



**World Bank Administrative Tribunal**

**2022**

**Decision No. 682**

**Diana Justyna Milton,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

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

**Diana Justyna Milton,  
Applicant**

**v.**

**International Finance Corporation,  
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Mahnoush H. Arsanjani (President), Marielle Cohen-Branche (Vice-President), Janice Bellace (Vice-President), Andrew Burgess, Seward Cooper, Lynne Charbonneau, and Ann Power-Forde.

2. The Application was received on 31 January 2022. The Applicant was represented by Alex Haines of Outer Temple Chambers. The International Finance Corporation (IFC) was represented by David Sullivan, Deputy General Counsel (Institutional Affairs), Legal Vice Presidency. The Applicant's counsel has informed the Tribunal that the Applicant has decided not to request anonymity.

3. The Applicant is alleging that the IFC failed to follow fair and proper processes with respect to the non-confirmation of her appointment and her probationary period.

**FACTUAL BACKGROUND**

4. The Applicant joined the IFC in June 2016 as an Information Technology (IT) Officer, Grade Level GF, under a four-year fixed term appointment on the Business Technologies team in the Corporate Information and Technology Department (CITBT). The Applicant's Letter of Appointment stated that her appointment was subject to a one-year probationary period, extendable for up to one additional year.

5. According to the IFC, shortly after the Applicant joined the IFC, she had difficulties performing at the GF level. On 31 March 2017, the Applicant's Supervisor recorded comments in

the IFC's performance management system assessing the Applicant's performance as part of the Applicant's Fiscal Year 2017 (FY17) Mid-Year Conversation. The Supervisor stated:

[The Applicant] need[s] to demonstrate improvement on [the] following skills which are part of her Job stream requirements [and] WBG [World Bank Group] core competencies at her grade level.

- She need[s] to be the lead Analysis and Assessment of business operations, understand strengths and weaknesses and identify opportunities to introduce process efficiencies.
- She needs to play the liaison between Business and [IT] teams and get vendors and contractors to deliver business needs.
- She need[s] to provide input to project estimates she is going to work on.
- As a Support [...] she needs to become key resource for all IFC Back office [...] processes. She need[s] to provide business insights and clarification of requirements to support delivery of effective technical solution[s].
- She needs to successfully troubleshoot the problems independently and recommend solutions for resolution.
- She needs to deliver results to clients by immersing herself in client experiences and ask probing questions to understand unmet needs.
- She need[s] to identify and pursue innovative approaches to resolve issues.
- She needs to make timely decisions within her area of responsibility, considering the interest and concerns of the stakeholders.

To be confirmed [the Applicant] will have to show significant improvement in each of the areas mentioned above.

6. The Applicant became ill in April 2017 and was placed on Short-Term Disability (STD).
7. On 1 June 2017, the Applicant was notified via an office memorandum by IFC management that her probationary period was extended by one year to 5 June 2018. The memorandum reiterated that the Applicant would need to show "significant improvement" in the areas mentioned by her Supervisor in her FY17 mid-year assessment, and stated that management was committed to

supporting the Applicant during the extended probationary period. The memorandum further stated:

If during, or at the end of your extended probationary period, it is determined that you are not suitable for confirmation based on an assessment of your achievement of the work program, technical qualifications and professional behaviors, your employment may be terminated by non-confirmation following at least sixty calendar days[?] notice, in accordance with Staff Rules 4.02 and 7.01.

8. According to the IFC, in an effort to support the Applicant's recovery after her return from STD, management sought to give the Applicant a "fresh start" by reassigning her to a lower-level position in a different unit and reporting to a different manager. On 1 June 2018, the Applicant, along with Corporate Information and Technologies Department (CIT) management and Human Resources (HR), agreed via office memorandum that the Applicant would be reassigned to a lower-level position as an IT Analyst, Grade Level GE, effective 4 June 2018. The office memorandum further stated:

Your probation will be extended for one more year and will commence on June 4th 2018 upon [your] return [from] STD and should end on June 4th 2019. As per Staff Rule 4.02 – 3.01 at any point during or at the end of the probationary period, a decision to confirm your appointment shall be made by your Manager or Designated Supervisor, in consultation with the next-in-line Manager, based on a written assessment of your performance, technical qualifications and professional behaviors.

9. On 4 June 2018, the Applicant returned to work at the IFC.

10. In July 2018, according to the Applicant, she and two female colleagues lodged misconduct complaints with the Ethics and Business Conduct Department (EBC). The Applicant stated that they reported to EBC instances of hostile work environment, unfair treatment, abuse of discretion, sexual harassment, and retaliation based on allegations of disloyalty, verbal abuse, favoritism, and threats of termination of employment and revocation of visas. The Applicant also stated that she raised concerns of financial misconduct that she had observed in CITBT around the procurement and vendor selection process for IT projects.

11. In early September 2018, the Applicant agreed to be transferred from CITBT to the Department of Corporate Strategy and Operational Policies and Procedures (CSSDR). On 18 September 2018, the Applicant started in her new position, Operations Analyst, Grade Level GE, with CSSDR, and reported to a new Manager who at the time held the title of interim manager of CSSDR.

12. The record suggests that, shortly after the Applicant started with her new unit, she was involved in interpersonal incidents with colleagues and her Manager.

13. On 2 October 2018, the Applicant abruptly left a meeting after expressing frustration. Later that day, the Applicant sent an email apologizing to the Manager and three other colleagues who were present at the meeting for her “behavior” and “frustration” in the meeting. In the email, the Applicant expressed frustration with the pace and cooperation of the IT team, whose inputs, she stated, “[W]e are dependent on.” The Applicant further stated that with IT’s cooperation a set of strategic reports could have been completed in “1–2 days at most” instead of 10 days. She added, “It does not justify however that I left the room or showed my frustration, whereas we should work as a team.”

14. Later that day, on 2 October 2018, the Manager replied to the Applicant’s email, stating, “Don’t worry about it. We’re all learning from this part of the project.”

15. Thereafter, according to the Manager, an IT Colleague pulled the Manager aside after a meeting to inform the Manager that the Applicant had accused him of ignoring her in meetings and discriminating against her. The Manager stated that the IT Colleague was “very concerned” and told her that he did not want to be in any meetings alone with the Applicant.

16. The Manager stated that she did not discuss the matter with the Applicant immediately but consulted another colleague who had been present in one of the meetings in question and who had received the Applicant’s apology email on 2 October 2018. According to the Manager, that

colleague confirmed that the Applicant had stormed out of another meeting and was “evidently very unhappy” about something that had been mentioned during the meeting.

17. The Manager stated that, on 16 October 2018, she met with a Senior HR Business Partner and the CSSDR Director (Director) to discuss the alleged interaction between the Applicant and the IT Colleague. According to the Manager, the Senior HR Business Partner informed her that the IT Colleague had contacted HR to formally report his concerns about the Applicant’s “behaviors.”

18. On the morning of 17 October 2018, according to the Manager, the Applicant called her to report that she would not come to the office because she had sustained injuries in a vehicle-related incident. The Manager stated that, during that phone call, the Manager mentioned her meeting with the Senior HR Business Partner and the Director regarding the Applicant’s interactions with the IT Colleague and “tried” to convince the Applicant to “take a bit of distance between [IT] which she seemed to abhor.”

19. The Manager stated that, on that same morning, she called the IT Colleague, who informed her that he was concerned about the Applicant’s intentions because the Applicant had emailed him to confirm the identity of his line manager. The IT Colleague then forwarded to the Manager an email from the Applicant to the IT Colleague, dated 27 September 2018, that stated, “Just wanted to confirm with you your reporting line, whether it is [the Acting CIT Director and Chief Information Officer] that you report to directly.”

20. On the afternoon of 17 October 2018, the Manager emailed the Applicant. She stated in part:

As a follow-up to this morning, I’d like you to consider sending a quick note of apology to [the IT Colleague]. I talked to him after I talked to you, and it is my judgment that this would be constructive. [...] If something is not working, please talk to me and [the Director]. It’s part of our jobs to support our team members in getting the inputs and resources they need to deliver.

As a manager I am committed to fairness and a pleasant working environment...for my direct reports, the team around us, and to all others across [the] IFC that we interact with on a daily basis. [...] So a short note of apology, I think, will help in restoring the relationship and [a] constructive, effective climate.

21. Later that same afternoon, the Applicant replied to the Manager with a lengthy email. With regard to the Manager's suggestion that she apologize to the IT Colleague, the Applicant stated, "I do not accept your suggestion. Clearly my rights and my feelings have and are being disregarded in this conversation." The Applicant further stated that (i) she was being excluded, ignored, and discriminated against by the IT Colleague and other colleagues in work meetings and emails; (ii) some of her colleagues had a lack of "logical thinking" and "appalling lack of technical expertise"; and (iii) she had "experienced the most disgusting behaviors" toward her during her time at the IFC.

22. On 19 October 2018, there was a further exchange of email correspondence between the Manager and the Applicant concerning the Applicant's summary of discussion points from their weekly meeting on 15 October 2018. The Applicant stated, "You confirmed that at my grade-Analyst; I am a servant and a service provider to staff with higher grades and therefore not entitled to work from home." In response, the Manager denied using the term "servant" and clarified that the term "service provider" was used "metaphorically." The Applicant stated in response that the use of those terms "in the 21<sup>st</sup> century, even in a 'metaphorical' way is unacceptable. Martin Luther King fought for that as recently as 50 years ago."

23. On 23 October 2018, the Manager sent an email to the Applicant, titled "Follow-up to status update." The email stated in part:

[O]ver the past month, you have demonstrated behaviors that are not consistent with the collegial and cohesive spirit of this department, nor the WBG values. You have left meetings abruptly, have been antagonistic to colleagues who have concerns about working with you and have asked not to have to interact with you. You have unduly challenged both colleagues and senior staff – going far beyond what could be considered acceptable disagreements. In addition, the emails that you sent me last week were hostile and rude. You challenged my integrity, accused me and others of discrimination, lack of ethics, and accused me of words I did not say.

I want to make 1000% clear that this is not acceptable. You need to change these unprofessional behaviors – **immediately**. [Emphasis in original.] You will be assessed on your ability to demonstrate flexibility, collegial and respectful interpersonal interactions within our team, with other colleagues, and with me. I will provide you weekly feedback in this regard and I also want you to meet with [our Senior HR Business Partner], to come up with some course(s) for you to undertake either with HR’s Career Leadership and Staff Development Unit or the Mediation Facility. Failure to demonstrate required professional behaviors towards others in and outside our unit will result in my recommendation to end your employment by non-confirmation of appointment, as per [S]taff [R]ules 4.02 and 7.01.

24. On 30 October 2018, the Manager emailed the Applicant asking her to include a specific professional development objective in the performance portal that would allow the Manager to assess the Applicant’s interpersonal skills.

25. Approximately six weeks later, on 18 December 2018, the Manager sent an email to the Applicant, titled “[the Applicant] Status update.” The email stated in part:

We have not seen you in weeks, and I sincerely hope you are well.

By my records, you were last in the office on October 19, and your last leave request was for until/through October 29th, 2018. This means that essentially, you have been absent without leave authorization for over 30 working days now.

We have discussed your absence in the meantime, and I have asked you on numerous occasions to regularize this. Our HR team likewise has been in touch with you about the short-term disability process.

[...]

Also, at this point, I must notify you that I am in no position to confirm your appointment. You have been either absent from the office on short-term disability (in your previous department), or absent without authorization, and you have demonstrated hostility and unprofessional behaviors in the short period you have worked under my supervision. And your probationary status already had been extended under extraordinary circumstances. Consequently, please contact me soonest. I will make the recommendation to end your employment by non-confirmation of appointment, as per [S]taff [R]ules 4.02 and 7.01. The termination will be effective January 14, 2019, giving you four weeks to apply for short-term disability – a more than reasonable period of time to apply for the short-term



disability benefits from the World Bank Group's Disability Administrator, Broadspire Services [the Disability Administrator].

26. On 21 December 2018, the Applicant responded to the Manager's email. She acknowledged receipt and stated:

I have been trying to sort things out with [the Disability Administrator] in order to clarify my Short-[T]erm Disability Status and my doctor supplied them with the necessary medical information in early November.

27. On 24 December 2018, the Applicant was retroactively approved for STD benefits from 23 October 2018. The Applicant's benefits were extended to 31 January 2019.

28. On 28 January 2019, the Manager emailed the Applicant another status update. The email stated:

Notwithstanding your current STD status, I must inform you again that I am not confirming your appointment due to your hostile and unprofessional behaviors towards me and our colleagues; those behaviors were the most salient feature of your tenure in our VPU [Vice Presidential Unit]. You have been notified of these unacceptable behaviors by me and your prior managers. Such behaviors and hostility do not indicate a good fit in our department and with the WBG.

Given your current STD status, however, I am suspending submission of my implementation memo recommending non confirmation of your appointment until the earlier of: (a) if, as and when you may return to duty from STD; or (b) the end of your extended probationary period – whichever arrives first.

Immediately upon your return or the end of your extended probationary period, I shall submit my written recommendation not to confirm your appointment, for the above stated reasons, and provide you 14 calendar days to respond as per Staff Rule 4.02 & Staff Rule 7.01[, paragraphs] 7.01–7.05.

29. On 6 February 2019, EBC wrote to the Applicant to inform her that it had closed its review into the allegations she had reported in July 2018. EBC stated that, after having carefully considered the matter, it did not identify evidence of behavior that amounted to a violation of WBG Staff Rules.

30. On 3 June 2019, HR extended the Applicant's probationary period to 21 August 2019, the date that the Applicant's STD was due to terminate.

31. On 6 June 2019, the Disability Administrator wrote to the Applicant informing her that her claim for Long-Term Disability (LTD) benefits had been approved, effective 22 August 2019. The letter further stated, "Your employment with the World Bank Group ends on August 22, 2019."

32. On 7 June 2019, the Applicant received an email from a Senior HR Specialist, stating, "In light of your approval for Long Term Disability (LTD), your probation period is suspended until you transfer to LTD."

33. On 25 June 2019, the Applicant was copied along with the IFC Vice President of Corporate Strategy & Resources on an automatically generated HR reminder email from HR Operations to the Director. The email stated in part:

According to HR records, the probationary period for the staff member identified above has expired. Since no action has been taken to confirm or extend the probationary period, the system automatically confirmed the staff member. Record has been made in the system that [the] OPE [Overall Performance Evaluation] was not signed. This message is copied to your Manager.

34. This automatically generated HR email, however, did not reflect the actual circumstances of the Applicant.

35. On 1 July 2019, the Applicant filed Request for Review No. 493 with Peer Review Services (PRS) challenging the following World Bank Group actions, inactions, and decisions: (i) performance management; (ii) probation, non-extension of contract, and ending of employment; (iii) continuous harassment, exclusion, and marginalization; and (iv) discrimination on the grounds of gender, nationality, and health. For relief, the Applicant requested a "decision to be made around the status of [her] appointment and ending of employment"; "appropriate compensation for [the] harm, harassment and discrimination suffered"; and "a clean performance record."

36. On 21 August 2019, the Applicant's STD leave expired.
37. On 22 August 2019, the Applicant's LTD leave commenced and her employment with the WBG ended in accordance with Staff Rule 7.01, paragraph 8.03. LTD benefits generally include (i) disability pay at 70% of final net salary during STD and (ii) continued participation in the Staff Retirement Plan (SRP), Retiree Medical Insurance Plan, and Retiree Group Life Insurance Plan.
38. On 3 September 2020, PRS issued an office memorandum informing the Applicant and the Manager that the Peer Review Panel had decided to dismiss the Applicant's Request for Review. Under the section of the memorandum titled "The Panel's Overall Conclusions," it stated:
- The Panel found that the documentary evidence in the current case is conclusive and does not warrant further review by the Panel because: (i) [The Applicant's] claims related to her performance are beyond the scope of review of the PRS; (ii) [The Applicant] has received clarity related to her employment status, making this claim moot; and (iii) allegations of harassment, exclusion and marginalization must first be brought before EBC whose mandate it is to review such allegations under Staff Rule 3.00, and there is no evidence provided by [the Applicant] to support her allegations of discrimination or improper motive on [the] part of management, and such allegations similarly fall within EBC's mandate pursuant to Staff Rule 3.00. Therefore, the Panel dismissed the claims referred [to] above in accordance with Staff Rule 9.03, paragraph 11.03(b)(ii).
39. The PRS memorandum also stated that the Applicant "may wish to avail herself of EBC's services regarding the allegations of harassment, exclusion and marginalization."
40. On 16 November 2020, the Applicant emailed EBC to request a meeting.
41. On 18 November 2020, EBC conducted an intake interview with the Applicant. During the intake interview, the Applicant reported to EBC two separate acts of retaliation. First, the Applicant accused the Manager, the IT Colleague, and the Director of retaliating against her based on a comment that the IT Colleague accused the Applicant of making. Second, the Applicant suggested that the Manager, and possibly the IT Colleague, retaliated against her because she reported misconduct by the Applicant's former managers to the Staff Association and EBC.

42. On 19 November 2020, EBC initiated a preliminary inquiry into the Applicant's retaliation allegations.

43. On 27 November 2020, the Applicant sought her first extension from the Tribunal to file an application. On 1 December 2020, the Tribunal granted the Applicant's request for an extension, and requested that the Applicant notify the Tribunal once the EBC investigation concluded so that the Tribunal could set the time limits for the submission of pleadings.

44. On 10 September 2021, EBC informed the Applicant of its decision to close its review of the Applicant's case at the preliminary inquiry stage due to insufficient evidence to support the Applicant's allegations.

45. Thereafter, the Applicant notified the Tribunal of EBC's case closure notification. On 20 September 2021, the Tribunal informed the Applicant that the deadline for her to submit an application was 10 January 2022.

46. After receiving one final extension on 22 December 2021, the Applicant submitted this Application to the Tribunal on 31 January 2022. The Applicant alleges that (i) her Manager did not follow proper procedures with respect to the non-confirmation of the Applicant's appointment following the Applicant's extended probationary period, (ii) her Manager's actions were "pre-determined and arbitrary," and (iii) her Manager's failure to properly act in either confirming or not confirming the Applicant's appointment resulted in harm to the Applicant.

47. The Applicant requests the following relief:

- A finding by the Tribunal that she was a whistleblower and benefitted from the rights thereof pursuant to Staff Rule 8.02;
- Compensation for "harm done to her career" given that it was "unachievable" for her to complete her four-year fixed term appointment with the IFC, and her career was mismanaged; and

- Moral damages for the distress and harm caused to her health and personal life.

48. The Applicant claims legal fees and costs in the amount of £8,280.00.

## SUMMARY OF THE CONTENTIONS OF THE PARTIES

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

*The IFC's actions were pre-determined and arbitrary, and the IFC did not follow the performance management process as required by the Staff Rules*

49. The Applicant contends that (i) by not initiating the recommendation for the non-confirmation of the Applicant's appointment, the Manager did not follow a proper performance management process as required by the Staff Rules; (ii) the decision to recommend the non-confirmation of the Applicant's appointment was pre-determined, premature, and arbitrary; and (iii) as a result of the pre-determined and arbitrary nature of the Manager's actions, the Applicant was not given a fair opportunity to achieve a satisfactory performance and the Applicant should be compensated for this breach of the Staff Rules.

50. The Applicant contends that, despite being informed by the Manager that she would be recommended for non-confirmation "less than six weeks into her new role" unless she demonstrated the "required professional behaviors towards others in and outside [the] unit," the Applicant was not, thereafter, given the opportunity to satisfy the Manager's warning because she did not return to work after the Manager's 23 October 2018 email – "meaning that her termination was, in essence, a *fait accompli*."

51. The Applicant asserts that the first notification of non-confirmation she received from the Manager, on 18 December 2018, was based only on the first few weeks of the Applicant's new role and was issued without any previous indication that such a decision may be forthcoming. The Applicant asserts that there was no warning in the weekly one-on-one meetings with the Manager. The Applicant further asserts that the only warning she received, on 23 October 2018, came with

a condition – to demonstrate the required professional behaviors toward colleagues – that the Applicant was unable to satisfy, through no fault of her own, because she never returned from STD.

52. The Applicant avers that the Manager failed to follow actions specified in Staff Rule 4.02, paragraph 3.02, because (i) an Opportunity to Improve plan was not offered to the Applicant, (ii) a health assessment request was not lodged to assess the Applicant's fitness to work, and (iii) the Applicant did not receive an offer of reassignment.

53. The Applicant contends that the Manager failed to document the Applicant's performance in writing on an ongoing basis. The Applicant further contends that the Manager never raised any performance issues with her during their one-on-one meetings. The Applicant asserts that the first time performance issues were raised was in a 17 October 2018 phone call relating to a different matter.

### ***The IFC's Response***

*The Applicant's performance management-related claims are moot because the Applicant was separated from the IFC due to her transition to LTD, not poor performance, and the IFC acted in good faith and in the Applicant's best interests*

54. The IFC contends that the Applicant's performance management-related claims are moot because the Applicant was not separated from the IFC as a result of poor performance, but rather due to her transition to LTD pursuant to Staff Rule 6.22, paragraph 5.11.

55. The IFC contends that management acted in good faith and in the Applicant's best interests due to the following:

Rather than initiate the recommendation for non-confirmation pursuant to [the] Applicant's poor performance, [the IFC] suspended [the] Applicant's probation until [the Applicant] became eligible for LTD. By doing so, [the IFC] ensured that [the] Applicant remained eligible to participate in the Staff Retirement Plan ([the

IFC] covers both the WBG's and the Staff Member's applicable contributions at 100% of Final Net Salary), [the] Applicant continues to remain eligible for [the] Retiree Medical Insurance Plan ([the IFC] covers the full cost of the Staff Member's premium contributions), and [the] Applicant continues to participate in the Retiree Group Life Insurance Plan ([the IFC] covers the full cost of the Staff Members' premium contributions). Had [the] Applicant's Manager implemented the recommendation of non-confirmation of [the] Applicant's appointment prior to [the] Applicant's approval for STD, [the] Applicant would have been terminated for poor performance and would not have been eligible for the benefits described above. As long as [the] Applicant continues on LTD, [the] Applicant remains entitled to these benefits, at no cost to [the] Applicant.

56. Further, the IFC contends that the Applicant would not have been eligible for rehire, pursuant to Staff Rule 4.01, paragraph 8.07, had management enacted the recommendation for the non-confirmation of the Applicant's appointment. The IFC avers that, should the Applicant's health improve and the Applicant be deemed fit to return to work, the Applicant remains eligible for employment within the WBG.

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

*The IFC failed to follow the applicable Staff Rules and Principles of Staff Employment around the confirmation/non-confirmation of her probationary period*

57. The Applicant contends that, although the Manager informed her on 18 December 2018 and 28 January 2019 that she would be recommended for non-confirmation, the Manager failed to perform any action as the end date of her probationary period approached and instead informed the Applicant informally that her probationary period had been "suspended." The Applicant contends that the Manager's decision to "suspend" the Applicant's probationary period rather than terminate it "amounts to a move to prevent the Applicant from being able to contest the decision." To the Applicant, the Manager suspended the Applicant's probationary period as a "means to insulate her managerial decision from review" because she avoided making a decision to confirm the Applicant's appointment, extend her probationary period, or terminate the Applicant's employment, which the Applicant asserts is "mandatory" according to the Staff Rules.

58. The Applicant contends that the Manager was “bound” to perform actions and procedures laid out in system-generated email reminders by HR Operations, yet failed to perform these actions and procedures. The actions referred to by the Applicant in the aforementioned emails provided guidelines on the length of the probationary period, the evaluation and confirmation/non-confirmation processes, and procedural steps for managers related to probation.

59. Last, the Applicant contends that the absence of contemporaneous documentation throughout the Applicant’s probationary period created a situation whereby it was difficult to ascertain whether managerial discretion was exercised fairly and transparently. The Applicant notes that, despite the two notifications she received informing her that her employment would be terminated, there was no decision to terminate.

#### ***The IFC’s Response***

*The IFC followed proper process, treated the Applicant fairly, and gave the Applicant every opportunity to succeed*

60. The IFC contends that the Manager followed proper process with respect to the Applicant’s probationary period pursuant to Principle 4.1(c) of the Principles of Staff Employment, Staff Rule 4.02, and the Tribunal’s jurisprudence relating to confirmation and non-confirmation decisions during or at the end of the probationary period. The IFC further contends that the Manager provided the Applicant with written notice, both that her performance was unacceptable and of the possible outcome of the Applicant’s behavior.

61. The IFC avers that the Applicant was treated fairly and given every opportunity to succeed. Specifically, the IFC asserts that, in addition to its efforts to give the Applicant a fresh start “at a lower level in a new unit reporting to a different manager,” the Manager (i) gave the Applicant four weeks to apply for STD benefits following the Manager’s 18 December 2018 email that stated her intention to initiate non-confirmation and (ii) never initiated the implementation memorandum recommending the non-confirmation of the Applicant’s appointment, thereby preserving several benefits for the Applicant and negating the Applicant’s claim that the Manager’s actions were pre-



determined and arbitrary. The IFC contends that the record demonstrates that the Manager's actions were, at all times, justifiable and within her discretion.

62. The IFC avers that the Applicant has failed to demonstrate how the IFC's action, namely extending the Applicant's probationary period, has adversely affected the Applicant. The IFC asserts that in fact its decision to "extend [the] Applicant's probation long enough for [the] Applicant to transition to LTD" had the opposite effect and ensured that the Applicant remained eligible for the benefits mentioned in paragraphs 55 and 56 above. The IFC further asserts that, on 3 June 2019, HR and the Manager "extended" the Applicant's probationary period, which was due to end the next day, partly because at the time the Applicant had been on STD for over 20 months and "was in the process" of being assessed for eligibility for LTD pursuant to Staff Rule 6.22, paragraph 5.10. The IFC contends that the Applicant's claim must be dismissed because the Applicant suffered no adverse effects due to its actions.

63. Further, in response to the Applicant's claim that the Applicant was denied the opportunity to comment on the non-confirmation recommendation of the Applicant's appointment in breach of Staff Rule 4.02, the IFC contends that the claim is moot and factually wrong because the non-confirmation recommendation was never submitted to the Applicant's Director and, consequently, the Applicant's right to provide comments thereon was never violated.

### ***The Applicant's Contention No. 3***

#### *The Applicant's separation from the IFC is a result of retaliation*

64. The Applicant contends that her non-confirmation and separation from the IFC are a result of retaliation. The Applicant contends that in July 2018 she performed a protected activity by reporting to EBC various misconduct at the IFC, including hostile work environment, unfair treatment, abuse of discretion, sexual harassment, and retaliation, as well as financial misconduct relating to procurement and the vendor selection process for IT projects. The Applicant avers that her "world fell apart" shortly after performing these protected activities in good faith.

65. The Applicant asserts that IFC management's behavior toward her – “the unexpected and unfounded allegations” regarding her performance and behavior that were used as the basis of the “recommendation for termination” – made her feel that she was retaliated against because of the report she made to EBC. The Applicant asserts that she sought the assistance of the Ombudsman, PRS, and EBC to “get to the bottom” of the Manager's actions and decisions “as they seemed irrational.” Finally, the Applicant contends that she is a whistleblower and should therefore benefit from the protections and rights afforded under Staff Rule 8.02.

### ***The IFC's Response***

#### *The Applicant has failed to establish a prima facie case of retaliation*

66. The IFC contends that, as with the Applicant's contentions relating to the non-confirmation inaction, the Applicant's contention that she should have benefitted from whistleblower status is moot. Specifically, the IFC asserts that the Applicant was not separated from the IFC as a result of an adverse employment action following alleged participation in a protected activity, but rather the Applicant was separated from the IFC as a result of her transition to LTD.

67. Notwithstanding the mootness issue, the IFC avers that the Applicant has failed to establish a *prima facie* case of retaliation. The IFC asserts that EBC thoroughly investigated the Applicant's allegations and determined that the “Applicant did not provide any evidence, or offer any other basis to believe,” that the Applicant's Manager took any adverse action against the Applicant based on any protected activity. Instead, the IFC asserts, the Manager's emails detailed performance-related concerns that ultimately led the Manager to indicate that she would not confirm the Applicant's appointment. The IFC further asserts that these concerns included the Applicant (i) leaving a team meeting abruptly, (ii) mischaracterizing the Manager's comments as insults against the Applicant, (iii) asking the IT Colleague who his manager was and then declining to apologize, and (iv) generally communicating with the Manager in an insulting manner.

## THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

WHETHER THE IFC FAILED TO FOLLOW A FAIR AND PROPER PROCESS WITH RESPECT TO THE  
APPLICANT'S SEPARATION FROM THE IFC

68. Principle 2.1 of the Principles of Staff Employment provides that the WBG “shall at all times act with fairness and impartiality and shall follow a proper process in [its] relations with staff members.”

69. Staff Rule 4.02, paragraph 3.02, in place at the relevant time, sets out the requirements for non-confirmation of an appointment at the end of the probationary period, as follows:

At any point during or at the end of the probationary period, the staff member's Manager may recommend to end a staff member's employment by non-confirmation of appointment. The written recommendation to not confirm must be supported by: prior written notice to the staff member concerning deficiencies in his/her performance, technical qualifications, or professional behaviors; reasonable guidance and opportunity to demonstrate suitability for the position, and warning that failure to do so may result in termination. The staff member shall be provided an opportunity to comment on the recommendation. The recommendation, together with any comments of the staff member, shall be submitted to the Manager's Manager (at Level GI or above) for decision, which shall be made in consultation with the Manager, Human Resources Team and with notice to the staff member's Vice President. Termination procedures are specified in Section 6 of Staff Rule 7.01.

70. Regarding disability, Staff Rule 6.22, paragraph 5.10, provides:

If a staff member remains on Short-Term Disability for 20 months from the start of Disability, the Disability Administrator assesses the staff member's eligibility for Long-Term Disability (LTD) Benefits. If, in accordance to said assessment, the Disability Administrator determines that the staff does not qualify for LTD Benefits or will not qualify for Disability Benefits at the conclusion of the 24 months STD period, the provisions of paragraph 5.08, of this Rule, apply.

71. Staff Rule 6.22, paragraph 5.11, provides:

Staff who are approved for LTD Benefits following 24 months of STD Benefits, are separated from the Bank Group's employment in accordance with Staff Rule 7.01, "Ending Employment," paragraphs 7.01–7.06, "Ending Employment as a Consequence of Ill Health," and provided LTD Benefits in accordance with paragraphs 6.01–6.04 "Long-Term Disability (LTD)," of this Rule.

72. The Applicant asserts that the Manager's decision to recommend her for non-confirmation was pre-determined, premature, and arbitrary, and as a result the Applicant was not given a fair opportunity to achieve and sustain a satisfactory performance that should have preceded the non-confirmation decision as specified in Staff Rule 4.02, paragraph 3.02. The Applicant further asserts that the Manager failed to document the Applicant's performance in writing on an ongoing basis, and that the Manager never raised any performance issues with her during their one-on-one meetings.

73. The IFC asserts that the Applicant's performance management-related claims are moot because the Applicant was not separated from the IFC as a result of poor performance, but rather due to her transition to LTD pursuant to Staff Rule 6.22, paragraph 5.11. The IFC asserts that management acted in good faith and in the Applicant's best interests in the way it handled the separation as it managed to preserve for the Applicant LTD benefits and the possibility of being rehired.

74. The Tribunal will first consider whether the Applicant was separated from the IFC through the non-confirmation of her appointment or through approval of LTD benefits.

75. The Tribunal observes that on two occasions, 18 December 2018 and 28 January 2019, the Manager informed the Applicant via email that she would make a recommendation to terminate the Applicant's appointment by non-confirmation, per Staff Rules 4.02 and 7.01. In the latter email, the Manager informed the Applicant that, given the fact that she was currently on STD, the Manager would suspend submission of her implementation memorandum recommending non-confirmation until the earlier of (i) if or when the Applicant returned from STD or (ii) the end of the Applicant's extended probationary period.

76. The Tribunal notes that the Manager never implemented the recommendation for non-confirmation because neither condition that she mentioned in her 28 January 2019 email occurred. The record shows that the Applicant never returned to work after she was retroactively approved for STD benefits beginning on 23 October 2018. The Tribunal observes that the IFC, in consideration of the Applicant's pending claim and assessment for LTD benefits pursuant to Staff Rule 6.22, paragraph 5.10, extended the Applicant's probationary period on 3 June 2019 to 21 August 2019 to coincide with the end of the Applicant's STD benefits. The Tribunal further observes that, on 6 June 2019, the Disability Administrator notified the Applicant of her approval for LTD benefits and that, on 22 August 2019, the Applicant was separated from the IFC pursuant to Staff Rule 6.22, paragraph 5.11.

77. In a letter to the Applicant, dated 6 June 2019, the Disability Administrator wrote:

We are writing to inform you that your claim for LTD benefits has been approved. We have determined that you presently meet the definition of disability as outlined in the World Bank Group Staff Rules. Our records indicate you became disabled on April 14, 2017. Therefore, your LTD benefit will be effective August 22, 2019. Your employment with the World Bank Group ends on August 22, 2019.

78. Further, on 7 June 2019, HR wrote to the Applicant, stating, "In light of your approval for Long Term Disability (LTD), your probation period is suspended until you transfer to LTD."

79. The Tribunal is therefore satisfied that the Applicant was separated from the IFC through the approval of her LTD benefits, which she was notified of by the Disability Administrator, and that she was not separated from the IFC through non-confirmation of her appointment or any other decision by IFC management.

80. The Tribunal will next consider whether the IFC followed a fair and proper process with respect to the Applicant's separation from the IFC due to her transfer to LTD.

81. The Tribunal observes that, despite the Manager's decision to recommend non-confirmation of the Applicant's appointment in December 2018, the Manager postponed

implementing her recommendation for non-confirmation and extended the Applicant's probationary period in consideration of the Applicant's disability leave status. The record shows that in the Manager's 18 December 2018 email to the Applicant, prior to her being informed that the Applicant had already filed for STD benefits, the Manager stated that she would give the Applicant four weeks to file her STD claim. The Tribunal observes that, in the Manager's 28 January 2019 email to the Applicant, she stated that she would suspend implementation of her recommendation for non-confirmation until either the Applicant returned from STD or the end of the Applicant's extended probationary period. The Tribunal observes that, on 3 June 2019, management extended the Applicant's probationary period in view of her pending LTD claim.

82. The Tribunal considers that, by not taking steps to implement the recommendation for non-confirmation and by extending the Applicant's probationary period, the IFC allowed the STD and LTD processes to reach their respective conclusions. This ultimately allowed the Applicant to transition to LTD status and preserve her LTD benefits, which included 70% disability pay and continued participation in the SRP, Retiree Medical Insurance Plan, and Retiree Group Life Insurance Plan. The Tribunal takes note of the IFC's position that, had the Manager implemented the recommendation of non-confirmation prior to the Applicant's transfer to LTD, the Applicant would have been (i) terminated for poor performance, (ii) ineligible for the benefits mentioned above, and (iii) ineligible for rehire, pursuant to Staff Rule 4.01, paragraph 8.07. Based on the foregoing, the Tribunal finds that the IFC treated the Applicant fairly and acted in good faith during the STD and LTD processes.

83. Based on the record, the Tribunal finds that IFC management followed a fair and proper process with regard to the Applicant's separation from the IFC.

WHETHER THE IFC FAILED TO FOLLOW A FAIR AND PROPER PROCESS WITH RESPECT TO THE  
APPLICANT'S PROBATIONARY PERIOD

84. Principle 4.1(c) of the Principles of Staff Employment states, "An appointment for more than a year shall normally commence with a probationary period to allow The World Bank or the IFC and the staff member to assess their suitability to each other."

85. Staff Rule 4.02, paragraph 2.02, in place at the relevant time, provides:

During the probationary period, the Manager or Designated Supervisor shall:

- a. as soon as practicable, meet with the staff member to establish the staff member's work program; and
- b. provide the staff member feedback on the staff member's suitability and progress based on achievement of the work program, technical qualifications and professional behaviors.

86. Staff Rule 4.02, paragraph 3.02, sets out the requirements for non-confirmation of an appointment at the end of the probationary period as quoted earlier.

87. In *Salle*, Decision No. 10 [1982], para. 50, the Tribunal emphasized the importance of due process because "[t]he very discretion granted to the [Bank] in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected."

88. In *McNeill*, Decision No. 157 [1997], para. 44, the Tribunal stated that the Bank has a duty to meet what the Tribunal has called "the appropriate standards of justice" (*Buranavanichkit*, Decision No. 7 [1982], para. 30). While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.

89. In *Zwaga*, Decision No. 225 [2000], para. 38, the Tribunal held

that one of the basic rights of an employee on probation is the right to receive adequate guidance and training (*Rossini*, Decision No. 31 [1987], para. 25) and that it is its duty to make sure that the Bank's obligation to provide a staff member on probation with adequate supervision and guidance has been complied with in a reasonable manner. (*Salle*, Decision No. 10 [1982], para. 32.)

*See also Liu*, Decision No. 387 [2008], para 19.

90. In *Samuel-Thambiah*, Decision No. 133 [1993], para. 32, the Tribunal recognized the elements of due process, in the context of probation, as follows:

First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself.

91. The Applicant asserts that the Manager informed her on two occasions, 18 December 2018 and 28 January 2019, that she would recommend the Applicant for non-confirmation yet failed to perform any action as the end date of her probationary period approached and instead informed the Applicant informally that her probation had been "suspended." The Applicant contends that the Manager's decision to "suspend" the Applicant's probationary period rather than terminate it "amounts to a move to prevent the Applicant from being able to contest the decision." The Applicant further asserts that the absence of contemporaneous documentation throughout the Applicant's probationary period created a situation whereby it was difficult to ascertain whether managerial discretion was exercised fairly and transparently. The Applicant notes that, despite the two notifications she received informing her that her employment would be terminated, there was no decision to terminate.

92. The IFC asserts that the Manager followed a proper process with respect to the Applicant's probationary period pursuant to Principle 4.1(c) of the Principles of Staff Employment, Staff Rule 4.02, and the Tribunal's jurisprudence relating to confirmation and non-confirmation decisions during or at the end of the probationary period. The IFC further contends that the Manager provided the Applicant with written notice, both that her performance was unacceptable and of the



possible outcome of the Applicant's behavior. The IFC avers that the Applicant was treated fairly and given every opportunity to succeed.

93. The Tribunal observes that in March 2017, during the Applicant's mid-year assessment, the Applicant's Supervisor advised the Applicant that she would have to show significant improvement in specific areas in order for her appointment to be confirmed. The Tribunal observes that the Applicant went on STD from April 2017 to June 2018 and that, preceding her return, the Applicant and IFC management agreed that she would be assigned to a lower-level position to give her a better chance to meet her performance objectives. The record shows that during that time the Applicant was also reassigned to a new position in a different unit, reporting to a different manager. The record further shows that, shortly after the reassignment, the Applicant was provided with a new Terms of Reference.

94. The record shows that, after the Applicant joined her new unit, she became involved in many interpersonal disputes with her colleagues and Manager. During this time, the Manager held regular meetings with the Applicant regarding her workplan. The Manager also provided the Applicant with guidance to address those interpersonal disputes. The Tribunal notes that, on 23 October 2018, the Manager put the Applicant on notice via email that her performance was not acceptable and warned her that, if there was no improvement, the Manager would recommend the non-confirmation of the Applicant's appointment.

95. The Tribunal observes that, on 18 December 2018, the Manager emailed the Applicant informing her that she would make a recommendation "to end [the Applicant's] appointment by non-confirmation of appointment." The Tribunal recalls that, on 28 January 2019, the Manager emailed the Applicant, stating:

Notwithstanding your current STD status, I must inform you again that I am not confirming your appointment due to your hostile and unprofessional behaviors towards me and our colleagues; those behaviors were the most salient feature of your tenure in our VPU. You have been notified of these unacceptable behaviors by me and your prior managers. Such behaviors and hostility do not indicate a good fit in our department and with the WBG.

Given your current STD status, however, I am suspending submission of my implementation memo recommending non confirmation of your appointment until the earlier of: (a) if, as and when you may return to duty from STD; or (b) the end of your extended probationary period – whichever arrives first.

Immediately upon your return or the end of your extended probationary period, I shall submit my written recommendation not to confirm your appointment, for the above stated reasons, and provide you 14 calendar days to respond as per Staff Rule 4.02 & Staff Rule 7.01[, paragraphs] 7.01–7.05.

96. Based on the foregoing, the Tribunal concludes that the IFC treated the Applicant fairly, gave the Applicant adequate opportunities to succeed, and followed a proper process pursuant to Staff Rule 4.02. The Tribunal is satisfied that the IFC followed a fair and proper process during the Applicant’s probationary period until the separation due to her transfer to LTD.

#### WHETHER THE APPLICANT’S SEPARATION FROM THE IFC WAS BASED ON RETALIATION

97. The Tribunal will now consider whether the Applicant’s separation from the IFC was based on retaliation.

98. The Tribunal observes that retaliation is prohibited under the Staff Rules. In *Bauman*, Decision No. 532 [2016], para. 95, the Tribunal held:

As the Tribunal has frequently observed, the Staff Rules are clear that retaliation against any person “who provides information regarding suspected misconduct or who cooperates or provides information in connection with an investigation or review of allegations of misconduct, review or fact finding, or who uses the Conflict Resolution System” is prohibited. *See* Staff Rule 3.00, paragraphs 6.01(g) and 7.06, and Staff Rule 8.01, paragraph 2.03; *see also* CS, Decision No. 513 [2015], para. 104; *Sekabaraga (No. 2)*, Decision No. 496 [2014], para. 60. This prohibition extends also to retaliation against any person who is believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken.

99. Staff Rule 8.02, paragraph 3.01(a), provides as follows:

Where a [s]taff [m]ember has made a *prima facie* case of retaliation for an activity protected by this Rule (i.e., by showing that the [s]taff [m]ember 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 [s]taff [m]ember’s protected activity.

100. The Tribunal has confirmed that, if an applicant makes a *prima facie* case or has pointed to facts “that suggest that the Bank is in some relevant way at fault,” then “the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.” *BI*, Decision No. 439 [2010], para. 47; *de Raet*, Decision No. 85 [1989], para. 57.

101. The Tribunal has made clear, however, that “[i]t is not enough for a staff member to speculate or infer retaliation from unproven incidents of disagreement or bad feelings with another person.” *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 nevertheless 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.

102. The Applicant asserts that her non-confirmation and separation from the IFC are a result of retaliation. The Applicant contends that in July 2018 she performed a protected activity by reporting to EBC various misconduct at the IFC, including hostile work environment, unfair treatment, abuse of discretion, sexual harassment, and retaliation, as well as financial misconduct relating to procurement and the vendor selection process for IT projects. The Applicant avers that her “world fell apart” shortly after performing these protected activities in good faith.

103. The IFC asserts that, as with the Applicant’s contentions relating to the non-confirmation inaction, the Applicant’s contention that she should have benefitted from whistleblower status is moot. Specifically, the IFC asserts that the Applicant was not separated from the IFC as a result of

an adverse employment action following alleged participation in a protected activity, but rather the Applicant was separated from the IFC as a result of her transition to LTD.

104. The Tribunal notes that the Applicant brought two separate retaliation allegations to EBC in November 2020. The Tribunal observes that in September 2021 EBC wrote to the Applicant informing her that it had closed its review of the Applicant's case at the preliminary inquiry stage due to insufficient evidence to support the Applicant's allegations.

105. The Tribunal observes EBC's finding from its preliminary inquiry, that, with regard to the Applicant's first retaliation allegation against the IT Colleague, EBC found that the Applicant had not engaged in a "protected activity."

106. The Tribunal further observes EBC's finding that, with regard to the Applicant's second retaliation allegation against the Manager for "fabricating performance concerns" about the Applicant and indicating that she was prepared to initiate non-confirmation of the Applicant's appointment in retaliation for reporting IFC management to EBC in July 2018, EBC determined that the Applicant's belief that the Manager was aware of the Applicant's reports to EBC and the Staff Association was "speculation" and that there was "no direct or even circumstantial evidence" that the Manager was aware of the Applicant's previous reports of misconduct to EBC.

107. The Tribunal notes the Applicant's statement in the record that, "[t]o date, no body or forum has been able to get to the bottom of the Applicant's case: she performed a protected activity in good faith when she was at the IFC and her world fell apart shortly thereafter." However, the Tribunal observes that the record is devoid of evidence to support this statement. The Tribunal recalls that in *Bodo*, Decision No. 514 [2015], para. 77, it stated:

[A]n applicant asserting discrimination or retaliation must still make a *prima facie* case with some evidence to show the discriminatory or retaliatory motives behind the impugned decision. Without any elaboration on [the applicant's] claims or evidence of actual or perceived retaliation and discrimination by the [applicant's manager], the [a]pplicant has given the Tribunal little to deliberate on.

*See also Bhadra*, Decision No. 583 [2018], para. 83.

108. Further, the Tribunal finds that the record shows that the Manager's emails detailed performance and behavior-related concerns that ultimately led the Manager to indicate that she would recommend non-confirmation of the Applicant's appointment, including the Applicant leaving a team meeting abruptly, mischaracterizing the Manager's comments to her as insults, and asking the IT Colleague who his manager was and refusing to apologize, as well as generally communicating with the Manager in an insulting manner.

109. The Tribunal also finds that the record shows that the Applicant was separated from the IFC as a result of her transfer to LTD, following notice to her on 6 June 2019 by the Disability Administrator that her claim was approved, pursuant to Staff Rule 6.22, paragraph 5.11, not by any action or inaction taken by the Manager or IFC management.

110. Based on the record, including the conclusions reached by EBC, the Tribunal finds that the Applicant has failed to make a *prima facie* case of retaliation and that the Applicant's separation from the IFC was not based on retaliation.

## DECISION

The Application is dismissed.

/S/ Mahnoush H. Arsanjani

Mahnoush H. Arsanjani

President

/S/ Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., 18 November 2022\*

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\* Judge Burgess attended deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary.