

Decision No. 337

**O,
Applicant**

v.

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

1. The World Bank Administrative Tribunal has been seized of an application, received on April 8, 2004, by O against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Elizabeth Evatt (a Vice President of the Tribunal) as President, Robert A. Gorman, Sarah Christie and Florentino P. Feliciano, Judges.

2. The Bank raised a jurisdictional objection which was decided by the Tribunal on November 12, 2004. In O, Decision No. 323 [2004], the Tribunal concluded that it had jurisdiction to consider the merits of two of the Applicant's claims: the extension of the Performance Improvement Plan ("PIP") in November 2001 and the January 16, 2002 performance-assessment memorandum. The President of the Tribunal directed the parties to file their subsequent pleadings on the merits with respect to these claims. The Applicant in her application of April 8, 2004 requested that the Tribunal hold oral proceedings. The Respondent made a similar request in its answer. The Tribunal informed the parties that it would hold oral proceedings, and provided them with the procedural rules for these proceedings, which were held on October 31, 2005. After the usual exchange of pleadings, the case was listed on November 2, 2005 for decision on the merits of the application.

The Relevant Facts

3. The Applicant, who has worked in the Bank's Legal Vice Presidency in different units since 1986, is a Senior Counsel at Level G.

4. In March 2000, the Applicant's manager in the Legal Department (LEG), East Asia and Pacific Division (LEGEA), referred to the Office of Professional Ethics a statement of travel expenses that the Applicant had prepared. He apparently believed that the statement showed that the Applicant had intended to defraud the Bank. The Ethics Office investigated the referral and on April 6, 2000 concluded that, despite certain discrepancies, there was no basis for finding that the statement demonstrated any intent to defraud. Nonetheless, there was continuing correspondence between the Applicant and her manager concerning her claim for travel expenses, which claim remained unpaid until approximately the end of June 2000. On July 6, 2000, the Applicant requested mediation from the Bank's Mediation Office because of the referral of her statement of travel expenses to the Ethics Office, and because of other issues.

5. In the summer of 2000, the Respondent's Country Director for the Philippines, Mr. Vinay Bhargava, complained to the Applicant's manager about the Applicant's ability to work effectively with the country team. He requested that the Applicant no longer work on a project dealing with judicial reform in the Philippines. According to the Respondent, the Country Director was of the view that the Applicant was argumentative and in certain respects showed poor judgment. The Applicant was replaced on this and other projects. She considers that this was a retaliatory measure for, among other things, her having earlier made a complaint about the alleged misconduct of her then manager.

6. On August 8, 2000, the Applicant wrote to Mr. Douglas Webb, the Managing Counsel in the Legal

Department, with a copy to Mr. Ko-Yung Tung, the General Counsel of the Bank, complaining about the referral of her travel claim to the Ethics Office, and listing a number of other instances showing that her manager's conduct had tended to undermine Bank policies in relation to the implementation of a number of projects and that he had improperly interfered with her work assignments. Her e-mail concluded by soliciting Mr. Webb's advice and guidance. On September 28, 2000, the Applicant sent a further e-mail to Mr. Webb about the fact that some of her work in the Philippines had been assigned to other lawyers. She reiterated some of the complaints of her August 8 letter, which remained unresolved. She requested the Bank's Legal Department to rectify her reassignment and to initiate an inquiry concerning it.

7. During October 2000, the Applicant's then manager left the Bank on an external assignment and did not return until February 2003. Before leaving the Bank, he completed the Applicant's 1999-2000 Overall Performance Evaluation ("OPE"). He rated the Results Assessment of the Applicant's performance as "Fully Successful" (for the Philippines Judicial Reform project, her East Asia law and gender work, and her knowledge management of the Bank's Legal and Judicial Reform thematic group) and "Superior" (for her operational work in the Philippines, Vietnam and Cambodia, and on Water Sector issues). In the Behavioral Assessment, however, the manager evaluated the Applicant's performance as having been only "Partially Successful." He considered that the Applicant's response to concerns he may have expressed from time to time was to exaggerate her own contributions to particular projects, to disparage the contributions of others, to use facts selectively in a manner that was at times misleading, and to be so adversarial as to escalate conflict. He stated:

This makes it very difficult to raise performance issues with her without the risk of unwarranted, retaliatory attacks which are quite defamatory in nature. ... To the extent [O] had genuine concerns, [O] has preferred to escalate them rather than discuss them promptly and resolve them.

[O] does not appear to recognize the serious institutional risks raised by her behavior. It appears that [O] sees these issues as merely bureaucratic/procedural.

8. The Applicant's manager identified specific incidents in support of his assessment of her behavior. One of these related to the Judicial Sector Study for the Philippines, which the Applicant had drafted and circulated to the Bank's Executive Directors and to the Government of the Philippines before securing the required clearance from her manager or the Country Director. This was despite her having been made aware that the document was highly sensitive and that there were differences of opinion in the Bank about whether the conclusions were adequately supported by reliable evidence.

9. Other instances cited in the Applicant's 2000 OPE related to her manager's concern that the Applicant had not clearly separated her private travel arrangements from her professional work responsibilities. On one occasion, she had told her manager that she intended to travel to Amman for a personal purpose, but despite this changed her travel plans and, after traveling to Jordan unannounced, initiated contacts with Jordanian government officials in relation to highly sensitive water sector issues. She did this without authorization, without informing her manager, and without informing management in the Water and Environment Sector. The OPE stated that this had caused irritation with her counterparts in the Region. The Applicant later admitted that this was a mistake.

10. The Applicant's manager concluded in the 2000 OPE:

I hope that [O] will take this feedback constructively and fully address these concerns – which are not new to [O] and are shared by senior LEG management – so that she can be an effective member of the LEG team and realize her true potential. LEG management will monitor progress on these issues over the next performance period. [O] should feel free to raise with me or other concerned LEG managers any questions/clarifications on this and let us know if we can be of any assistance to her in addressing and resolving these matters.

11. On October 18, 2000, Mr. Tung reviewed the Applicant's 2000 OPE and concurred with her manager's assessment of her behavior, noting that "some of these issues" had occurred in previous assessments. He also requested that the Managing Counsel work with the appropriate individuals within and outside the Vice Presidential Unit (VPU) to institute a PIP to help the Applicant appreciate the impact of these tendencies both

on colleagues and on the work of the Bank.

12. The Managing Counsel, Mr. Webb, subsequently reviewed the Applicant's personnel file, spoke to staff in LEG and to one of her previous managers, and on October 24, 2000, met with the Applicant to discuss her performance and to give her feedback on her complaints respecting her manager, who had left the Bank earlier that month. He informed the Applicant that, in his view, the allegations which she had made to him in her August and September 2000 memoranda concerning her former manager were not well-founded. He advised her that, in his opinion, there were a number of shortcomings in her own performance, and that pursuant to the recommendation of the General Counsel in her OPE, he would implement a PIP. He specified that the Bank's concerns related to the following areas: (1) the Applicant's failure to accept normal managerial oversight; (2) her failure to disclose information required by managers to make decisions; and (3) her tendency to attribute improper motivations to colleagues where there is a legitimate difference of professional opinion. He informed her that she would be placed on a PIP for six months with effect from November 27, 2000. The plan was designed to run until May 27, 2001.

13. On November 16, 2000, Mr. Webb gave the Applicant written notice of the PIP and, as part of the PIP, the Applicant was reassigned to the Africa Practice Group under the supervision of Ms. Elizabeth Adu, then Acting Chief Counsel for Africa.

14. In respect of the three areas of concern identified, the PIP Work Plan, which Mr. Webb prepared for the Applicant for the six months of her PIP, set out the standards, the current evaluation and the required outcome by the end of the plan period. The first standard was "[f]ull compliance with decisions or instructions of immediate supervisor or senior management concerning activities as a staff member." The current evaluation identified that the Applicant had not kept her supervisors informed of her activities and had involved herself in activities that, according to her supervisor, were not relevant to her current responsibilities. The required outcome was that the Applicant would keep her supervisors and other relevant staff in LEG "fully informed of her actions or intended actions, to enable normal managerial oversight and quality control"; that she would ensure "[c]onsistent compliance with instructions as to the scope of her activities"; and that she "[a]ccepts and complies with decisions by supervisor or senior management in the normal course of Bank activities." The second standard was "[f]ull voluntary and timely disclosure to supervisors of information required to enable them to make decisions on matters with which she is concerned." The Applicant was evaluated as having made inadequate disclosures of relevant information and as having made misleading statements. The required outcome was: "Consistent disclosure to supervisors of accurate and complete information known to her and required by supervisors to carry out their responsibilities. No misleading statements." The third standard called for "[p]rofessional respect for colleagues and avoidance of any attribution of improper motives on the part of colleagues unless fully substantiated to senior management." The Applicant's performance was recorded as having been "[u]nsatisfactory. Claims of [sic] credit for preserving the application of Bank policies against the improper actions of other colleagues where legitimate differences of opinion concerning policy interpretation or application exist." The required outcome was: "Does not blame colleagues or allege improper motives for actions within the normal scope of Bank activities."

15. The monitoring process envisaged by Mr. Webb in the PIP Work Plan stated:

Your supervisor and I will meet with you once a month, or more frequently if required, to provide you with feedback, to clarify your performance objectives and standards further, if necessary, and to review your progress. For this purpose, we may solicit feedback on your performance from other staff. We will also incorporate those steps of the annual performance management cycle which occur during this period.

16. The Applicant did not consider this PIP process fair. She claimed that the basis for the PIP was not her actual work performance but her former manager's unwarranted and improper assumptions about her performance. She persists in this view.

17. Although the PIP was designed to expire on May 27, 2001, the Respondent continued to administer it through the summer and into the fall of 2001. On June 21, 2001, Mr. Webb, Ms. Adu and Ms. Karungari Murira (a Human Resources (HR) Officer) met with the Applicant to discuss her OPE for the period April 1, 2000 to

March 31, 2001. In the course of discussing the OPE, the Applicant was informed that the PIP would be extended for a further six-month period, so as to expire on November 27, 2001.

18. The Applicant's 2000-01 OPE described her as "Fully Successful" in respect of her output as a lawyer, but only "Partially Successful" in respect of her "Behavioral Assessment." Although her conduct had improved during the first half of 2001, the Applicant's supervisor recorded that the Applicant's behavior still displayed some problems. The OPE recorded that, in relation to the three standards identified in the PIP, the Applicant had satisfactorily complied with all three, although Ms. Adu stated that in relation to a specific incident (i.e., "the Nigeria HIV/AIDS project"), "Ms. [O] needs to remain mindful of the need to include all affected parties in the discussion of issues." The Applicant had also sought work in the East Asia and Pacific Region (EAP) and had requested permission from Ms. Adu to travel to the Philippines (even though she was no longer involved in any work in the Philippines) and to stop over in Vietnam to discuss a gender report. Ms. Adu referred the Applicant to the Chief Counsel for LEGEA, who declined the Applicant's request regarding the trip to the Philippines. Ms. Adu noted that although the Applicant was disappointed with his decision, she accepted it and did not make the trip.

19. At the June 21, 2001 meeting to discuss the draft OPE, Mr. Webb considered that there had been instances of conduct similar to those which had given rise to the November 2000 PIP. On October 12, 2001, Mr. Webb finalized the Applicant's 2000-01 OPE and confirmed in writing what he had said on June 21, 2001, i.e., that the PIP would be extended until November 27, 2001.

20. On November 13, 2001, Mr. Webb addressed a further memorandum to the Applicant in which he referred to the June 2001 OPE meeting. In this memorandum, he set forth his conclusion that she had not "demonstrated a sustained improvement" in her performance, and he informed her that the PIP would remain in force until December 31, 2001. During this extended PIP period, she would continue to work in the Africa Practice Group supervised by Ms. Adu. Mr. Webb further informed her that Mr. Tung had concurred with his conclusions.

21. According to the Respondent, the Applicant's professional behavior improved during the second half of 2001. Her OPE for April 1, 2001 to March 31, 2002, which covers this period, describes the Applicant's Behavioral Assessment as "Superior" in respect of two categories, namely "Client Orientation" and "Drive for Results," and "Fully Successful" in respect of "Teamwork" and "Learning and Knowledge Sharing."

22. On January 16, 2002, Mr. Webb delivered to the Applicant a memorandum stating that, in his view, the Applicant's professional behavior had improved and that the PIP had been effective. The memorandum provided in part that:

On November 13 last year, I sent to you a memorandum, setting out the terms of an extension of your PIP until December 31, 2001. I noted in that memorandum that at the end of the plan period, your performance would be evaluated against the standards set out in the original plan of November 16, 2000.

The evaluation of your performance has now been completed, based on reports received from [the Chief Counsel of Africa Practice Group, Legal Vice Presidency (LEGAF)], which in turn drew on input from regional and LEGAF staff. I am pleased to say that [the Vice President and General Counsel of the World Bank] has accepted my assessment that your performance has improved significantly, and accordingly the plan will not be further extended. I congratulate you on your response to the feedback you have received and the efforts you have made to remedy the concerns of the VPU [Vice-Presidential Unit] which led to the original plan.

At the same time, it is important that you sustain this improvement, and avoid any recurrence of the behaviors that led to those concerns. The standards of performance you have displayed while on the PIP are the baseline standards that we expect you to perform while carrying out your present duties and responsibilities. At the minimum therefore, you are expected to exhibit these performance standards consistently. Any slippage from these standards would not be acceptable, and would require us to

consider all our options, including separation from the Bank on performance grounds.

23. The Applicant immediately expressed concern to Mr. Webb about this language because she considered that it indicated that she could be summarily dismissed without the Respondent having to comply with its obligations under the Staff Rules. Mr. Webb, together with Ms. Patricia Neill, Manager of the Unit's HR team, consulted with the Applicant and on January 24, 2002 he wrote to the Applicant to assure her that the due process requirements contained in the Staff Rules would be complied with.

24. At various times during 2002, the Applicant sought to resolve the conflict between herself and the Respondent by mediation within the Bank's Conflict Resolution System. On a number of occasions in 2002, the Appeals Committee Secretariat granted the Applicant, at her request, extensions of time within which to file an appeal before the Appeals Committee. The third and last mediation process terminated on May 5, 2003.

The Proceedings Before the Appeals Committee

25. On June 4, 2003, the Applicant filed her Statement of Appeal before the Appeals Committee. She sought review of: (1) the Philippines travel claim/Ethics investigation; (2) the reassignment of her Philippines-related work; (3) the initiation of the PIP in November 2000; (4) the extension of the PIP in November 2001; and (5) the January 16, 2002 memorandum terminating the PIP process. The Respondent raised a jurisdictional challenge and submitted that none of the grounds of appeal was receivable because the Applicant had not filed the appeal within the applicable time periods. On July 25, 2003, the Appeals Committee assumed jurisdiction to consider only the January 2002 memorandum concerning the termination of the PIP. It rejected all of the Applicant's other claims as being time-barred. On November 18, 2003, the Appeals Committee held oral hearings on the merits of the Applicant's claim regarding the language of that memorandum, and subsequently concluded that it was not arbitrary. The Appeals Committee therefore rejected the Applicant's appeal. On December 11, 2003, the Vice President of HR informed the Applicant that the Bank had accepted the Appeals Committee's recommendation that her appeal be denied.

26. The Applicant submitted her application to the Tribunal on April 8, 2004. As mentioned earlier, the Tribunal has assumed jurisdiction to determine the merits of the Applicant's claims only regarding the extension of her PIP in November 2001 and regarding the January 16, 2002 performance-assessment memorandum. The Applicant requests as relief an order requiring that: (1) the Bank clear from her personnel files all materials relating to her PIP, and that the Ethics complaint relating to the Statement of Expenses submitted for her mission to the Philippines in early 2000 be placed under seal; (2) the Bank retract the Managing Counsel's memorandum of January 16, 2002 and give the Applicant a written apology for the offensive language; (3) the Applicant be granted compensatory economic damages and moral damages for the economic loss and the professional and emotional stress, in the total amount of two years' salary; and (4) the Applicant be reimbursed for her legal costs.

The Parties' Contentions Regarding the Extension of the PIP

27. The Applicant claims that the decision to extend the PIP was arbitrary and that the Respondent was guilty of "failing to follow the Staff Rule on the Management of Performance." Particularly pertinent to the latter claim is Staff Rule 5.03, paragraph 3.02, which as then operable provided in relevant part:

(a) Normally, the performance improvement period shall not exceed six months. An extension beyond six months must be approved by the Vice President responsible for the position. ...

(b) At the beginning of the performance improvement period, the designated supervisor shall discuss with and provide the staff member a written notice of: (i) the performance improvement plan which includes the work program and the professional behaviors expected from the staff member during the performance improvement period, and (ii) the fact that failure to achieve a sustained level of satisfactory performance may result in termination from service at the end of the performance improvement period.

(c) No later than fourteen working days after the end of the performance improvement period, the

designated supervisor shall discuss and provide the staff member with a written evaluation. The evaluation shall specify satisfactory completion of the performance improvement plan or, in the event of less than satisfactory completion, any further action to be taken. The designated supervisor may recommend to the Vice President responsible for the position: (i) extension of the performance improvement period, or (ii) termination from service

28. As regards the procedure relating to the extension of the PIP, the Applicant claims that the requirements set forth in the quoted Staff Rule are "stringent" and that the Respondent did not comply with them in the following respects:

(i) The original PIP should have terminated on May 27, 2001 and as no action was taken in terms of paragraph 3.02(c) to extend the PIP, it lapsed. The Bank was not permitted to extend the PIP beyond the six-month period because by then it had already expired.

(ii) The meeting of June 21, 2001 was not properly constituted as a PIP evaluation because it was a discussion focused on the Applicant's annual performance review (i.e., her OPE) rather than on the PIP process.

(iii) Paragraph 3.02(c) calls for "a written evaluation" of the PIP within 14 working days after its scheduled conclusion. Apart from the note in the OPE signed by Ms. Adu on July 31, 2001, no written evaluation was provided to the Applicant.

(iv) There is no evidence that Mr. Tung formally approved the extension of the PIP.

29. With respect to the merits and fairness of the PIP extension, the Applicant claims that during the six months of the PIP from November 2000 until the date on which it was to expire, May 27, 2001. Ms. Adu did not make the Applicant aware of any aspects of her behavior concerning the PIP that were of concern to Ms. Adu. It was only on June 21, 2001 that the Applicant "learned there for the first time of the concerns about my performance." The record of the OPE meeting of June 21, 2001 noted "[O's] concerns that she did not feel she had received timely feedback on these areas of concern during the first PIP period, and agreed that her supervisor would hold periodic documented review meetings with her."

30. The Applicant further submits that the standards that the Bank required of the Applicant in the November 2000 PIP, and by association in its extensions first to November 2001 and then to December 31, 2001, were vague, subjective and "essentially a bureaucratic device to limit the attorney's exercise of his/her professional responsibilities."

31. The Applicant also argues that the PIP extension was a product of retaliation by her managers. She claims that Mr. Webb's decision to extend the PIP was affected by his negative attitude towards her because of the incidents in 2000 which led to some of her work in the Philippines being reassigned. She further infers that Ms. Adu was her supervisor and she, not Mr. Webb (whose attitude towards the Applicant was suspect), was in the best position to assess her performance.

32. The Respondent takes a considerably different view of the circumstances relating to the claims of abuse of discretion, violation of rules, and retaliation. According to the Respondent, the behavioral problems which the Applicant manifested during the period before Mr. Webb decided to implement the PIP in November 2000, and which continued during the PIP and led to its extension, had occurred from time to time throughout the Applicant's career at the Bank. Although the incidents referred to might reasonably be considered slight when viewed individually, they were collectively symptomatic of persistently unacceptable conduct.

33. The Respondent points out that toward the latter part of the PIP in the second quarter of 2001, there were a number of incidents which gave rise to concerns regarding the Applicant's behavior. The Respondent cites three separate such incidents. The first related to a request by the Applicant to stop over in Vietnam to discuss a report on Gender, and then to go to the Philippines to attend a centenary celebration for the Supreme Court of the Philippines. As reaching a determination on this request was outside Ms. Adu's terms of reference, she

referred the Applicant to the EAP Chief Counsel. The Applicant was not given approval for the trip to the Philippines and so did not make it, although she was said not “to be comfortable with the decision.”

34. The second incident related to the Nigeria HIV/AIDS project. The Applicant’s 2000-01 OPE recorded that some of her actions undermined the team in which she worked in the EAP Region. The OPE stated that

in a May videoconference on the Nigeria HIV/AIDS project, it appeared that she had discussed a project related issue with the country Director without the team leader being present. Ms. [O] needs to remain mindful of the need to include all affected parties in the discussion of issues.

Ms. Adu also stated in the OPE that

Ms. [O] can at times push her position to the point where she begins to lose her effectiveness and her “audience.” In this regard Ms. [O] needs to work on trying to understand other points of view in order to reach consensus (for example the issue of the special accounts during the negotiations for the Nigeria HIV/AIDS).

35. The third allegedly troubling incident cited by the Respondent was the Applicant’s request for payment for the dissemination of a Gender Assessment report for Vietnam which had been prepared by a Bank Consultant. When the Chief Counsel declined approval for the payment, the Applicant approached EAP Regional staff and Gender staff to raise the necessary finances, without referral to her supervisor, the Chief Counsel, LEGEA, or to the LEGEA Gender co-ordinator. Although the payment for the report itself had been approved, the Respondent considered the report unsuitable for dissemination using Bank funds.

36. The Respondent denies that the Applicant was unaware that her supervisors remained concerned about some aspects of her performance. It states that the OPE meeting on June 21, 2001 was a comprehensive oral assessment of the PIP process. Moreover, Ms. Adu gave the Applicant her 2001 OPE on July 31, 2001. So although it was only on October 12, 2001, when he signed the Applicant’s OPE as the Reviewing Manager, that Mr. Webb confirmed the extension of the PIP in writing, the Applicant knew of the performance problems and the decision to extend the PIP and the Applicant suffered no prejudice because of this.

37. The Respondent also rejects the Applicant’s claim that the PIP process was an improper reaction to her functioning as an independent counsel: “All lawyers in Legal are encouraged to provide independent and sound legal advice. The Applicant has not faced difficulties because she articulated independent views, but because all too often she showed poor judgment and did not meet performance standards required in her position.”

38. As for the Applicant’s claim of retaliatory motive for the PIP extension, the Respondent denies any such retaliation and states that Mr. Webb decided to extend the PIP based on his own review of the Applicant’s performance history and on advice from Ms. Adu. Neither he nor Ms. Adu had been connected with the decision of the Applicant’s previous manager in making his evaluation of her performance in 2000. The Applicant has tendered no evidence to support a finding that Mr. Webb had any ill-will against her. The Respondent argues that the Applicant had a good relationship with Ms. Adu and “under Ms. Adu’s guidance she improved her performance during the PIP extension and completed the PIP successfully.”

Whether the Decision to Extend the PIP Was an Abuse of Discretion or Retaliatory

39. It is established law that the substantive assessment of the performance of a staff member is a matter falling within the discretion of the Respondent and that such an assessment is final “unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.” (*Saberi*, Decision No. 5 [1981], para. 24. *See also Desthuis-Francis*, Decision No. 315 [2004], para. 19.) In *Marshall*, Decision No. 226 [2000], para. 21, the Tribunal also stated that even if Bank decisions “were not a product of intentional ill-will, they might still be overturned by the Tribunal if they were arbitrary or capricious.”

40. In her application to the Tribunal, the Applicant has alleged that management’s conduct towards her in imposing the PIP at the outset was threatening. The Tribunal, however, has no jurisdiction to review the Bank’s

decision to place the Applicant on the PIP in November 2000 (although it is clear that the Applicant did not accept its legitimacy). In any event, in her own remarks on her 2000-01 OPE the Applicant wrote that, notwithstanding that she “did not agree with the prior OPE, in a good faith effort to address concerns that were raised about my performance, I entered into a performance improvement plan for the six month period commencing November 27, 2001.”

41. The Applicant’s complaints about the vagueness of the required performance standards in her PIP are not persuasive. Although set out in the PIP in general terms, the Tribunal considers that these standards took on sufficient specificity in light of the Applicant’s employment history. They were also reasonably founded upon such principles as these: that the essentials of an employment relationship are based on mutual trust and confidence; that a staff member is required to account fully; and that even one who is required, as a senior attorney, to give expert advice, must do so with due deference to one’s peers and supervisors as well as to clients and other stakeholders, especially when there are differences of opinion among them.

42. The Tribunal concludes, however, that the Respondent’s claim that the Applicant continued to demonstrate problems during the first half of 2001 during the currency of the PIP lacks substance. None of the three incidents given as reasons for the extension of the PIP constituted a legitimate basis for the extension.

43. The first incident, i.e., the Applicant’s request to be granted permission to travel to the Philippines and Vietnam when she was no longer working in the EAP Region, along with her alleged resulting disappointment at the denial of such request regarding the trip to the Philippines, does not show that she violated any of the three standards that Mr. Webb identified in the PIP Work Plan of November 2000. These standards were: (a) “[f]ull compliance with decisions or instructions of immediate supervisor or senior management concerning activities as a staff member”; (b) “[f]ull voluntary and timely disclosure to supervisors of information required to enable them to make decisions on matters with which she is concerned”; and (c) “[p]rofessional respect for colleagues and avoidance of any attribution of improper motives on the part of colleagues unless fully substantiated to senior management.” The record shows that, in compliance with these standards, the Applicant requested permission from her supervisor and the EAP Chief Counsel to take the trip and that, even if uncomfortable with the denial of her request regarding the trip to the Philippines, she did not persist. Furthermore, the record indicates that this incident occurred in June 2001, as the Applicant made the request for this trip in that month. It is clear, therefore, that this incident fell outside the six-month period covered by the PIP (November 27, 2000 to May 27, 2001) and was taken into account only because the manager had failed to comply with the rules requiring a written evaluation within 14 working days of the end of the PIP period.

44. The second incident used as a basis for the extension of the PIP, i.e., the Nigerian HIV/AIDS project which occurred in May 2001, the last month covered by the PIP, was also not directly related to any of the three standards listed in the PIP Work Plan and presented immediately above. The Tribunal notes with particular regard to the third standard (professional respect for colleagues and avoidance of any attribution of improper motives on the part of colleagues unless fully substantiated to senior management) that although the Applicant did discuss an issue related to the Nigeria HIV/AIDS project with the Country Director without the Team Leader being present, she avoided blaming or attributing any improper motives to her colleagues as stipulated in the third standard. This was in fact noted by her supervisor, Ms. Adu, in the Applicant’s 2000-01 OPE, where she simply noted in this respect that the Applicant needed to remain mindful of the need to include all affected parties in the discussion of the issues.

45. Finally, similar to the first incident, the third incident used as a reason for the extension of the PIP, i.e., the Applicant’s attempt to raise additional funding for the dissemination of the Gender Assessment report for Vietnam, occurred in June 2001 (outside the six-month period covered by the PIP), and thus should not have been taken into account when considering the extension of the PIP. In the circumstances, the Tribunal finds that the purported decision to extend the PIP lacked any substance and was an abuse of discretion.

46. The Tribunal turns now to consider whether the purported extension of the PIP constituted improper retaliation. The Applicant claims that she was targeted by her managers for being forthright about misconduct and inefficiencies within the Bank. The Bank’s rule prohibiting retaliation is clear. The relevant version of Staff

Rule 8.01, paragraph 3.02, provided in part that: “Retaliation by a Bank staff member against any person who in good faith reports suspected misconduct is expressly prohibited and is grounds for disciplinary action under Staff Rule 8.01.”

47. The burden lies with an applicant to establish facts which bring his or her claim within the definition of retaliation under the Staff Rules. An applicant bears the onus of establishing some factual basis to establish a direct link in motive between an alleged staff disclosure and an adverse action. A staff member’s subjective feelings of unfair treatment must be matched with sufficient relevant facts to substantiate a claim of retaliation, which in essence is that the allegation of poor performance is a pretext to mask the improper motive. See *Madabushi*, Decision No. 257 [2001], para. 57, where the Tribunal concluded:

There is, however, nothing to support the view that the PIP was imposed on the Applicant in retaliation for any complaints he had made, or that he was prevented by the PIP from either pursuing these complaints or raising further issues. Once again, it was not retaliation within the meaning of Staff Rule 8.01.

48. The Tribunal finds no relevant evidence to support the Applicant’s claims that the decision to extend the PIP was retaliation for her alleged whistleblowing. Even if the Applicant were able to present convincing evidence that the incidents in 2000 relating to the differences she had with her former manager were a *sine qua non* for the PIP, this would not, without more, prove that its extension by other managers several months later was retaliatory. Although Mr. Webb and Ms. Adu knew that the Applicant had experienced problems with her supervisor before the Applicant was transferred from LEGEA, there is no evidence that Mr. Webb’s decision to extend the PIP was tainted by improper motive, let alone that it was retaliatory.

49. Although 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. The “Tribunal accepts that it is not always easy for an applicant to produce evidence to support a claim of retaliation” (*Harou*, Decision No. 273 [2002], para. 68). Nevertheless, the Staff Rule on the Management of Unsatisfactory Performance is a legitimate rule and the fact that a staff member has made a good faith complaint about alleged irregularities does not confer any immunity upon that person from managerial authority. An allegation of retaliation is an allegation of very serious impropriety on the part of the alleged perpetrator and the Tribunal should not lightly find retaliation when a manager has made a difficult decision in relation to a staff member, simply because some time before, that staff member had had a troubled relationship with another manager.

50. The Tribunal finds that although the justification for the extension of the PIP in the fall of 2001 lacked substance, the Applicant has not presented sufficient evidence to warrant a finding that the extension was a retaliatory measure.

Whether the Extension of the PIP Was Procedurally Improper

51. The implementation of a PIP is a serious matter and it is clear from the Staff Rules and the jurisprudence of the Tribunal that “[t]he very discretion granted to the Respondent 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.” *Salle*, Decision No. 10 [1982], para. 50. The core procedural guarantees are that the staff member has adequate notice of any performance or behavioral problems and an adequate opportunity to correct them. For example, in *Lopez*, Decision No. 147 [1996], para. 46, the applicant was given “specific warning” and put on notice that “[i]n the absence of a sharp and sustained improvement in the area where your performance is deficient” he was at risk of a decision being taken to terminate his service.

52. In complaining about unfair procedure, the Applicant makes the claim that at no stage during the six-month period of the PIP was she advised that her performance was wanting and it was only at the end of the six-month period, indeed after its expiry, and in the context of her later-prepared OPE that she was given such notice. The Respondent’s view is that because the Applicant knew of the problems and had informally been apprised of her managers’ concerns, no harm was done, certainly no compensable harm.

53. Although the Tribunal has no jurisdiction to pass directly upon the validity of the initial PIP of November 2000 and its implementation, how that program was administered does bear upon the decision to extend it beyond its initial expiration date of May 27, 2001. The PIP Work Plan stated that Mr. Webb and Ms. Adu would meet with the Applicant at least once a month to provide feedback, and Mr. Webb himself reflected this commitment in his memorandum to the Applicant on November 16, 2000 detailing the purpose and process of the PIP: "it is my judgment that your performance requires more intensive management than would occur in the regular course of your work." The Tribunal notes, however, that there is no clear evidence that formal meetings of this frequency actually occurred. As the Bank had established a procedure to deal with performance problems which it identified as requiring attention, the Bank should be expected to comply with that procedure.

54. The Tribunal has held that if a person is put on a PIP, that process calls for a monitored performance plan:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered. Even if the Respondent is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of its discretion. (*K. Singh*, Decision No. 188 [1998], para. 21.)

Lapses in performance should be identified when they occur and should be addressed expressly and promptly. They should not be held in reserve only to be disclosed at the end of a review period.

55. The Tribunal considers that the Bank failed to comply with fair and required procedures when it purported to extend the PIP. By merging the PIP evaluation into the process of conducting the Applicant's OPE on June 21, 2001, management mingled processes which are essentially different and lost sight of the specific purposes and the procedural requirements of a PIP and any extension of the process. A PIP is not part of a normal or routine oversight and evaluation. The process is one which, if not successfully discharged, can lead to a staff member's employment being terminated. The PIP is a special measure to deal with a serious problem and it calls for a specific process tailored to an individual staff member and to particular areas of unsatisfactory work performance.

56. By subsuming the PIP evaluation within the scope of the OPE process, the Bank violated proper procedure in a manner that may well have unfairly confused the Applicant and resulted in a tainted decision to extend the PIP. It must be pointed out that the Applicant's managers reviewed instances of her performance that fell within the 2001-02 OPE period one year early, namely during the 2000-01 OPE process. All three incidents that were the basis for the PIP extension (the Nigeria HIV/AIDS project; the request to travel to the Philippines and Vietnam when the Applicant was no longer working in the EAP Region; and the attempt to raise funds for the dissemination of the Gender Assessment report for Vietnam) took place in May and June 2001 and were therefore relevant to the 2001-02 OPE period, which began on April 1, 2001. The record shows, however, that none of these incidents was mentioned in the 2001-02 OPE in which the Applicant's performance was found fully satisfactory and superior in all respects. On the contrary, two of the three incidents (the Nigeria HIV/AIDS project and the Applicant's request to travel to the Philippines and Vietnam) were erroneously addressed in the 2000-01 OPE and were discussed in the meeting of June 21, 2001, because the Applicant's manager had tried to combine two essentially different processes, the OPE discussions and the PIP evaluation. Notably, the Applicant's attempt to raise funds for the dissemination of the Gender Assessment report for Vietnam, which formed the third reason for the extension of the PIP, was never addressed in any OPE, even though its putative seriousness as a reason for the extension of a PIP might have been reasonably worthy of a remark in the 2001-02 OPE.

57. The Tribunal is equally troubled by a number of failures to comport with the procedural requirements of the Staff Rules. In particular, the Bank's management disregarded the time periods established in Staff Rule 5.03, paragraph 3.02(c). Those periods are explicit and are couched in mandatory not permissive language: the designated supervisor is required to discuss the PIP with the staff member concerned and to provide the staff member with a written evaluation within 14 working days of the end of the PIP period. If, as in this case, the designated supervisor wishes to recommend extension of the period, a proposal should be put to the relevant Vice President. The representatives of the Bank complied with none of these requirements.

58. Moreover, even if the Tribunal were to find that there was substantial compliance with the duty to inform the staff member of the prospect of an extended PIP, this did not occur during the currency of the PIP. The Tribunal finds that by the time the June 21, 2001 meeting took place the PIP had already lapsed. Thus, Mr. Webb's oral notification on that date that the PIP would continue until November 27, 2001 was ineffective and of no legal consequence. It follows that Mr. Webb's written notification of the extension in the OPE signed on October 12, and the purported further extension of the PIP on November 13, 2001 until December 31, 2001 were also of no force or effect because the PIP had by its own terms already expired.

59. The Tribunal concludes that the failure to comply with the provisions of Staff Rule 5.03 relating to the purported extension of the PIP was a violation of the Applicant's rights. The violation is not trivial. She was, as a consequence, subjected to an unusual degree of monitoring and to the continuing stigma and embarrassment entailed in being on a PIP, and she is entitled to relief for this violation of her contract of employment.

The January 16, 2002 Memorandum

60. The Applicant submits that the language of the January 16, 2002 memorandum, which signaled the end of the extended PIP, was punitive and retaliatory, and she specifically draws attention to the following words: "Any slippage from these standards would not be acceptable, and would require us to consider all our options, including separation from the Bank on performance grounds." The Applicant claims that this language implied that she could be summarily dismissed without the benefit of due process. After consulting with Ms. Neill of HR, Mr. Webb wrote to the Applicant by e-mail on January 24, 2002. The e-mail stated in pertinent part:

I appreciate that you may have felt concerned by the statements concerning the potential consequences should there be slippage from the standards that have been established. However, those statements are made so that there is clarity regarding our expectations for the future, and to inform you that, should there be a recurrence of the behaviors that led to the PIP, VPU management would review all the options that are available, including the possibility of separation. In that event, you would be informed of the concern or slippage, as with any other performance issue relating to a staff member, and would have the opportunity to put your point of view or, in case of disagreement, to utilize the Bank's conflict resolution system. Obviously, we do not expect there to be such a recurrence, and I have noted in my memo our pleasure at the manner in which you have responded to the feedback provided to you. But as a matter of prudent management, and in fairness to you, I have made clear in my memo the seriousness with which we would view any backsliding.

Provided you continue to maintain the level of performance that the PIP describes, you should have no reason to feel any concern.

61. According to the Respondent, Mr. Webb's cautionary words were fully justified. Managers should deal with staff in an honest and direct manner and in the Applicant's case, it was particularly important to advise her of the gravity of the situation because she had experienced similar performance problems periodically throughout her career at the Bank.

62. The Applicant maintains that the memorandum had been wrongfully initiated in the Legal Vice Presidency by decision of the Bank's General Counsel, together with Mr. Webb and Ms. Adu, in retaliation for Applicant's "whistleblowing" about her concerns about failures of Bank oversight in relation to the Philippines Banking Sector Reform Loan (BSRL). In support, she refers to her meeting of December 6, 2001 with the Bank's President James Wolfensohn and with Mr. Pieter Stek, the Executive Director for the Netherlands' constituency. At that meeting, the Applicant reported what she considered to be the serious lapses in oversight of the BSRL and Mr. Bhargava's failure to warn the Government of the Philippines about the conditionality under the BSRL. Although at that meeting President Wolfensohn agreed to appoint an external lawyer to look into the allegations, he did not do so. The Applicant considers that Mr. Webb's "cautionary" language of January 16, 2002 was specially tailored to intimidate the Applicant and to dissuade her from taking further steps to bring about accountability for the Philippines BSRL.

63. The Respondent strenuously denies that the language of the memorandum was tainted by any reprisal. As regards the supposed link between the December 6, 2001 meeting with Mr. Wolfensohn, Mr. Webb knew nothing of it; moreover, Mr. Webb states that his language of January 16, 2002 was drawn in part from the template which had been prepared by the HR Department for the assistance of managers when dealing with the termination of a PIP, but that he varied the language slightly. In his evidence before the Appeals Committee, he testified that he varied the language intentionally:

[T]he nature of [O's] past behaviors had some relationship to the decision to use this language, and the language was meant to signal in the clearest terms I thought I could send that it was necessary to keep observing the standards of behavior that [O] had been meeting during the previous period and not to revert, because a reversion would, I felt, make it difficult for her and also make it, I felt, difficult for the Bank as her employer to deal with, because again of the nature of [her] behaviors.

64. As a preliminary matter, the Tribunal considers that the Applicant's claim that the memorandum ending the PIP was threatening, and a violation of her rights under the Staff Rules, is unpersuasive. The Tribunal considers that the Applicant's claim of a link between the December 2001 meeting between herself, Mr. Stek and the President of the Bank and the allegedly threatening language of the January 16, 2002 memorandum is not borne out by the evidence of record. Compare *Madabushi*, at para. 62, where the Tribunal held that "[t]he evidence does not support a conclusion that the supervisor or senior management knew of the comments or reacted adversely to them"

65. The language of Mr. Webb's memorandum of January 16, 2002 is firm and direct and it nowhere expressly states that the Applicant could be, let alone that she would be, dismissed summarily without the benefit of due process as is required by the Staff Rules. The Tribunal is not persuaded by the Applicant's claim that she subjectively believed that if she signified her acceptance of the memorandum this would amount to a voluntary waiver of her rights. As a senior counsel with the Bank, and having full cognizance of its legal regime, it was unreasonable on her part to draw a conclusion not supported by the language of the memorandum.

66. The Tribunal also considers that even if the Applicant had subjectively believed that signifying her receipt of the memorandum was tantamount to a waiver of her rights to due process, she cannot with reasonable justification have held that view for very long. She sought and then promptly secured clarification orally in a meeting with Mr. Webb and HR manager Ms. Neill, to the effect that no waiver was intended or required and that all of her rights to due process remained intact and would be upheld.

67. The oral reassurance was confirmed in writing a few days later. Mr. Webb's e-mail of January 24, 2002 explained his purpose in writing his memorandum of the previous week as firmly and directly as he had done. There is nothing improper or harmful in this. Although the HR Department template is a guide to managers in the exercise of their discretion, there is no legal requirement that they limit themselves to the template language.

68. In sum, the Tribunal considers that the language of the January 16, 2002 memorandum is not inherently menacing. Although the memorandum does not expressly state that if there were a recurrence of the Applicant's performance problems the principles of due process would be applied, these are implied. The Applicant has not set forth any evidence of surrounding circumstances that would lead a reasonable person in the position of the Applicant to believe that she was being threatened with summary dismissal, without due process. Nevertheless, because the purported PIP extension – to which the January 16, 2002 memorandum was meant to be a conclusion – was invalid, there was in fact no valid basis in the Staff Rules for the memorandum, and it should be withdrawn from the Applicant's personnel records.

Decision

For the above reasons, the Tribunal orders that:

- (i) the Respondent shall pay the Applicant compensation in the amount of eight months' net salary;
- (ii) the Respondent shall pay the Applicant costs in the amount of \$12,000;

(iii) the Respondent shall withdraw the January 16, 2002 memorandum from the Applicant's personnel records; and

(iv) all other pleas shall be dismissed.

/S/ Elizabeth Evatt
Elizabeth Evatt
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington DC, November 4, 2005