



World Bank Administrative Tribunal

2014

Decision No. 488

**Gordon McIntosh,
Applicant**

v.

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

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

**Gordon McIntosh,
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 13 May 2013. The Applicant was represented by Marie Chopra and Jeff Vockrodt, James & Hoffman, PC. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), and Natalia Yegorova, Counsel, Legal Vice Presidency. On 18 September 2013 the World Bank Staff Association submitted an *Amicus Curiae* brief pursuant to Rule 25(2) of the Tribunal's Rules. Oral proceedings were held on 25 February 2014.

3. The Applicant challenges the Bank's decision not to pay him on-call compensation and requests retroactive pay for prior years of on-call services. The Applicant further asserts that the Bank acts in a discriminatory manner by paying on-call compensation to some World Bank staff members who are also on the duty officer roster. He contends that the Bank's decision not to make the on-call compensation policy public constitutes a failure to meet the necessary standard of transparency.

FACTUAL BACKGROUND

4. The Applicant joined the Bank in October 1985 as a Shipping Assistant in the Travel & Shipping Division. In April 1995 he commenced a six-month developmental assignment with the Security Operations Section and was permanently reassigned as a Security Specialist in February 1996. The Applicant is presently employed as a Senior

Project Manager and Program Coordinator for Corporate Security and Business Continuity in the World Bank's Corporate Security Office ("GSDCS"). Since July 2004 he has been a Level GG staff member. As part of his duties in GSDCS, the Applicant is the Headquarters Security duty officer who is on-call for emergencies after hours and on weekends. The Applicant's on-call duties include taking calls about incidents occurring in the Washington Metropolitan area. When on-call, his name is added to the Bank's weekly Duty Office Roster, which includes staff members from the Health Services Department ("HSD"), Human Resources Services ("HRS"), Travel and Visas, Global Security and GSDCS Communications. The Applicant is typically on-call for a week at a time, although sometimes he serves for a two week period. Between 2010 and 2011, the Applicant was on-call for fourteen weeks.

The Bank's on-call compensation policy

5. In its pleadings, the Bank defines on-call compensation as a "monetary incentive tool which [the Human Resources Compensation Unit ("HRSCM")], at the request of a relevant unit, may authorize to compensate staff who may be required by their departments to be available to work outside normal business hours where such availability is not within the scope of their normal duties." The Bank stresses that the on-call compensation policy is a management tool developed to allow individual units within the Bank to tailor compensation practice to meet their particular business needs.

6. An on-call compensation policy was first introduced in the Bank in 1990. Its purpose was to induce benefits assistants in the Personnel Operations Department, Employment and Benefits Division ("POPEB") to volunteer for back-up on-call duties. A request was made by the POPEB manager to the Personnel Policy Department, Policy Development Division ("PPOPD") highlighting the fact that the benefits assistants, who were employed at a lower pay grade, had been reluctant to perform back-up support without extra compensation. Some benefits assistants were identified to provide back-up on-call service to the Emergency Officer. PPOPD granted approval to pay on-call compensation to these benefits assistants under the following terms:

(a) They will receive a lump sum premium for on-call back-up time equal to \$250 for each full back-up week. ... This amount corresponds to 5 percent of grade 19 midpoint, for 60 days a year (average service for each back-up).

...

(c) This lump sum is not part of base salary, and does not qualify for pension.

(d) Any work performed during back-up time will be paid as overtime.

7. In 1992 the Health Services Department (“HSD”) requested authorization from PPOPD to apply the same form of compensation given to POPEB on-call staff to HSD staff members. On-call compensation payment was approved for four HSD staff members who were required to be on-call after working hours. The applicable terms were:

- Staff on-call will receive a lump sum premium for on-call time based on 5% of the midpoint of grade 19 for 60 days a year, i.e., currently \$39 per day.
- This lump sum is not part of base salary and does not qualify for pension.
- Any work performed during back-up time will be paid as overtime.

8. In 1994 forty-two staff members in the Office of Organization and Business Practices Department (“OBPDR”) were identified by their manager for standby duty. A request for on-call compensation was submitted to the Personnel Services and Compensation Department (“PSCPS”). In its proposal for on-call compensation OBP defined standby duty as follows:

Standby duty occurs outside of normal Bank hours and is the act of making oneself available to come to work at a moment’s notice, to offer counsel and advice over the telephone to other staff dealing with a problem or to resolve a problem from home using telecommunication services.

A person on standby duty must carry a beeper (and respond to a beep within 15 minutes) or be reachable by telephone at all times during the period of standby, be available and have the means to report to HQ within

a reasonable time and have the requisite skills to manage and resolve problems within their realm of responsibility.

9. PSCPS granted approval to pay OBP on-call staff a lump sum premium under the following terms:

- Staff on standby will receive a lump sum premium for standby time based on 5% of the average grade (currently grade 21) for 70 days a year, i.e. currently \$45 per day.
- This lump sum is not part of base salary and does not qualify for pension.

10. In 2002, the Bank undertook a study of the “on-call compensation system policy.” The review, conducted by HRSCM, was triggered by concern within HSD that the on-call compensation rate was not competitive. At the time, all staff members on the on-call list were professional staff at grade levels GE – GG. Most of these staff members were on-call for 7-day weeks, 24 hours a day, once or twice a month. However, a few staff members performed on-call duties for two consecutive weeks.

11. HRSCM met with the managers of six units, including GSD to determine “whether the current compensation system perform[ed] adequately and [satisfied] the units’ business needs.” According to Pamela Scheibach, the GSD Staff Officer at the time, GSD did not then have any staff who performed on-call duties and no one in the department received on-call compensation.

12. At the end of 2002 a report entitled On Call and Shift Differential Compensation Policy Review was produced by HRSCM. The report summarized the relevant existing compensation policy at the Bank, and noted that an external survey was conducted among selected comparators in both the private and public sector.

13. According to the report:

Staff receive a daily lump sum premium calculated as 5% of the market reference point of the appropriate reference grade for 60 days a year. 60 days is an expected average of on call duty per year per person. However,

compensation is not limited to 60 days per year. Staff who work during their on call are paid overtime (1.5 time over the regular hourly rate) for each hour worked. The on call premium is not part of the base salary, and is not pensionable.

14. Regarding the rate of compensation, the report noted that:

The current rate is \$48 a day or \$336 a week for the GE staff (e.g. nurses, emergency officers). During this review, we also discovered that all staff, regardless of their grade, receive the same flat amount based on the MRP of grade GE. Furthermore, the overtime payments for hours actually worked are paid only to HRS and HSD staff (all on call staff in those units are graded GE). Therefore the current policy is not consistently applied across the different units having staff on call.

15. The external survey revealed that fourteen out of the seventeen organizations surveyed required some of their staff to be “on-call” after working hours. More than half of these organizations reported that they did not pay any premium for standby functions on-call duties were considered part of certain positions. These positions included IT maintenance and support, print-shop engineers, technical staff in newspaper businesses and airline engineers. The report observed that:

None of the surveyed organizations reported the use of a flat fee rate in addition to hourly payment to their employees, which is the model currently followed at the WBG. The current WB payment, \$336 a week is significantly above the market compensation rates for on call. Since the WBG on call compensation policy mandates overtime payments, on top of the daily flat fee, for each hour worked during on call period, we consider that the WBG on call compensation policy is very competitive.

16. The report concluded that the existing:

WBG on call compensation policy is competitive and does not require an upward adjustment. However, as already reported, discussions with the WBG managers have revealed that on call compensation policy is not applied uniformly across grades, as is intended. Regardless of their grades, all staff receive the same flat fee, based on the MRP of grade GE. On call staff in departments other than HSD and HRS do not receive overtime payments.

17. Two recommendations were made regarding the flat fee and overtime payment. It was proposed that the “flat fee should be based on the appropriate reference grade. Staff at grade GF should be paid \$65 a day, or \$455 a week, and staff at grade GG should receive \$85 a day or \$595 a week.” Regarding overtime payment, the report noted that

managers indicated a need to simplify the system and make administration of on call compensation simpler. Managers suggested to use a combination of the flat fee and compensatory time off and to drop the overtime payments. The flat-fee only approach would decrease administrative work, such as verification and approval of the overtime payments. Compensatory time off would allow the staff to recover after intensive work outside the regular business hours.

18. On 4 March 2003, Alphonsus Marcelis, HRSCM manager, circulated the results of the market survey by e-mail to “managers whose staff might be affected by the policy.” He summarized the following key findings from the report:

Currently in the World Bank there are around 50 staff in grades GE through GG performing on-call duties. Even though all on-call staff perform comparable tasks, two different compensation models and two different payroll flags are present. While staff flagged as recipients of the Emergency Duty Pay (EDP) are getting flat fee payments plus overtime payments for the time actually worked, staff flagged as Stand By (SBY) are receiving only flat fee payments. Since FY03, flat fee payments are \$50 a day, or \$350 a week.

The survey of the market revealed that the WBG flat fee rate is very competitive and even leads the market among the selected comparators. None of the surveyed organizations reported the use of hourly payments in addition to flat fee payments. Usage of both the flat fee and overtime payments for EDP staff positions the WBG compensation ahead of comparators.

In order to align the WBG On Call compensation policy with that of the market and make the policy uniform for all staff performing on-call duties it was decided:

- To freeze flat fee payments for both SBY and EDP staff at a current rate of \$50 per day. A review of the flat fee rate will be conducted every five years, unless movement in comparator markets or internal business needs indicate a need for an earlier review. The next On Call compensation review will be conducted in FY07.

- To discontinue compensation for the time actually worked (overtime payments) for the EDP staff. All new On Call recruits will receive a payroll flag as SBY and will be eligible for the flat fee payments only.
- To grandfather 6 current EDP staff in the existing compensation system.

All changes in the On Call compensation policy were, as discussed with you, effective as of January 1, 2003.

19. An undated document entitled Shift Differential & On-Call Policies reiterates the content of Mr. Marcelis' 2003 e-mail as follows:

ON-CALL COMPENSATION POLICY

Applicability

The On-Call Compensation Policy compensates any staff who is required by the Bank Group to be available for work during off-hours on a regular basis.

Payment

1. On-call compensation will amount to a flat payment of \$50 per day for each day that the staff member is on call irrespective of whether the staff member is called to work or not.
2. A staff member who is receiving On-Call Compensation and is called to work during off hours is not also eligible to receive overtime payments for those off-hours worked.

20. In 2009 GSD began paying on-call compensation to staff who were moved from the Office of Information Security ("OIS") to the GSD Office of Information Security ("GSDIS"). According to the record, in 2009 an OIS staff member approached the then GSD Director, Mr. Van Pulley, requesting on-call compensation. OIS staff received on-call compensation prior to joining GSD and wanted to continue receiving these payments. On 20 August 2009, Ms. Scheibach contacted Human Resources requesting the Bank's policy on "on-call compensation." On 3 September 2009, Mr. Tyler Jug, then Senior Program Assistant, Human Resources Corporate Team ("HR SCT"), sent an e-mail message to Ms. Scheibach attaching "the Bank's policy for on-call situations" entitled Shift Differential & On-Call Policies. Based on this policy document, Mr. Pulley decided to allow OIS staff to

receive on-call compensation on the grounds that they had previously received it. These staff members were paid on-call compensation by GSD until 2011 when they were reassigned to the Information Management and Technology Network (“IMT”) where they continued to receive it.

21. In December 2010 the Bank’s Compensation & Benefits Office prepared a draft for a “newly proposed Staff Rule 6.24, On-Call Compensation & Shift Differential”. According to the e-mail message circulated to managers and officers in the Human Resources Department by Ms. Mildred Arroyo, Senior Compensation & Benefits Officer,

the WBG has had an on-call, shift differential policy for the past several years although said policy has never been published in the Staff Manual. There are currently approximately 50 WBG staff participating in either on-call or shift differential programs primarily, but not exclusively within the HR Service Center, HSD, GSD, and ISG. Publication of the revised policy will hopefully minimize any existing confusion and standardize departmental practices.

22. The proposed revised policy added a section on “eligibility.” This eligibility section does not appear, based on the comments Ms. Arroyo received, to have been included in the initial draft circulated to some departments in December 2010, but was included in the February 2011 draft. The section notes:

2.0 On-Call Compensation

Eligibility

2.1 On-call compensation is designed to compensate any staff who is required by the Bank Group to be available for work during off-hours on a regular basis. On-call compensation must be approved for individual staff by management.

23. In response to various e-mail comments on the draft, Ms. Arroyo made a number of clarifications stating that “the on-call and shift differential policies/practices have been in place at WBG for some time. We are currently trying to record those policies/practices in our staff manual in the interest of transparency and equity.” She also stated, in response to a proposal to limit the compensation program to staff of a particular unit, “we cannot limit

the on-call compensation to ISG because we currently also have participants in GSD, Treasury, Human Resources and the Health Services Department.” Ultimately, the Bank decided not to promulgate Staff Rule 6.24.

Applicant’s Claim to On-Call Compensation

24. In early 2012, the Applicant was informed by the Ombudsman that one of the staff members in the Applicant’s unit had heard others were being compensated for on-call duty. On 9 February 2012 the Applicant contacted Massimo Vicini, Adviser, Employment & Compensation Policy in the Human Resources Vice Presidency (“HRSEC”). In his e-mail message to Mr. Vicini the Applicant explained that:

A year ago a draft policy on a proposed Staff Rule 6.24 On-Call Compensation & Shift Differential was circulated for comment and staff became aware that the Bank was considering this concept. Since then there hasn’t been further word about the policy and staff have been asking about its status.

My unit, Corporate, has a 24x7 role and a designated number of staff serve as on-call duty officers every day. It has come to our attention that, despite a lack of corporate policy, several other units are currently compensating their staff for on-call duty. This lack of equity this practice presents, coupled with the lack of action to promulgate a corporate policy is creating a morale issue for GSDCS staff that are expected to serve as duty officers.

25. On 10 February 2012 Mr. Vicini responded stating:

I checked with my colleagues and you are right that a draft Staff Rule 6.24 on On-call Compensation & Shift Differential was circulated last year for comments. However, the work for some reasons did not go forward. This draft was based on an approved policy on on-call compensation which has been implemented since 2003 which is attached. Pending the approval of the review and publication of Staff Rule 6.24, you may implement the attached policy.

26. The document attached was the 4 March 2003 e-mail message from Mr. Marcellis. The Applicant subsequently contacted individuals in Human Resources, the Bank’s Legal Vice Presidency, GSD Strategy & Finance and Jeffrey Culver, Manager, GSDCS,

objecting to the treatment of security duty officers. In his 13 April 2012 e-mail message to Mr. Culver, the Applicant contended that “on-call duties involve being personally available to receive and respond to calls for assistance on a 24 hour, seven day per week basis. These expectations apply equally to the [duty officers] who are currently receiving compensation as to ours. Unless GSDCS’s on-call duty requirements change, in fairness our [duty officers] should be receiving compensation in accordance with the policy.” Mr. Culver did not respond to the Applicant.

27. On 2 May 2012 the Applicant filed a Request for Review before the Peer Review Services (“PRS”) challenging the Bank’s decision not to pay him on-call compensation. On 26 December 2012 the PRS Panel found that the Bank did not act consistently with the Applicant’s contract of employment and terms of appointment when it decided not to pay him on-call compensation. Although the Panel found that Mr. Culver’s decision was made on a reasonable basis because the Applicant was treated consistently with other members of GSD, the Panel determined that the Bank failed to follow a fair and proper process. The Panel determined that

in the absence of a Staff Rule governing on-call compensation, there was a lack of clarity from Human Resources as to the applicability of the Bank’s policy and practice. For example, there was no clear definition in the March 2003 email explaining on-call compensation and to whom it applies, making it very difficult for Mr. Culver to determine whether the practice applies to [the Applicant]. Second, the Panel found that the Bank had no transparent process for on-call compensation because the applicable policy and practice were not published and were not otherwise communicated to staff members, including [the Applicant]. For example, the March 2003 email governed the Bank’s practice for years and most staff members were not aware of it. Similarly, the on-page policy provided to Ms. Scheibach in 2009 was not known to many and appeared to be an unpublished document. Third, the Panel recognized that the Bank has not finalized any policy regarding on-call compensation despite the ambiguity in its application.

28. The Panel recommended that the Bank compensate the Applicant for the harm he suffered as a result of the Bank’s actions in the amount of ten weeks’ net salary.

29. In a letter dated 14 January 2013, Charles McDonough, Vice President & Controller, communicated to the Applicant his decision not to accept the Panel's recommendation. He based this decision on the "fact that the Panel found that Mr. Culver's decision to decline to pay you on-call compensation was reasonable and that the policy on on-call compensation was applied consistently within GSD." He added that he believed that the "Panel's finding that there was a lack of clarity from Human Resources as to the Bank's policy and practice on on-call compensation to be outside the scope of review of the Panel."

30. In this Application before the Tribunal, the Applicant challenges the Bank's refusal to pay him on-call compensation under the terms of the 2003 e-mail message from Mr. Marcelis or the Shift Differential & On-Call Policies document, or both. He also challenges the Bank's refusal to pay on-call compensation for the years prior to 2012 when he was entitled to on-call compensation but was unaware of the policy because it had not been published. Furthermore, the Applicant alleges that the Bank acted in a discriminatory manner by refusing to pay him on-call compensation. The Applicant requests back pay of \$50 per day for 623 days for on-call duties from April 2005 to 13 March 2013. This amounts to \$31,150. He also seeks compensation for the pain and suffering caused by the allegedly discriminatory manner in which he was treated for the last ten years.

31. On 25 February 2014 the Tribunal held oral proceedings for this case and the case of the Applicant in Decision No. 491 [2014]. The Tribunal heard testimony from: the Applicants in both cases; Mr. Marcelis; Ms. Scheibach; Mr. Pulley; Mr. Culver; Ms. Lisa McClean, HSD Nurse Practitioner; and Ms. Pragna Toulmin, Senior Human Resources Case Management Assistant.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicant's main contentions

32. The Applicant argues that the Bank is obligated, pursuant to Principles 2.1 and 9.1 of the World Bank Principles of Staff Employment to treat its staff members fairly and not discriminate against them. Staff Principle 2.1 provides that:

The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members. They shall not differentiate in an unjustifiable manner between individuals or groups within the staff and shall encourage diversity in staffing consistent with the nature and objectives of the Organizations. They shall respect the essential rights of staff members that have been and may be identified by the World Bank Administrative Tribunal.

33. Staff Principle 9.1 in part notes that “[s]taff members have the right to fair treatment in matters relating to their employment.”

34. According to the Applicant, the application of the 2003 policy was arbitrary, unfair and discriminatory and deprived Security duty officers of the benefit of the policy. The Applicant asserts that he was treated unfairly and discriminated against when the Bank refused to pay him on-call compensation under the 2003 policy and/or the undated document entitled Shift Differential & On-Call Policies, while paying others who also performed on-call duties. The Applicant asserts that for over ten years – from the time when the terms of the 2003 e-mail went into effect on 1 January 2003 – he has been on-call for several weeks at a time. According to the Applicant, since the on-call policy applies to him, he is entitled to receive compensation retroactively at the approved rate of \$50 a day in accordance with Staff Principle 2.1(c) and the Tribunal’s decision in *de Merode*, Decision No. 1 [1981], para. 46.

35. The Applicant denies that there was any policy of compensation for on-call duties in GSDCS in the form of compensatory time off, flexible working hours and increased salaries. He avers that even if this were a policy within GSDCS it is not an answer to the issue of on-call compensation because such compensation is provided to those who are

“on-call” regardless of whether they are called or not. The Applicant further contends that the Bank has failed to provide documentary evidence of its assertion that GSDCS staff salaries include a premium for on-call responsibilities. The Applicant notes that he did not receive any kind of salary premium when he moved from the Travel and Shipping Division to GSD. He further observes that although his Salary Review Increase (“SRI”) has consistently been good, these SRI ratings have been in line with his very good performance evaluations which did not incorporate his on-call duties. There is no indication that he was given better SRI ratings over the years because of his on-call duties.

36. Finally, the Applicant argues that the Bank failed to meet the necessary standard of transparency with respect to the on-call compensation policy. The Applicant contends that the 2003 policy was never published in the Staff Rules or made public to staff, even though a number of staff members benefited from it. The Applicant observes that staff members in GSDCS were not aware that the policy existed and it was only when the Bank considered revising the policy in the form of draft Staff Rule 6.24 that the subject was discussed by staff in GSD.

The Bank’s main contentions

37. The Bank first contends that the Applicant is barred, by the doctrine of laches, from bringing this claim. According to the Bank “[a]fter a decade of ...accepting Respondent’s practice and compensation that was offered to him, it was reasonable for Respondent to rely on the deal that Respondent offered Applicant at a time he commenced his career as a security officer, and which remained the deal during at least a decade of Applicant performing on-duty functions.”

38. Secondly, the Bank argues that the Applicant has failed to demonstrate unjustified differentiation or discrimination. Relying on the Tribunal’s decision in *Crevier*, Decision No. 205 [1999] para. 25 the Bank asserts that staff who work in HSD, HRS or IMT and receive on-call compensation are not in the same situation as GSD security staff, and should not be relied on as a standard for comparison. According to the Bank, being on-call

represents a significant interruption in the lives of staff members HSD, HRS or IMT as they are required to “pick up the phone whenever it rings, and be prepared to log into their computer and handle whatever emergency that might arise...” The Bank asserts that due to the “engagement to wait” this creates, and the lack of any expectation that a staff member in that position would normally be expected to work outside business hours, managers of these units requested that these staff receive on-call pay, in addition to their salary.

39. The Bank asserts that, in contrast, the nature of work performed by a GSD security officer is inherently different from the technical or administrative nature of the work of a nurse, an HR analyst, or an IT specialist who are on-call and receive on-call compensation. With respect to the Applicant, the Bank argues that when he is on-call he can pursue his personal activities while being mindful that in the event of an emergency, he may need to address it or give instructions to the Security Operations Center (“SOC”) which is operated by contractors on a 24/7 basis who handle a significant portion of what is required during an emergency. The Bank also maintains that it is inherent in the job of a security officer that he or she be available on a regular basis after working hours in the event of an emergency. The Bank maintains that this, and the fact that the Applicant is comparatively better compensated than other security officers in the US market, meant it was “fair and reasonable for GSD’s management to decide against any additional compensation for performing an essential part of a security officer’s job.”

40. The Bank argues that the Applicant and other GSD staff are compensated in other ways for being “on-call.” The Bank refers to the salaries they receive, and notes that a GSD staff member who was on the on-duty roster could request compensatory leave, under Staff Rule 6.06, paragraph 7.01, or have a flexible work schedule commensurate with the level of effort spent addressing an actual emergency during those on-duty hours.

41. The Bank also asserts that since it decided against codifying the policy within a staff rule, it was reasonable not to publicize the policy as it would a staff rule. According to the Bank the policy that the Applicant is challenging is different from the policies governing salary setting or redundancy reviews which applies to all staff. The 2003 e-mail was directed at management which first decides whether its staff should be eligible for on-

call pay, and then requests approval from HRSCM. The e-mail was not a Bank-wide HR policy, but rather internal guidance to management.

42. Finally, the Bank asserts that the on-call compensation policy was not designed to provide staff with a disproportionately large extra income. Therefore, according to the Bank, the amount of damages claimed by the Applicant is further proof that he was never intended to be eligible for on-call compensation. The Bank argues that a finding in the Applicant's favor would have "potentially unforeseen financial consequences not only on GSD, and not only on other units which have on-duty functions, but potentially on every department within WBG where staff regularly deal with pressing matters outside working hours." In the Bank's view, the days of a traditional 9:00am to 5:00pm workday and of a 40-hour week are gone and staff members, especially at professional grades, accept more fluid work arrangements as part of the deal they make with their employer. The Bank also contends that any claim for damages is limited by the three year statute of limitations contained in Staff Rule 11.01.

Amicus Curiae Brief

43. In support of the Application, the World Bank Staff Association submitted an *amicus curiae* brief. The Staff Association observes that on-call duty serves the same function across departments, and staff members who are on-call should be considered in a similar situation regardless of the unit they work in. The Staff Association further argues that the Bank has failed to demonstrate that on-call duties were included in the Applicant's job description, results agreement or performance evaluation.

44. The Staff Association expressed its concern that the on-call compensation policy was kept confidential for nearly ten years, commenting that "the notion that Bank policies only need to be made available to those who (in the Bank's view) are covered by them would be a startling standard indeed." The Staff Association observes that the Bank's Access to Information Policy requires that all Bank documents be made available to staff unless there is a basis for keeping them confidential under the policy. According to the

Staff Association the Bank has not provided any reason why the on-call compensation policy was kept confidential. Furthermore, the Staff Association considers the Bank's interpretation of the 2003 on-call policy restrictive and rejects a unilateral interpretation of a policy which according to the Staff Association applies to "all" staff as meaning applying "only if requested or approved by the manager."

45. Finally, the Staff Association dismisses the Bank's argument that in the modern world the days of traditional working hours have passed. According to the Staff Association the Bank's assertion does a disservice to the Applicant and others "who have made genuine sacrifices for years in support of the Bank and its staff by making themselves available for duty at all hours." The Staff Association notes that the fact that an on-call compensation policy exists is proof that the Bank appreciates this type of sacrifice, and argues that recognition should be fairly and equally applied across the Bank.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

Admissibility

46. The Bank contends that the Application is time barred under the doctrine of laches. The Bank argues that "[a]fter a decade of Applicant accepting Respondent's practice and compensation that was offered to him, it was reasonable for Respondent to rely on the deal that Respondent offered Applicant at a time he commenced his career as a security officer, and which remained the deal during at least a decade of Applicant performing on-duty functions."

47. The record demonstrates that as soon as the Applicant became aware of the existence of the on-call compensation policy in 2012 he contested his alleged ineligibility to receive on-call compensation. The admissibility challenge is therefore dismissed.

Nature and content of the Bank Group on-call compensation policy

48. Determination of the primary issue before the Tribunal, namely whether the Applicant was treated in a discriminatory manner depends on the nature and content of the Bank's on-call compensation policy. In this regard, the Bank contends that the on-call compensation policy was an un-codified management tool developed in the 1990s to induce staff members required by their departments to perform on-call duties and that the need for inducement is a critical component of the policy. The Bank maintains that under this policy on-call compensation payment was only available to staff in a department which had identified a business need, and had sought and obtained the authorization of HRSCM to make such payment. The Applicant, however, relies on the 2003 e-mail message from Mr. Marcelis and the undated Shift Differential & On-Call Policies document to argue that, on the face of these two documents, the terms of the policy do not include any provisions which would exclude its application to the Applicant and other staff who are required to be "on-call." The Applicant asserts that the only relevant criterion is that the staff member is required by the Bank to be available after working hours on a regular basis.

49. The Tribunal finds that the parties are in agreement that there is an on-call compensation policy. The area of divergence between them is whether or not the 2003 e-mail and the undated Shift Differentials & On-Call Policies document contain the totality of the on-call compensation policy. The Tribunal considers that a contextual approach is necessary to understand the practices which form part of the Bank's on-call compensation policy. Adopting this approach, the Tribunal notes that at the time the 2002 review of the on-call compensation and shift differential policies was conducted, those units which paid staff some form of compensation for on-call duties had been doing so since the 1990s. The practice was for these units to first submit requests to Human Resources laying out the business need for on-call compensation. Once approval was obtained, on-call compensation was then paid to the identified staff members.

50. The Tribunal also considers it relevant to review the objective of the 2002 review. As noted above, the 2002 review, and the subsequent changes which took effect 1 January 2003, were only intended to regularize the payment of on-call compensation; they did not intend to alter the relevant pre-existing administrative processes, nor increase the universe of staff members entitled to on-call compensation. The Tribunal finds that Mr. Marcelis' 2003 e-mail message did not go beyond addressing payment of on-call compensation.

51. The Tribunal finds that the administrative process for applying on-call compensation to eligible staff remained intact and was not amended by the terms of the 2003 e-mail or the undated Shift Differentials & On-Call Policies document. The administrative process required the unit in question to first submit a request to HRSCM for approval of on-call compensation payment to staff members. This process, as demonstrated by the practice of the Bank, was a condition precedent to the application of the on-call compensation policy to staff members and formed an essential element of the policy.

Did the Bank discriminate against the Applicant in the application of the 2003 on-call compensation policy?

52. The Tribunal will now assess whether the decision not to pay on-call compensation to GSD staff members who are "on-call" amounted to an abuse of managerial discretion and unjustified differentiation in the treatment of staff. As a judicial body whose mandate it is to examine allegations of non-observation of the contract of employment or terms of appointment, the Tribunal's role in the review of Bank policies is restricted. In considering the policy making functions of the Bank, the Tribunal has noted that "these functions fall within the discretionary ambit of the powers of the Bank and its governing institutions," *Oinas*, Decision No. 391 [2009], para. 27, and the Tribunal will not "override the Bank's considered judgment and [...] replace it with its own." *Von Stauffenberg*, Decision No. 38 [1987], para. 123.

53. It is within the Bank's discretionary powers to develop managerial tools aimed at achieving the Bank's business objectives. Nonetheless, the discretionary powers of the

Bank are not limitless. These powers must be exercised in a manner which complies with the contract of employment or terms of appointment of staff. Decisions which are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack a reasonable and observable basis, constitute an abuse of discretion and will be set aside. *See AK*, Decision No. 408 [2009], para. 41 and *Marshall*, Decision No. 226 [2000], para. 21.

54. The Tribunal has not been requested by the Applicant to modify the Bank's on-call compensation policy, but rather to review its application to him. According to the Applicant, the on-call compensation policy was applied in a discriminatory manner. It is this allegation which forms the focus of the case and is a claim which is well within the Tribunal's mandate to review.

55. In *Crevier*, Decision No. 205 [1999] para. 25, the Tribunal held that "discrimination takes place where staff who are in basically similar situations are treated differently." (*See also Hitch*, Decision No. 344 [2005], para.43). As illustrated in *Crevier* "discrimination would occur if only some, but not all, members of a group of eligible redundant staff members were allowed to opt for an unreduced pension under the Rule of 50." (para. 25). Though the Bank argues that the Applicant should be compared only with other GSD staff members, the Tribunal finds that the claim of discrimination may be raised in the present case more broadly.

56. The record shows that the Applicant is in a similar situation to other World Bank staff who performed on-call duties and received on-call compensation. The Applicant, like these staff members, is required to be available to work after-hours *on a regular basis*. For example, on the roster for the week of 25 May – 1 June 2012, eleven individuals from different departments are noted as being on-call. Four are contractors and one is the duty officer during business hours; the on-call compensation policy does not apply to these individuals. Of the remaining six only three – the Applicant, the Applicant in Decision No. 491 and a GSD Security Operations Officer – were not paid on-call compensation. Similarly, of the fourteen individuals listed on the Emergency Duty Roster for the week

from 12–19 October 2012, six individuals received the daily \$50 supplement, five were not covered by the policy because they either worked for outside vendors or worked only during business hours, and the remaining three – all in GSD – did not receive on-call compensation. The Tribunal finds that the peers, with whom the Applicant must be compared, are those who are listed on the weekly duty roster and required to be available after working hours on a regular basis.

57. Having determined the comparator group, the Tribunal observes that not all differential treatment is prohibited. Principle 2.1 of the Principles of Staff Employment provides that the Bank “shall not differentiate *in an unjustifiable manner* between individuals or groups within the staff.” (Emphasis added). In *Moussavi*, Decision No. 360 [2007], para. 20, the Tribunal clarified that differences based on “criteria and facts that provide a basis in reason, and within the Bank’s discretion” are justifiable. It stated that:

Principle 2.1 imposes a prohibition on “unjustifiable” differentiation among individual staff members, not *all* differentiation. If salary differences, even extreme ones, are “justifiable” – i.e., based on criteria and facts that provide a basis in reason, and within the Bank’s discretion – then they are fair, they comport with the Principles of Staff Employment, and they do not violate the rights of the lower-paid staff member.

58. The Bank contends that the GSD was justified in its decision not to apply the on-call compensation policy to its staff on at least five grounds. First, the Bank argues that GSD security specialists are different from other classes of Bank staff receiving on-call pay. According to the Bank the nature of the work performed by GSD staff when on-call is minimal in comparison. Secondly, the Bank contends that being on-call is an inherent part of the responsibilities of a security officer. The Bank’s third justification for non-payment of on-call compensation is that the Applicant’s salary is higher vis-à-vis internal and external comparators and this salary reflects the Bank’s expectation that he be available after hours. Fourthly, the Bank contends that GSD staff members are compensated in other ways for being “on-call.” Finally, the Bank refers to the practice of other international organizations, citing these as confirmation of the reasonableness of its decision not to pay on-call compensation to GSD staff.

59. With respect to the Bank's first contention, the Tribunal heard testimony from Ms. Lisa McClean, HSD Nurse Practitioner and Ms. Pragna Toulmin, Senior Human Resources Case Management Assistant on the nature of the work they perform in the event of an emergency while on-call. They testified that emergencies could require anywhere between five to thirty minutes to resolve, although as a result of some difficult cases they were required to be up all night. The Applicant and the Applicant in Decision No. 491 both testified to the nature of some of the work they have been called to do while on call, though they maintain that the nature of work performed while on-call is irrelevant to the payment of on-call compensation.

60. The Tribunal considers that, on balance, while the nature of the work performed could have been a basis for compensating certain staff performing on-call duties, it is not evident that this is the case here. The record shows that on-call staff are not paid for the type of emergency which could arise or the work they could do in the event of an emergency. Under the terms of the policy, on-call compensation is paid for the requirement that staff be on "standby" after working hours on a regular basis. As explained by Mr. Marcelis in his 2003 e-mail "[o]n-call compensation will amount to a flat payment of \$50 per day for each day that the staff member is on call *irrespective of whether the staff member is called to work or not.*"(Emphasis added).

61. Additional compensation for attending to an emergency was abolished effective 1 January 2003. In his 2003 e-mail message Mr. Marcelis noted that "even though all on-call staff perform comparable tasks, two different compensation models and two different payroll flags [were] present." Prior to 2003, some on-call staff were paid overtime or Emergency Duty Pay ("EDP") as well as Stand By ("SBY") pay. Mr. Marcelis noted that the decision was taken to "discontinue compensation for the time actually worked (overtime payments) for the EDP staff."

62. It is not conclusive from the record that the Applicant cannot also be considered on standby when he is on-call. The Applicant certainly considered himself to be on standby, and due to advances in technology on-call staff are able to fulfill their tasks remotely and

are not required, in all cases, to report to headquarters. The Tribunal finds that neither the terms of the on-call compensation policy nor the proposed Staff Rule 6.24 make a differentiation based on the nature of the work performed by those who are on-call or the amount of personal inconvenience these staff members may endure if called. In the absence of such evidence, the Tribunal finds that the nature of the work performed while on-call was not considered an essential part of the on-call compensation policy.

63. The Bank's second contention concerns its argument that being "on-call" was an "inherent part of [the] security personnel job description." During the PRS proceedings Mr. Culver testified that

[b]ecause of the nature of their job, security personnel are expected to deal with emergencies at any given time, including after hours. ... Since dealing with emergencies is inherently a function of security, Corporate Security staff members were never envisioned to be recipients of on-call pay but rather were expected to perform the duties as part of their job description.

64. In the oral proceedings before the Tribunal, Mr. Culver made reference to his extensive experience in the security industry including at the United States (US) Department of State:

In security work, being available and reachable 24/7 is an inherent part of our profession and as I said, I have been doing this for 27 years, and I can tell you that I have been called many times after-hours on weekends and holidays and woken up in the middle of the night throughout the course of my career, and my staff has similar experiences, and it's the nature of our work.

65. The Tribunal sees considerable force in the foregoing argument. However, Mr. Culver acknowledged that he and his staff at the US Department of State received law enforcement availability pay – i.e. a premium paid to federal law enforcement officers - which was an extra 25% on top of their salaries to recognize that they are often called after working hours.

66. It is observed that there are no references in the Applicant's job description or Overall Performance Evaluations ("OPE") that he is expected to be available on a regular basis after working hours. While evidence of industry practice and standards may be informative, a staff member cannot be faulted for relying on his terms of reference or the description of the job to which he applied to understand the expectations his organization has of him. The Tribunal therefore finds the Bank's second contention to be an insufficient basis to justify non-payment of on-call compensation to the Applicant.

67. With regard to its third contention the Bank relies on a 2011/2012 Global 50 Remuneration Planning Report prepared by Towers Watson Data Services ("the Towers Report") to argue that GSD security officers are better paid than those in the US "outside market." The Applicant provides an alternative market survey of security officer salaries prepared by the Foushee Group in 2011 which according to the Applicant demonstrates that he is not paid more than other security officers in the US market, and that he is probably paid less. The Bank in turn reviews this survey and argues that the Applicant should be measured against jobs which it asserts represent his skillset, duties, education and experience. According to the Bank once this adjustment is made, the Foushee Group data supports its position that the Applicant is "vastly better compensated than he would be in the outside market."

68. In considering the relevance of these remuneration surveys, the Tribunal observes that the pay grade system adopted at the World Bank as an international organization may be different from that applied by organizations in the local US job market. The Tribunal further considers that the remuneration practice of comparator international organizations such as the United Nations, the International Monetary Fund ("IMF"), and the Inter-American Development Bank ("IDB") may be more directly relevant to the present case. An internal comparison of World Bank staff at the same grade as the Applicant who receive on-call compensation is more indicative of whether salaries paid to GSD staff members include a premium for on-call duties.

69. An analysis of the recent salary information of Level GG staff members within IMT who receive on-call pay reveals that the Applicant's salary is 9% higher than the average. The Tribunal is aware that various factors, such as the Salary Review Increase ("SRI"), may result in one staff member earning more than another at the same grade level. The Bank has not provided evidence that the reason the Applicant's salary is 9% higher than the average is not due to these other factors. Furthermore, the Applicant testified, and the Bank did not contest, that he did not receive a salary premium when he moved to GSD from the Travel & Shipping Division. He also did not receive a salary premium when the GSD Duty Roster was created in 2005. The Tribunal finds that the record does not support the Bank's third contention.

70. The Bank's fourth contention is that GSD staff members are compensated in other ways for being "on-call." Since the on-call compensation policy purports to compensate staff regardless of whether they are called or not, the Tribunal finds that a compensation scheme which only compensates a staff member for actual time spent addressing an emergency cannot be considered a justifiable substitute for the existing on-call compensation policy.

71. Finally, the Tribunal considers the practices of other international organizations which the Bank asserts confirm the reasonableness of its decision not to pay on-call compensation to GSD staff. The relevant information concerns the practices of the IADB, IMF, United Nations, the Organisation for Economic Co-Operation and Development ("OECD"), and the European Central Bank ("ECB"). According to a review conducted by the Bank the IDB outsources security functions to contractors who, under the Bank's on-call compensation policy would be ineligible to receive on-call pay. Furthermore, the survey reveals that the on-call security functions performed at the IMF are performed "24-7 either through shifts or through arrangements with vendor companies." According to the survey the United Nations does not provide on-call compensation to staff in the professional services category and the OECD does not apply an official on-call system.

72. The Tribunal observes that the only organization which provides on-call compensation to its security staff is the ECB which the Bank asserts is not a comparator organization. The record shows that security agents and security technicians in the ECB who are required to be “on-call” receive a daily on-call allowance of 47 euros for working days and 107 euros for Saturdays, Sundays and Public Holidays. The Tribunal finds that the practices of these organizations are inconclusive.

73. In light of the above, the Tribunal finds that the Bank’s contentions do not serve as a justifiable basis for the differential treatment between the Applicant and other staff members who received on-call compensation. The Applicant is employed at the same grade level as others who receive on-call compensation and on-call duties were not specified to be part of the Applicant’s work. Furthermore, management did not communicate any changes in his job description to him at any stage.

Did the Bank fail to communicate the on-call compensation policy in a transparent and fair manner?

74. The Tribunal has consistently required transparency from the Bank in relation to its policies and procedures and in its treatment of its staff. In *Moussavi*, Decision No. 360 [2007], para. 47, the Tribunal encouraged the Bank “consider establishing a more transparent and consistent approach to” salary reviews. Similarly, in *Ingco*, Decision No. 331 [2005], para. 47 the Tribunal insisted on “the strictest observance of fair and transparent procedures in implementing the Staff Rules relating to redundancy.” See also *Yoon (No. 2)*, Decision No. 248 [2001], para. 28.

75. The Bank argues that there was no requirement to publish the on-call compensation policy to staff who are unaffected by the policy. The Tribunal finds the Bank’s argument inconsistent with Bank practice. The Bank’s practice of publishing a policy to all staff does not depend on whether all staff members would be affected by the policy or are eligible to benefit from the terms of the policy. The World Bank Group has routinely made public to all staff, regardless of their eligibility, benefits provided by the Bank. The Staff Manual is

replete with benefits for which some staff members are eligible and others are not. Moreover, the fact that the Bank provides on-call compensation is publicly listed on the Bank's intranet on pages dedicated to an overview of compensation benefits. These pages note that staff members on Regular, Term or Open contracts are "eligible" to receive on-call compensation, while staff members on short-term temporary and consultancy contracts are ineligible. However, unlike the other compensation benefits listed on these pages, no further information is provided on on-call compensation.

76. The importance of transparency in the relationship between the Bank and its staff cannot be overstated given that the haphazard disclosure of information can result in prejudice to staff. The Bank is required, by virtue of Staff Principle 2.1, to follow proper process in its relations with staff members and such a process includes transparency. Failure to properly publicize the provisions of the on-call compensation policy constitutes a breach of this process.

77. Moreover, the existence and terms of an on-call compensation policy which has been consistently applied since 1 January 2003 should not come as a surprise to staff, their managers or HR personnel. The Tribunal considers it unacceptable that neither the Bank, nor any of the witnesses called to explain the on-call compensation policy, could state when the Shift Differential & On-Call Policies document was created and by whom.

78. The Bank asserts that the criteria for deciding whether on-call compensation will be authorized are as follows: (i) the work requirements of the position; (ii) the difficulty encountered in attracting staff willing to perform these requirements; (iii) management's expectation of the level of reachability of its staff after-hours and; (iv) the level of intrusion on a staff member's personal life. The Tribunal is of the view that it is incumbent on the Bank to make these objective criteria available to all managers so as to put them in the position to provide reasoned explanations of their decisions not to apply the on-call compensation policy to staff within their units. Mr. Pulley who was the head of GSD from 2004 – 2010 testified that he only became aware of the on-call compensation policy in 2009 when called to address the specific case of GSDIS staff. He asserts that he took the

decision then not to apply the on-call compensation policy to other GSD staff who did not know the policy existed but were performing on-call duties.

79. The Tribunal finds that the Applicant was prejudiced by the Bank's failure to observe the basic principles of transparency. As the Applicant testified in response to a question from the Tribunal

knowing about the policy would give me and my colleagues an opportunity to make that decision to have that dialogue with our management. Now, there has been discussion about we couldn't get people to do on-call duty because it was intrusive. We couldn't get them to do it. If we knew that the Bank saw it as important enough to compensate people for being on-call, but our management was not willing to see it that way, well, then there is a different relationship that we are going to have in terms of on-call. We could then make an informed decision about whether we saw it as part of our role or whether we weren't going to be on-call, we would be available and you could use us when you need us.

80. Due to the Bank's failure to publish the terms of the on-call compensation policy, the Applicant consented to perform on-call duties without knowledge of the existence of such a policy, and was denied the opportunity to request compensation for his on-call duties. The benefit derived by the Bank from the Applicant's availability outside working hours for several years is undeniable.

81. The Tribunal finds that the Bank should have publicized the terms and parameters of the existing on-call compensation policy. It further finds that the Applicant was discriminated against insofar as others on the Duty Roster were compensated for on-call services, which were comparable to those which he performed, whereas he was uncompensated. At the same time, the Bank remains free, to specify for the future, the criteria it finds desirable for the application of its on-call compensation policy. Such criteria should be published.

DECISION

For the foregoing reasons the Tribunal orders that:

- (1) The Bank shall pay the Applicant compensation in the amount of \$8000.
- (2) The Bank shall pay the Applicant's attorneys' fees in the amount of \$18,690.43.
- (3) All other pleas are dismissed.

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

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 28 February 2014