule 8.02 (Protections and Procedures for Reporting Misconduct (Whistleblowing)). Regarding the applicability of this new Staff Rule, paragraph 1.03 states that:

This Rule applies to reports of suspected misconduct that may threaten the operations or governance of the Bank Group. The protections set out in this Rule apply whether the subject of the allegations is a staff member or any other person or entity inside or outside the Bank Group.

156. Staff Rule 8.02 prohibits retaliation against individuals engaged in whistleblowing. Paragraph 2.04 states that:

Managers and other staff members are expressly prohibited from engaging in any form of retaliation against any person for reporting suspected misconduct under this Rule, or for cooperating or providing information during an ensuing review of allegations under Staff Rule 3.00, or investigative process under Staff Rule 8.01. This prohibition against retaliation extends also to retaliation against any person because such person was believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken. For purposes of this Rule, retaliation shall mean any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in an activity protected by this

Rule. A staff member who believes he or she has been retaliated against in violation of this provision may seek relief in accordance with Section 3 of this Rule. A staff member who engages in such retaliation shall be subject to proceedings under Staff Rule 3.00.

157. Staff Rule 8.02 also includes a specific rule regarding burden of proof in whistleblowing retaliation. Paragraph 3.01(a) states that:

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

158. The Tribunal understands the significance of protecting whistleblowers from retaliation. The Tribunal observes that the burden-shifting framework in cases of retaliation as articulated in Staff Rule 8.02 is not a new framework for the Tribunal as it has consistently applied such framework in prior cases of retaliation or discrimination. In *de Raet*, Decision No. 85 [1989], para. 57, the Tribunal observed that

it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power – not, that is, until an Applicant has made out a *prima facie* case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner. (*See also Bertrand*, Decision No. 81 [1989]).

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

In a case like the present one, the applicant carries the initial burden of establishing a *prima facie* case of racial discrimination. If the applicant meets this burden, the Bank then must provide a non-discriminatory business rationale for its decision. The applicant may then challenge the Bank’s stated rationale and provide evidence to show that the Bank’s stated reason was a pretext for a racially discriminatory decision.

160. In the same case at paragraph 80, the Tribunal clarified that: “The burden of proof in the case of alleged retaliation is no different from the burden of proof in the case of alleged discrimination.”

161. The Tribunal has made clear, however, that “it is not enough for a staff member to speculate or infer retaliation from unproven incidents of disagreement or bad feelings with another person. There must be a direct link between the alleged motive and the adverse action to amount to retaliation” (*AH*, Decision No. 401 [2009], para. 36). The Tribunal has also recognized that “[a]lthough staff members are entitled to protection against reprisal and retaliation, managers must [...] have the authority to manage their staff and to take decisions that the affected staff member may find unpalatable or adverse to his or her best wishes.” (*O*, Decision No. 337 [2005], para. 49).

Did the investigation or imposition of disciplinary measures constitute retaliation?

162. It is important to note that the Applicant is not claiming that he engaged in whistleblowing when he leaked the OVP Comments to the third parties for which he was disciplined. The Applicant has expressly stated that he “never claimed that sending the OVP Comments to BIC was a whistleblowing activity.” He states, however, that:

The targeting of [the Applicant] for this extraordinary investigation was retaliatory for his whistleblowing and his very public and harsh criticisms of Bank policy. Obviously, his public revelations about the bonuses paid to [the CFO] and his complaints to EBC about [the HRVP, the CFO, the Vice President for Latin America, the Senior Communications Officer, and the Vice President of ECR] were all classic whistleblower actions. The Bank’s policies specifically and strongly prohibit retaliation for whistleblowing.

163. He asserts that the investigation was unprecedented, and that the timing is “strong circumstantial evidence of retaliation.” Specifically, he notes that:

The leaks occurred at the end of May 2014, and the matter was reported to INT or EBC in June. But it was not until October 14 – four working days after the Town Hall meeting attacking [the CFO] as a direct result of [the Applicant’s] whistleblowing – that the search of [the Applicant’s] printer/scanner took place. And almost immediately after that, [the HRVP] – who [the Applicant] had reported for unethical behavior just a couple of weeks earlier – made the decision to hand

over the matter to Locke Lord. Clearly, finding [the Applicant] guilty of something had suddenly become a top priority for senior Bank management.

164. The Bank maintains that the investigation did not target the Applicant, that the Applicant was in fact not a whistleblower, and that the timing of the investigation negates his claims of retaliation.

165. With respect to the critical issue of whether the leaking of the OVP Comments was whistleblowing, the Applicant has clearly stated that it was not an act of whistleblowing. Even assuming, for the sake of argument, that he engaged in some kind of whistleblowing and further assuming that somehow he made a *prima facie* case of retaliation, the record provides a legitimate, non-retaliatory basis for the Bank's actions to conclude that "the same employment action would have been taken absent the staff member's protected activity."

166. First, the extent of the initial investigation as set out at paragraphs 33-40 counters the Applicant's claim that he was targeted from the outset. The record shows that the investigation was not about the Applicant but rather it was about the leak of a number of confidential documents that resulted in, in the Bank's view, embarrassment and reputational harm to the Bank. The record includes a document entitled "OVP Comments Leak Case: Forensic Report" prepared by ITS that provides in details the painstaking steps EBC and ITS took to identify the source of the leaks. The Applicant does not provide any specific comment on the report nor any explanation why the Tribunal should consider the steps taken were pretextual.

167. Second, in line with the authorizations issued by senior Bank management, the ITS searches were conducted based on stipulated search terms and date ranges. These expanded as the investigation progressed, reflecting the difficulties EBC encountered in identifying the source of the leak, but at each stage the search terms selected were logically connected to the investigation (i.e. they included phrases from the OVP Comments document, names of BIC employees and the journalists involved in the subsequent media articles). The third authorization issued to ITS, on 10 July 2014, authorized a search of the emails of certain staff members, based on a list of those who were direct or indirect recipients of the OVP Comments. The Applicant was not one of some forty

staff members included on this list – a clear indication that he was not the subject of the investigation in its early stages.

168. Third, the EBC report of its investigation indicates that the investigators focused on the potential involvement of Mr. A of BIC long before the Applicant was identified. Fourth, the report indicates that between August and early October 2014 the investigation considered a number of staff as “persons of interest” - not including the Applicant - who were subsequently exonerated. Rather than any pre-determined targeting, as the Applicant has alleged, the focus of the investigation turned to him after a number of other avenues had been exhausted and, crucially, after ITS discovered on 9 October 2014 that one staff member had accessed the OVP Comments in WBDocs.

169. Fifth, even after that discovery had been made, the investigation was not limited to the Applicant; by the end of its investigation EBC had identified three “persons of interest,” one of whom was the Applicant.

170. The Bank then decided to hire Locke Lord to conduct an investigation. In this regard, the Applicant points out that the engagement of Locke Lord itself should be considered as evidence of retaliation. The Applicant adds that “the massive investigation into his conduct – by an outside law firm which was clearly on a fishing expedition to gather as much against him as it could – was retaliatory for his whistleblowing [...]”

171. The record however provides a legitimate basis for engaging an outside firm. The submitted declaration of the HRVP explains the reasons as follows:

When EBC started the investigation into the four leaks, none of us recognized or appreciated the sheer magnitude of the investigation that the institution was undertaking. The number of individuals who received various documents that had been leaked was considerable and therefore the search of the metadata, even when limited by narrowly construed terms related to the leaked documents, was very broad. ITS and EBC did not have any suspects identified at the start of the investigation, which meant that potentially any recipient of the document could have disclosed the document. By October 2014, even though ITS made progress in identifying the scanner from which the OVP Comments were sent out, and

identified [the Applicant] as potential suspect, the evidence was still inconclusive as to the other leaks, and not entirely definitive even with regard to [the Applicant].

Neither ITS nor EBC had previously faced such massive leaks of numerous documents at the same time. The amount of resources that the investigation was taking up from both units was extremely high. It also required them to prioritize this investigation over the other work of the unit. Consistent with Staff Rule 3.00, para. 6.03, I therefore, decided to engage an outside reviewer, a law firm of Locke Lord, to conduct an independent and objective investigation into all four leaks. That allowed EBC and ITS to focus on their daily tasks and other investigations that were ongoing at the time. Meanwhile, Locke Lord had the expertise and experience to conduct an investigation of this size, and to do it within a reasonable amount of time. I wanted to ensure that they act as a neutral in this investigation. I therefore specifically instructed them to approach the investigation anew and with an independent mind, and let the findings take them where they went.

172. The reasons articulated above are consistent with contemporaneous email exchanges between the HRVP and the General Counsel of the Bank. In an email of 20 October 2014, HRVP wrote to the General Counsel:

I am writing to inform you that I have decided to exercise my authority under Staff Rule 3.00, "Office of Ethics and Business Conduct," para. 6.03, to designate an alternative reviewer in connection with the investigation of the unauthorized disclosure of documents pertaining to the Environmental and Social Safeguards Policy Review. This decision is taken because of the high level of complexity presented by this investigation. It is based on the desire to obtain the services of a firm specialized in such investigations and possessing a more developed forensic capacity than is available within the Office of Ethics and Business Conduct. Engaging an outside firm will also allow for an impartial review of the matter by someone independent of the World Bank Group.

173. The EBC's "Closure Memo" of 21 October 2014 also highlights the complexity of the investigation and why outside help was necessary. The "Closure Memo" notes as follows:

The scope of this investigation was exceptionally wide because, unlike other investigations, there were no potential suspects or persons of interest at the start of the investigation. This meant that EBC investigators and ITS had to sift through a colossal volume of data before they could focus on specific persons of interest. The volume of data to be scanned with key words represented more than 25,000 million electronic records for all WBG staff globally. The total number of emails sent and received during the investigative period was about 65 million. This has so far engaged over 2,500 working hours for 5 EBC investigators. The investigation has also absorbed over 2,000 working hours for 5 ITS experts who had to

simultaneously investigate 4 other non-safeguards-related leaks and respond to other ITS-related demands. This investigation has included ITS' manual review of over 400 staff mailboxes representing a minimum of 20 million emails and 400 GB of data. It has also included the interviews of 15 staff members by EBC, as well as EBC's manual review of a minimum of 75,000 metadata records and 30,000 emails.

The technological challenges highlighted by this investigation show that the WBG needs to acquire the latest forensic software. In the course of the investigation, ITS recommended to management that more sophisticated forensic software that would enhance the efficacy of the investigation be acquired.

174. Based on the record, the Tribunal is satisfied that there was a legitimate business reason for engaging Locke Lord and rejects the claim of retaliation in this regard. The HRVP had the legal authority to do so under Staff Rule 3.00. The record shows that there have been previous cases in which the Bank engaged outside law firms to conduct internal investigations.

175. The Tribunal also rejects the Applicant's argument that Locke Lord engaged in a targeted investigation of the Applicant. The Locke Lord investigation involved targeted IT searches for words and phrases that were cognate to the documents leaked and the subsequent press articles, and interviews of a total of 33 individuals between 17 March and 2 September 2015. The report of the Locke Lord investigation provides detailed elaboration about the process they followed and the basis of their conclusions. The record simply does not support that the investigation was just a pretext.

176. The Applicant refers to a temporal aspect of the investigation to show retaliation. He specifically refers to his 23 July 2014 blog post about staff benefits and the payment of Scarce Skills Premium to the CFO. He states that this blog post "caused a storm" and "senior management was outraged." However, the record shows that the decision to commence an investigation was made in late June 2014, and that EBC and ITS investigators were actively investigating all Safeguards-related leaks since 2 July 2014. Again, the Applicant's other claimed whistleblowing activities, such as filing complaints with EBC against the Vice President of Latin America, the HRVP and other senior managers, occurred in September-October 2014, after the investigation into the leaks was launched.

177. The Applicant refers to the fact that Locke Lord issued the Notice of Alleged Misconduct on 18 March 2015 suggesting that it was in response to his criticism of the firm in his blog post of 15 March 2015. However, the record shows that the decision to issue a Notice of Alleged Misconduct, and the related process, started prior to his blog of 15 March – the Notice was first drafted on 6 March 2015. The record demonstrates that the investigation progressed following its natural course and there is no basis to suggest that the pace or intensity of the investigation changed depending on the Applicant’s criticism of the Bank’s management.

178. As for the claim that the subsequent imposition of disciplinary measures constituted retaliation, the assertion that the Applicant was punished disproportionately has been considered, and rejected, above. The Tribunal found that the HRVP’s disciplinary letter and the record provide a reasonable basis for the sanctions imposed. The record includes a number of examples of prior cases where leaks in the Bank were investigated and sanctions were imposed. The Tribunal is not convinced that the Applicant was the only one targeted; there is no evidence of retaliation in this respect.

179. The Applicant has further asserted that the retaliation against him continued after the investigation was over and the disciplinary measures had been imposed. He mentions the letter of 20 July 2015 from the HRVP. As discussed before, the Tribunal finds the letter of 20 July 2015 was appropriate in view of the circumstances that the Applicant himself has created. The Applicant states that his career at the Bank is over and currently he is on external service. The record shows that it was the Applicant who requested external service and the Bank approved it with pay. The Bank agreed to pay the Applicant’s salary benefits for two years and provide him with a six-month conditional reentry guarantee upon the conclusion of the external service. This record hardly suggests ungenerous procedures designed to expel the Applicant from the service of the Bank.

180. In conclusion, the Tribunal finds the Applicant’s claims of retaliation and discrimination to be unfounded.

DECISION

The Application is dismissed.

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

/S/Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 4 November 2016