



World Bank Administrative Tribunal

2020

Decision No. 641

**Charlene Atkinson,
Applicant**

v.

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

(Merits)

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

**Charlene Atkinson,
Applicant**

v.

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

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

2. The Application was received on 20 August 2019. The Applicant was represented by Monika Ona Bileris, Attorney-at-Law. The Bank was represented by David Sullivan, Deputy General Counsel (Institutional Administration), Legal Vice Presidency. The Applicant informed the Tribunal in writing that she had decided not to seek anonymity in this case.

3. The Applicant is challenging (i) “the improper termination of her contract as a retaliatory measure”; (ii) the denial of her due process rights as a result of not being provided “the real reasons” for the termination of her contract; (iii) the decision “not to renew her contract for a 3–5 year term”; and (iv) “abuse of power and authority [...] by failing to address the Applicant’s many complaints of ongoing harassment [...] and failing to protect her from such behaviors.”

FACTUAL BACKGROUND

4. The Applicant joined the Bank as a Short-Term Consultant (STC) in January 2015. On 14 December 2015, she was appointed as an Operations Officer, level GF, in the policy unit of the Corporate Secretariat Vice Presidential Unit (SECPO) on a two-year term contract, from 14 December 2015 to 13 December 2017. The Applicant is a Jamaican national and an attorney with a Master of Laws degree from Georgetown University Law Center. The Applicant describes herself as “a black/Afro-Caribbean descendant female, who identifies as LGBTQ.”

Non-renewal of Contract

5. On 25 September 2017, the Applicant and her Manager met for her annual performance conversation. During this meeting, the Applicant's Manager provided her with performance feedback and informed her that her contract would be renewed for one additional year. Following this discussion, on 29 September 2017, the Applicant's Manager emailed her, stating:

Regarding the renewal of your contract, unfortunately our current budget environment linked to the ongoing Business Review process only gives me space to renew your contract until December 2018. We can revisit the issue during our midyear discussion. In the meantime I would encourage [you] to seek as we discussed during our OPE [Overall Performance Evaluation], other opportunities in other units of the Bank.

The Applicant claims that in prior career discussions her Manager had promised her "a contract renewal of 3–5 years." The Applicant further claims that, around the time she was notified of the one-year renewal, "three new hires were announced [...], while three staff were terminated (all black consultants – two female lawyers and one openly gay African American)."

6. According to the Bank, in Fiscal Year 2017 (FY17) a decision was made in SECPO to reduce the number of STCs while filling available staff positions. The Applicant's Manager, in a written statement filed with the Tribunal, stated that, "[o]f the 14 STCs on the roster in FY17, only a few applied for the advertised positions and two of them were hired in 2017 at grade level GF." The selected candidates for these level GF positions, a black female and a white male, were selected in April 2017 and joined SECPO in May and September 2017 due to their respective work commitments. The third hire referenced by the Applicant, a white female, was an STC who joined SECPO in May 2017.

7. The Applicant emailed her then-Director and contacted Human Resources (HR), indicating in these communications that she was uncomfortable with a renewal of only one year. The Applicant contends that her mental health was affected due to her belief that management was seeking to fire her under false pretenses. She claims that she wanted to resign, as she did not want to change her son's school in the middle of the academic year. She contends that she told the Manager that she had a legitimate expectation of a three- to five-year renewal, and that he told her

that he would do his best to honor that promise. The Applicant avers that the Manager offered her an extension for 18 months but that she did not want to remain in the position.

8. On 3 October 2017, the Applicant emailed her then-Director, telling him about the Manager's assurances that her contract would be extended for longer than one year, and about the Manager's email of 29 September 2017 in which he told the Applicant that her contract could only be renewed for one year. On 23 October 2017, the Applicant emailed her then-Director and her Manager, stating, "I've discussed my contract non-renewal situation with you both and there has been no resolution. I however, see that a 1 year extension has been processed without my consent."

9. On 26 October 2017, an HR representative informed the Applicant by email that, if she did not want her appointment to be extended by one year, she could request the action to be rescinded. On 6 November 2017, the Applicant emailed her Manager, informing him that she was told by HR that her option was to rescind. Her Manager reiterated in a 10 November 2017 email that, "[a]fter consulting with management, given our current budget situation and our ongoing business review process unfortunately at this point in time we can just provide you with a one-year extension of your contract." The Applicant did not request the one-year renewal to be rescinded, and her contract was subsequently extended to 31 December 2018.

10. The Applicant requested mediation on 10 November 2017, as she preferred an extension of her contract beyond December 2018. However, on 8 January 2018, the Applicant notified Mediation Services that she did not intend to continue the mediation.

11. The record reflects that, throughout the first half of 2018, the Applicant's unit was faced with budget overruns and was informed of an anticipated claw-back in upcoming fiscal years. In response to these budget challenges, management discussed multiple ways to reduce costs, including by reducing one GH-level staff member (the Applicant's Manager) and one GF-level staff member (the Applicant). Other efforts were made to move staff and fill positions with lower-grade staff to reduce costs, including by replacing the Applicant's position with an Extended-Term Consultant.

12. On 12 June 2018, the Applicant was informed that her contract would expire on 31 December 2018, and she received written confirmation the following day. On 20 June 2018, the Applicant informed the new Director of the unit about her contract issues, but she claims that she did not get the assistance she asked for. The new Director discussed the Applicant's request with HR and the Vice President and Corporate Secretary of the Bank (the Vice President) but did not get the chance to follow up with the Applicant because she began sick leave. The Applicant subsequently contacted Ombuds Services and the Staff Association to discuss her concerns.

13. The Applicant went on sick leave on 22 June 2018. She subsequently went on Short-Term Disability (STD) through December 2018.

14. The Applicant's term appointment ended on 31 December 2018.

Alleged Incidents of Discrimination and Harassment

15. The Applicant has alleged that she suffered multiple instances of discrimination and harassment during her appointment.

16. On 4 October 2017, the Applicant emailed the Vice President, raising concerns regarding the departure of her then-Director from the unit, stating:

I thought it best to ask you since you would be fully in the know, and I asked others but getting mixed views. I admired [the then-Director] so I want to speak up when there's negative talk and it makes me uncomfortable in meetings, but I feel somewhat afraid to say anything about it since it's really senior people. I'm not sure about the formalities surrounding the Director's extended leave and leaving and I'm a bit confused about the whole situation as it's unfolding. But, is it ok for others to share their personal views/perception/judgments of [the then-Director] if it's uncomfortable or is that open discourse?

The Vice President responded, stating, "This is a bit unclear but in general if you're uncomfortable you can either speak up, extricate yourself from the situation or alert your manager if appropriate." The Applicant replied the next day, thanking the Vice President and expressing a wish to take her to lunch, as she thought she might be leaving her contract in December. The Vice President

responded, stating, “Let’s catch up after the AMs [Annual Meetings]. I’d like to understand what’s going on.”

17. On 20 October 2017, after meeting in person, the Applicant emailed the Vice President, stating:

I found your questions about [my Manager] very perceptive but was afraid to state exactly the full truth. The persons who were speaking in a demeaning manner about [the then-Director], and also do it at times about [other colleagues] ... are [another colleague] and [my Manager]. That’s why I reached out for help. It hurts, it affects me deeply and there is a pattern.

I also fear staying here because there are strong racial bias undertones in the current state of SECPO. I don’t believe that the talk about [the then-Director], my treatment and that of the 3 Consultants who have also been told that they must leave, is a coincidence that we are all persons of color. There is a clear pattern. Of maybe 11-15 new entrants to the Unit, only 3 are people of color. The treatment of certain STCs [is] now bordering on undignified... [My Manager] saw me giving name tags for the open house on Tuesday and used that exact moment to send an email that STCs are discouraged from participating at the Open House. I felt the dejection and spoke up privately to [my Manager] about how he went about this, and he hid behind the excuse that this was due to the nature of the work program.

I’m sorry I didn’t speak up sooner.

The Vice President responded the same day that she would find a time to talk as she was “perturbed.”

18. The Applicant alleges that she was discriminated against because of her ethnicity and that during her employment she experienced “microaggressions and demeaning treatment.” She claims that a white male British consultant was given favorable treatment as compared to her and other staff in the unit, and she cites an incident when he shouted at her and “insisted that Burma would always be the correct name to him,” and later cut her off in a meeting. She further alleges that there was a meeting in which she was singled out due to her ethnicity. She claims that staff members made inappropriate comments about her with regard to her ethnicity, her LGBTQ status, and her family situation as a single mother, and that there were “countless times she was called ‘articulate,’ mocked for her accent, [and] told to change her physical features to be more feminine so that she would be accepted at work.” She also alleges that she was “denied visible or meaningful work,

even when assignments were taken away and given to white males after she had done the groundwork.” The Applicant notes that “[n]one of these would have necessarily been documented or elevated to HR or EBC [Office of Ethics and Business Conduct].”

19. The Applicant claims that a co-worker (Ms. X) verbally attacked her and physically threatened her in her office on 23 October 2017 (23 October 2017 incident; while the Tribunal’s judgment in *Atkinson (Preliminary Objection)*, Decision No. 628 [2020] refers to this as the “24 October 2017 incident,” it is now clear from the record that the incident actually occurred on 23 October and will be referred to as such henceforth). According to the Applicant, Ms. X entered her office and asked her questions in a “combative” manner. The Applicant states that Ms. X moved closer to her, started pointing in her face, and physically positioned herself close to the Applicant’s desk, while leaning across the desk at times. The Applicant further states that Ms. X continued to verbally abuse her, including about whether she should have been hired, and at one point stretched her arms out toward the Applicant. The Applicant claims that she felt trapped and that she pushed her chair back and hit herself on the table behind her, which resulted in “long standing chronic back pains.” The Applicant states that Ms. X left her office after the Applicant said that she would call the Manager.

20. Following the incident, the Applicant’s Manager met with her, Ms. X, and a Respectful Workplace Advisor. At this meeting, the Manager clarified that comments about the Applicant’s hiring were inappropriate and were not to be made in the workplace. The Manager also directed Ms. X to apologize to the Applicant for the incident.

21. On 24 October 2017, the Applicant emailed her Manager, notifying him that she would be making a “formal report to HR” and that she would be taking sick leave as she did “not feel safe returning to the office.” Her Manager responded, informing her that she could take leave and copying the HR Business Partner. The same day, the Applicant reported the incident to EBC.

22. On 25 October 2017, the Applicant’s Manager emailed her to ask how she was doing, stating that he was concerned she did not feel safe at the office and that he was happy to discuss

options to address her concerns. The Applicant replied the same day, thanking her Manager and expressing her continued distress.

23. Also on 25 October 2017, Ms. X emailed the Applicant with a formal apology. The Applicant replied the following day thanking her for the email and asking her to direct further correspondence to her Staff Association representative.

24. On 26 October 2017, the Applicant informed the Vice President about the 23 October 2017 incident. The Vice President replied the same day, suggesting a time for them to meet and advising the Applicant to discuss her working situation with the HR Business Partner. On 20 November 2017, the Vice President emailed the Applicant again to suggest that they meet.

25. The record suggests that, sometime following the 23 October 2017 incident, the Applicant met with Ombuds Services to discuss the incident and other workplace concerns. On 2 November 2017, the Applicant emailed Ombuds Services with concrete concerns that could be addressed regarding her treatment in the unit. In this email, the Applicant stated that there was a “clear bias” in her unit, and that she would often not be given work or be at her desk with nothing to do. The Applicant also discussed other staff members, specifically with regard to certain staff members getting special privileges over others. The Applicant specified that a Ugandan national and an African American consultant in her unit were both told to leave and did not get new contracts with the unit.

26. EBC conducted an initial review and, on 20 November 2017, closed the case relating to the 23 October 2017 incident. The EBC Case Closure Memo noted that the Applicant’s Manager had asked Ms. X to apologize to the Applicant following the 23 October 2017 incident and had made it clear to Ms. X that any comments about the Applicant’s hiring were not appropriate. The Case Closure Memo also noted that the Applicant’s work program was to be communicated to her directly by the Manager, that she had been assigned a more “stable” work program, and that the Manager had removed the Work Program Agreement duties from Ms. X’s remit. EBC closed the case based on the managerial actions taken by the Manager. The Applicant was notified that EBC closed the case on the same day.

27. On 21 November 2017, the Applicant followed up with Ombuds Services by email. In the email, she stated that her Manager had informed her of the changes he would put in place to address her concerns. She also stated that she had received a more defined work program, and that her Manager had now been speaking up on her behalf if Ms. X tried to intervene with the Applicant's work program. She further stated that she had advocates both inside and outside her unit. The Ombudsman replied to the Applicant on 22 November 2017 and stated, "I have been able to have some conversations. [...] [Y]ou have done a great job speaking up and getting help and I am very happy to hear that things are much better!"

28. On 27 January 2018, the Applicant sent an email to the Director in which she complained about an incident of alleged sexual harassment that she suffered at the hands of another co-worker (Ms. Y). The Applicant states that Ms. Y repeatedly touched her hair and her breasts on separate occasions since the time the Applicant began working at the Bank. She referred specifically to an incident at a holiday celebration in December 2017 in which Ms. Y allegedly asked if there were any cameras around before moving closer to the Applicant to touch her breasts. The Applicant also referred to an incident at a staff meeting during which Ms. Y touched her hair. The Applicant stated in the email that the Manager did nothing to address the situation at the meeting.

29. The Director reported the Applicant's complaint to EBC. EBC conducted an initial review on 8 February 2018. The Applicant declined to be interviewed by EBC and claimed that she had not intended the matter to reach EBC. In an email to EBC, the Applicant stated that she "did not intend for action but planned to address with the person perhaps in a more direct way." During its initial review, EBC interviewed Ms. Y.

30. On 22 February 2018, EBC closed its review of sexual harassment and hostile work environment, due to insufficient evidence to substantiate the allegations. The EBC Case Closure Memo stated that the Applicant alleged that a staff member from another unit had made lewd sexual jokes and "blatant racist and sexist statements" about her. The Memo noted that she also claimed that her Manager had done nothing to stop the jokes at a particular staff meeting and that a Senior Finance Officer in the unit had shouted at her on another occasion.

31. In the Case Closure Memo, EBC found that the Director intervened to stop the jokes at the relevant staff meeting. EBC also found that, when the Director asked the Applicant if she wanted her to address the issue of Ms. Y touching her hair and breasts, the Applicant told her to ignore it. EBC noted that it

contacted [the Applicant] for an interview but she declined the invitation for a meeting explaining that it was not her intention for this issue to be escalated to EBC. EBC also interviewed [Ms. Y] who was not aware of any inappropriate behaviors in the office and had no knowledge of that allegation. She also denied that she engaged in any such behavior.

With regard to the lewd jokes and comments made by a staff member in another unit, the Director told EBC the name of a staff member she believed was responsible. EBC told the Director to mention the issue to that staff member's manager. The EBC Case Closure Memo noted that, without the Applicant's collaboration, EBC had closed the case due to insufficient evidence. The Memo also noted that EBC had spoken to Ms. Y as a subject and had stressed the importance of a harassment-free workplace.

32. The Applicant was notified on 22 February 2018 that EBC had closed the case.

33. The Applicant filed a police report with the Washington, D.C., Metropolitan Police Department on 10 April 2019. Details from the report beyond the fact that it dealt with an allegation of sexual harassment have not been provided in the record.

The Present Application

34. The Applicant filed her Application on 20 August 2019. The Applicant is challenging (i) "the improper termination of her contract as a retaliatory measure"; (ii) the denial of her due process rights as a result of not being provided "the real reasons" for the termination of her contract; (iii) the decision "not to renew her contract for a 3–5 year term"; and (iv) "abuse of power and authority [...] by failing to address the Applicant's many complaints of ongoing harassment [...] and failing to protect her from such behaviors."

35. The Applicant seeks (i) the rescission of the non-renewal of her contract; (ii) a new contract of five years or payment in lieu of such; (iii) rescission of the decision not to extend her contract; (iv) a new contract of two years in this regard; (v) an order to the Bank to improve its policies on harassment and develop new policies where necessary; (vi) mandatory training for Bank staff and management on how to address bias in the workplace; (vii) a letter of apology from the Bank and “each individual who perpetrated the actions against the Applicant,” as well as a proposal to the Board of Executive Directors and Board of Governors on addressing discrimination in the Bank; (viii) back payment of salary and benefits from 1 January 2019; (ix) compensation of five years’ salary and benefits in lieu of the “3–5 year” contract she was not given; (x) compensation in the amount of the difference in remuneration to maintain 100% salary when she was on STD; (xi) compensation in the amount of the difference in remuneration to maintain 100% salary if assessed for Long-Term Disability; (xii) compensation for loss of future earnings and pension to be calculated at the expected age of retirement, which is 67; (xiii) \$1,000,000.00 in moral damages for pain and suffering; (xiv) payment for medical costs; (xv) interest of 5% on all monetary compensation dated back to her date of separation from service; and (xvi) legal fees and costs in the amount of \$7,200.00.

36. The Bank filed preliminary objections with the Tribunal on 10 September 2019.

37. On 30 May 2020, in *Atkinson (Preliminary Objection)* [2020], the Tribunal dismissed the Bank’s preliminary objection to the Applicant’s non-renewal claim. The Tribunal further decided “that during its next session it will adjudicate the Bank’s preliminary objections to the Applicant’s allegations of harassment and discrimination, as well as the Applicant’s non-renewal claim and any of her discrimination and harassment claims that it finds jurisdiction over, on the merits.”

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

PRELIMINARY OBJECTION***The Bank's Contentions***

The Applicant has failed to exhaust internal remedies with regard to alleged incidents of discrimination and harassment, and the claims are untimely

38. The Bank contends that the Applicant has failed to exhaust internal remedies as required by Article II(2)(i) of the Tribunal's Statute with respect to all the Applicant's allegations of discrimination and harassment, with the exception of the 23 October 2017 incident. Citing Staff Rule 9.03, paragraphs 6.02 and 6.04, the Bank submits that the Applicant was required to submit the matter to either Peer Review Services (PRS) or EBC before appealing to the Tribunal. The Bank notes that, with the exception of the 23 October 2017 incident, the Applicant did not submit any claims to PRS or EBC. The Bank further submits that "[n]one of the other steps listed by Applicant, including Mediation [...], talking to her supervisor, the Staff Association, the Ombuds, and various [B]ank officials, meet the requirement to exhaust all other remedies," citing *Moss (Preliminary Objection)*, Decision No. 571 [2017], para. 67.

39. The Bank also contends that the Applicant's claims regarding alleged incidents of discrimination and harassment are untimely. The Bank notes that Article II(2)(ii) of the Tribunal's Statute "provides that any Application must be submitted within 120 days as of the receipt of notice that relief will not be granted, following exhaustion of remedies." The Bank submits that, because the Applicant was notified on 20 November 2017 that EBC had closed the case relating to the 23 October 2017 incident, the Applicant had until 20 March 2018 to file an application with the Tribunal. The Bank also submits that, because the Applicant was notified on 22 February 2018 that EBC had closed the case relating to allegations of sexual harassment, the Applicant had until 22 June 2018 to file an application with the Tribunal. The Bank notes that the Applicant did not request an extension of the deadline to file her Application until 26 September 2018.

40. Regarding the Applicant's contention of exceptional circumstances, the Bank submits that,

[u]nless Applicant demonstrates that her medical condition not only prevented her from filing a timely Application with the Tribunal but also persisted *throughout* her tenure at the Bank in a manner that prevented her from bringing claims to internal administrative review fora, specifically Peer Review Services (PRS) or EBC, Applicant should not be heard with a good faith argument that internal review can *now* no longer be achieved by her as a former staff member. (Emphasis in original.)

41. The Bank further questions whether the submissions by the Applicant meet the standard of reliable and pertinent contemporaneous proof establishing exceptional circumstances as required by the Tribunal.

The Applicant's Response

Exceptional circumstances warrant excusing the requirements to exhaust internal remedies and issues of timeliness

42. The Applicant first contends that it is “simply impossible to review the Applicant’s case and claim that she did not exhaust all of her administrative remedies with regard to the harassment and discrimination claims,” pointing to her communications with Mediation Services, Ombuds Services, EBC, her Manager, and other Bank staff. The Applicant further contends that she “declined to engage with EBC in January 2018 because she realized what a futile effort it was, and she feared retaliation for taking any further action.” The Applicant claims that she attempted several times to get the Staff Association to help her file a claim before PRS, but that she was “intimidated by the harassing and abusive actions taken against her within her unit, and by fear of reprisal for bringing a claim.” The Applicant submits that she was convinced by her Manager not to file a claim until finally, “having fallen ill due to the mistreatment she experienced, the Applicant was simply not in good enough health to undertake further appeals of her case.” To that end, the Applicant contends that there are exceptional circumstances which excuse the requirements to exhaust internal remedies and to timely submit claims, and she submits medical records for the Tribunal’s *in camera* review. According to the Applicant, the submitted medical records demonstrate “the frequency with which the Applicant required medical attention, and thus her inability to take care of legal/administrative issues such as appealing her claims.”

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

The non-renewal of the Applicant's contract was improperly motivated, the Applicant was denied due process, and the non-renewal was in violation of a promise made by the Applicant's Manager

43. The Applicant contends that her contract was not renewed in retaliation for having raised complaints concerning harassment, sexual assault, and discrimination. The Applicant submits that she engaged in protected activities when she complained about "racism, sexism, sexual assault, etc." To the Applicant, because her Manager was aware of her complaints, it "[a]ppears that [he] felt as if the easiest solution was to simply not renew the Applicant's contract as a way to be rid of her."

44. The Applicant further suggests that the non-renewal of her contract was improperly motivated by racism. To support this contention, the Applicant claims that, around the time she was informed that her contract would only be renewed for one year, three black consultants were terminated while three new hires were announced. In this respect, the Applicant claims that a "white male consultant was hired and given access and opportunities not granted to other staff, including a work program that the Applicant should have worked on, thereby pushing her out of her role." The Applicant further alleges that a "white female lawyer" took over her post while the Applicant was on STD. The Applicant also points to the 23 October 2017 incident, during which she claims that Ms. X, the co-worker, insinuated that she did not belong in the unit.

45. The Applicant next contends that the Bank "failed to follow the tenets of due process by failing or refusing to provide her with the honest and true reason for the termination of her contract." The Applicant points to her Manager's email of 13 June 2018, in which he writes, "Further to our previous conversation, this is to provide you a written notice that your Term appointment will end on December 31, 2018." The Applicant contends that her due process was violated because this written confirmation contained no reason for the non-renewal and because she was not given an opportunity to address performance problems. The Applicant further

contends that the Bank's explanation that her contract was not renewed for budgetary reasons is not compatible with the fact that new hires were made around the same time and submits that the non-renewal decision was arbitrary "as there was no budgetary implication to the Unit while the Applicant was on disability." The Applicant also claims that she was informed by an Ombudsman that "her disability was a factor considered in Management's refusal to extend her contract."

46. The Applicant also contends that her "contract was constructively renewed based on the verbal and written assurances given to her by her manager" and that the Bank "failed to honor said renewal." According to the Applicant, around July 2017 her Manager promised her a "3-year contract renewal/extension to start." The Applicant claims that this promise was made to "dissuade the Applicant from formally advancing her claims of physical harassment, racism, and bullying." The Applicant "notes that, while her own emails do not reflect an express promise by the Bank to extend her contract for 3-5 years, they memorialize the discussions that took place, and establish that such expectations [...] were raised." The Applicant further submits that her Manager's "failure to correct the Applicant's understanding and impression that a 3-5 year contract was discussed and anticipated (at least by the Applicant) [...] lends further credence to Applicant's argument that an expectation of a 3-5 year contract was, in fact, established."

The Bank's Response

There was no retaliation, due process was observed, and there was no breach of promise

47. The Bank contends that the Applicant has failed to meet her burden of proof to establish a *prima facie* case of retaliation. The Bank submits that the "Applicant's earliest complaints on the record relating to harassment and discrimination only arise after the Manager [...] had communicated that, in light of budgetary considerations, [the Bank] was not in a position to extend Applicant's contract beyond December 2018." The Bank further submits that the "record shows that the budgetary consideration underlying Applicant's non-renewal persisted and that this was the reason communicated to Applicant on June 12, 2018 when she was informed that her contract would not be renewed." The Bank also contends that there is no evidence of retaliatory animus, citing "management's active engagement to support Applicant to find an alternative position."

48. The Bank further contends that the Applicant has failed to meet her burden of proof with regard to her allegations of improper motivations of her contract non-renewal based on racism. The Bank submits that the Applicant has failed to “introduce facts supporting a claim of individualized wrongdoing which amount to a violation of [...] her own terms of employment.” With regard to the specific allegations, the Bank asserts that the Applicant’s claims are either unsubstantiated or would not prove that she was treated with improper motivation. The Bank also emphasizes that it has set out a business rationale for the non-renewal decision.

49. The Bank next contends that due process regarding the non-renewal of the Applicant’s appointment was observed in accordance with Staff Rules and Tribunal precedent. The Bank notes that the Applicant was provided notice of the non-renewal on 12 June 2018, therefore giving the Applicant six months’ notice. The Bank submits that the Applicant’s contention that she was not given sufficient notice to address performance issues is “misplaced” because the non-renewal was not related to performance. The Bank further submits that it gave “an honest reason for the non-renewal” by “informing Applicant during the Annual Review discussion on June 12, 2018 that the non-renewal was due to budget constraints.”

50. The Bank asserts that the hiring of new employees does not call into question the budget rationale, as some of the employees noted by the Applicant joined the Bank prior to the initial budget discussions in September 2017 and the other was hired as an STC, “therefore entailing significantly less cost than a staff employment.” The Bank disagrees with the Applicant’s contention that there was no budgetary implication for the unit while she was on disability, noting that STD eligibility is determined by the Disability Administrator and “therefore does not lend itself to budgetary predictions.” The Bank “contests Applicant’s assertion that she was informed by the Ombuds that her disability was a factor in the non-renewal decision [...] which is entirely unsubstantiated.”

51. The Bank also contends that the “Applicant’s claim that the non-renewal of her appointment violated a promise made to her for a 3–5 year renewal [...] is entirely unfounded.” The Bank submits that there is nothing in the record that meets the standard of “a clear and

irrefutable commitment or assurance” or an “unmistakable implication” that a promise was made, citing *Tange*, Decision No. 607 [2019], para. 79.

The Applicant’s Contention No. 2

The Bank abused its power and authority by failing to address the Applicant’s many claims of sexual assault, harassment, and discrimination, and by failing to protect her from the same

52. The Applicant contends that the Bank engaged in an abuse of power and authority in direct violation of Staff Rules and policies by failing to address the Applicant’s many complaints of ongoing harassment – including sexual assault and harassment, intimidation, bullying, and the creation of a hostile work environment – and by failing to protect her from such behaviors, notwithstanding her own efforts for remedies. The Applicant submits that many of the instances of discrimination and harassment were documented by her emails to management, Ombuds Services, Mediation Services, the Staff Association, and EBC, but that, despite these efforts, “no agreements were formed or solutions reached.” To the Applicant, the Bank “knowingly and negligently failed to sufficiently address the Applicant’s concerns, and failed to protect her from harm.”

53. In response to the Bank’s contention that it complied with its obligations regarding the 23 October 2017 incident, the Applicant submits that the remedy “involved a forced and insincere apology” from Ms. X and “having the Applicant’s attacker merely avoid her.” The Applicant further asserts that, contrary to the Bank’s contention, she has met her burden of proof to show that she was the subject of discrimination and harassment.

The Bank’s Response

The Bank complied with its obligations regarding anti-harassment, and there is insufficient evidence of harassment or discrimination

54. The Bank contends that the Applicant’s assertions do not meet the Tribunal’s standards in relation to harassment and discrimination claims because, in its view, “(i) it has complied with its obligation under the Principles of Staff Employment in relation to the alleged harassment; and in

any case, (ii) Applicant has the burden of proof and has not discharged it with respect to harassment or discrimination.”

55. The Bank maintains that its obligation with respect to anti-harassment is “a procedural one,” and that it fulfilled that obligation in this case when it “provided the option of a formal complaint and investigation of claims by EBC to Applicant throughout her tenure at the Bank and management proactively supported the investigative and remedial action.” The Bank submits that, with respect to the 23 October 2017 incident, EBC thoroughly reviewed the complaint in accordance with its obligations and the Applicant’s Manager “took effective measures to address the situation including a reprimand, reducing the interaction between [Ms. X] and Applicant and ensuring a written apology to Applicant.” The Bank further asserts that the “Applicant’s arguments are based on a flawed understanding of [the Bank’s] disciplinary system as a conduit of her personal ideas of punishment for [a] situation which she perceived as unfair treatment of her in the workplace.”

56. With respect to the alleged sexual harassment, the Bank notes that the Applicant’s new Director

acted precisely as required under the Principles of Staff Employment, the World Bank Group Code of Conduct – Living our Values and the WBG [World Bank Group] Guidance – Anti Harassment: She intervened relating to inappropriate comments during the staff meeting, reported the incident to EBC, offered help to address the situation with [Ms. Y], and alerted the Manager of the colleague allegedly making inappropriate jokes.

The Bank also asserts that EBC “equally took all steps possible to fulfill its mandate to investigate misconduct.”

57. The Bank contends that the Applicant has not met her burden of proof regarding allegations of harassment and discrimination. The Bank submits that the “Applicant’s evidence is largely confined to her own emails or summaries reiterating specific instances of alleged abuse, namely the October [23], 2017 Incident” and the alleged sexual harassment incident. The Bank contends that the “Applicant additionally lists a whole host of general allegations of mistreatment, giving some examples, in her Application, which are not supported by documentary evidence at all”; and

the Bank contests these allegations. The Bank notes that the fact that it, “like many large institutions, is grappling with the question of racism in the workplace does not relieve Applicant from arguing her specific case in these proceedings.”

58. Finally, the Bank notes that it “opposes Applicant’s request to order a review, revision or creation of policies, staff training or strategic announcements at the Board of Executive Directors and the Board of Governors at the Annual Meetings, which, as policy decisions, are in the exclusive competence of [the Bank] and outside of the purview of the Tribunal.”

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

PRELIMINARY OBJECTION

WHETHER THE APPLICANT EXHAUSTED INTERNAL REMEDIES FOR THE ALLEGATIONS OF DISCRIMINATION AND HARASSMENT

59. The Bank contends that the Applicant has not exhausted internal remedies for her discrimination- and harassment-related claims, with the exception of her claim relating to the 23 October 2017 incident. Specifically, the Bank states that the Applicant did not engage either PRS or EBC for any of these claims.

60. The Applicant responds that she exhausted remedies when she brought her concerns to Mediation Services, Ombuds Services, her supervisor, other Bank officials, and the Staff Association. She also avers that there were exceptional circumstances that prevented her from filing her claims with PRS.

61. Article II of the Tribunal’s Statute provides the following:

2. No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

(i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal.

62. The Tribunal has emphasized the importance of the statutory requirement of the exhaustion of internal remedies. *See, e.g., O*, Decision No. 323 [2004], para. 27. In *Berg*, Decision No. 51 [1987], para. 30, the Tribunal stated:

This statutory exhaustion requirement is of the utmost importance. It ensures that the management of the Bank shall be afforded an opportunity to redress any alleged violation by its own action, short of possibly protracted and expensive litigation before this Tribunal.

63. The Tribunal has previously decided that “[e]xhaustion of internal remedies means formal remedies and timely recourse to the Appeals Committee [now PRS].” *Rittner*, Decision No. 335 [2005], para. 36. The Tribunal also clarified in *DJ (Preliminary Objection)*, Decision No. 536 [2016], paras. 39, 44, that “EBC is the appropriate body for staff members who wish to complain of misconduct” and that, “[o]nce the EBC process is completed, the [a]pplicant is not required to go to PRS before coming to the Tribunal” regarding the complaints of misconduct.

64. In this regard, in *Moss (Preliminary Objection)* [2017], para. 64, the Tribunal stated that it

has frequently held that the reference to “all other remedies within the Bank Group” in Article II(2) of the Statute denotes formal remedies; this requirement is not satisfied by meetings with Human Resources Officers, Country Directors and other staff, or participating in mediation. *See Lysy*, Decision No. 211 [1999], para. 46; *Dey*, Decision No. 279 [2002], para. 20; *Islam*, [Decision No. 280 [2002],] para. 19; *Motabar*, Decision No. 346 [2006], para. 12; *Ampah [(Preliminary Objection)]*, Decision No. 522 [2015],] para. 63.

See also Malik, Decision No. 333 [2005], para. 34; *Vick*, Decision No. 295 [2003], para. 27. The Tribunal further clarified in *Ampah (Preliminary Objection)* [2015], para. 64, that “consultation with the Ombudsman, though one of the conflict resolution avenues available to staff members, is not a substitute for the filing of a formal grievance with the Appeals Committee/PRS or the Tribunal.”

65. The Applicant claims that she exhausted internal remedies for her discrimination- and harassment-related claims when she brought her concerns to Mediation Services, Ombuds Services, her supervisor, other Bank officials, and the Staff Association. The Tribunal is not convinced by this contention, as it has previously held that remedies that are exhausted must be

formal, rather than the informal remedies that the Applicant has used. The Tribunal notes that the Applicant brought her complaint about the 23 October 2017 incident to EBC, and that her Director brought her complaint about the later alleged incident of sexual harassment to EBC. Therefore, apart from these two claims, the Applicant has not exhausted internal remedies for any other claims relating to discrimination or harassment, as no other claims were brought before EBC or PRS.

66. The Applicant contends that she attempted several times to get the Staff Association to help her file a claim before PRS, but that she was “intimidated by the harassing and abusive actions taken against her within her unit, and by fear of reprisal for bringing a claim.” She further contends that she “declined to engage with EBC in January 2018 because she realized what a futile effort it was, and she feared retaliation for taking any further action.” The Applicant also claims that certain exceptional circumstances, including the deterioration of her physical and mental health “from the stress that the abuse and terms of her contract renewal were causing her,” prevented her from filing her claims with PRS.

67. With regard to the Applicant’s belief in the futility of bringing a claim before EBC, the Tribunal stated in *Levin*, Decision No. 237 [2000], para. 23, that

[i]t would altogether undermine the required time limits if a staff member were allowed to ignore them merely by invoking his doubts about the efficacy of the Bank’s grievance system or about the outcome of his claim. (*See Caryk*, Decision No. 214 [1999], para. 31, and *Madhusudan*, Decision No. 215 [1999], para. 40.)

68. With regard to exceptional circumstances, the Tribunal stated the following in *Malekpour*, Decision No. 320 [2004], para. 22:

The burden is on the Applicant to show that “exceptional circumstances” exist which justify relief from or suspension of the exhaustion requirement in Article II(2) of the Statute of the Tribunal. (*Hristodoulakis*, Decision No. 296 [2003], para. 17.) [...] “[M]ere inconvenience,” the Tribunal has ruled, “is not sufficient” to constitute “exceptional circumstances.” (*Hristodoulakis*, *id.*)

69. The Tribunal has also stated that it takes a “strict approach in determining what constitutes exceptional circumstances” and that “[e]xceptional circumstances cannot be based on allegations of a general kind but require reliable and pertinent ‘contemporaneous proof.’” *See Brace*

(*Preliminary Objection*), Decision No. 621 [2019], para. 51; *BI (No. 5) (Preliminary Objection)*, Decision No. 564 [2017], para. 20, citing *Nyambal (No. 2)*, Decision No. 395 [2009], para. 30.

70. The Tribunal notes that the Applicant has not put forth any contemporaneous proof of the intimidation, abuse, or stress that she suffered that would have prevented her from filing her claims with PRS or complaining to EBC. Furthermore, the Applicant herself states that she had brought her complaints to different individuals or entities in the Bank, including Ombuds Services, her supervisor, the Staff Association, and other Bank officials. The Tribunal notes that the Applicant could have chosen to bring her complaints to formal avenues, including PRS and EBC, rather than pursuing them through informal avenues.

71. In response to the Tribunal's order for the production of "[m]edical records during the time period between October 2017 and June 2018 that show the circumstances that may have led to the Applicant not taking her allegations of harassment and discrimination to either [PRS] or [EBC]," the Applicant submitted, for the Tribunal's *in camera* review, twelve items containing medical records dating from late 2016 to 2019.

72. The Tribunal notes that the majority of the medical records submitted by the Applicant post-date 22 June 2018, when the Applicant began her sick leave and STD, and that these records therefore do not speak to whether there were exceptional circumstances that prevented the Applicant from exhausting internal remedies. The medical records submitted do demonstrate that, during the relevant time period, the Applicant visited the emergency room once in October 2017 and once in May 2018. The medical records also demonstrate that the Applicant fell ill again on 21 June 2018, leading to her sick leave and subsequent STD. While the severity of the Applicant's medical circumstances from July 2018 onward is clear from the record, the Tribunal is not convinced that the Applicant has demonstrated through "reliable and pertinent 'contemporaneous proof'" that, during the relevant time period, the Applicant was suffering from a medical condition such that she was unable to bring her complaints to PRS or EBC.

73. The Tribunal thus finds that there were no exceptional circumstances that prevented the Applicant from exhausting internal remedies, and the Tribunal does not have jurisdiction over her

discrimination- and harassment-related claims, with the exception of the claims regarding the 23 October 2017 incident and the alleged incident of sexual harassment, which will be determined below.

WHETHER THE APPLICANT FILED HER CLAIMS RELATING TO THE 23 OCTOBER 2017 INCIDENT AND
A LATER ALLEGED INCIDENT OF SEXUAL HARASSMENT IN A TIMELY MANNER

74. The Bank contends that EBC closed the case relating to the 23 October 2017 incident on 20 November 2017 and the case about the later alleged incident of sexual harassment on 22 February 2018. According to the Bank, the deadlines for the Applicant to bring those claims before the Tribunal would have been 20 March 2018 and 22 June 2018, respectively; however, since the Applicant submitted a request to the Tribunal for an extension to file her Application on 26 September 2018, the Bank contends that her claims were not filed in a timely manner. The Applicant states in response that there were exceptional circumstances that prevented her from filing her claims before the Tribunal in a timely manner.

75. Article II(2) of the Tribunal's Statute provides:

No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

[...]

(ii) the application is filed within one hundred and twenty days after the latest of the following:

(a) the occurrence of the event giving rise to the application;

(b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or

(c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.

76. In *DG*, Decision No. 528 [2016], para. 55, the Tribunal emphasized “the importance of the timely filing of applications and respect for time limits prescribed by Article II of the Statute ‘for a smooth functioning of both the Bank and the Tribunal.’”

77. In *DZ (No. 2) (Preliminary Objection)*, Decision No. 590 [2018], para. 88, the Tribunal stated that

there is a time period within which a claim has to be pursued before the Tribunal or other internal bodies. Timely resolution of claims is an essential feature of the Bank’s internal justice system. A staff member has to pursue a claim within the time frame articulated by the Tribunal or other bodies, counting from the day staff members knew or should have known of the claim.

78. The Applicant avers that she did bring her claims before various parts of the Bank “for over a year,” but that the Bank did not resolve her complaints in a meaningful way. She also claims that it was unclear to her how she could have filed a case before PRS or the Tribunal when her complaints were still pending before the other individuals and entities at the Bank to whom she brought her complaints. The Applicant contends additionally that there were exceptional circumstances in her case that prevented her from filing her claims in a timely manner. In this regard, she claims that the abuse and suffering she experienced were exceptional. The Applicant also contends that she went on disability leave and was “unable to do much more than take care of her health throughout that time,” but that she did seek extensions to file her claims during that time, which shows that she was “keen to assert her rights.”

79. In the present case, the Applicant received notice that EBC had closed the cases that dealt with her claims relating to the 23 October 2017 incident and the later alleged incident of sexual harassment on 20 November 2017 and 22 February 2018, respectively. The Applicant therefore had 120 days from those two dates to file her Application before the Tribunal, which would have been 20 March 2018 and 22 June 2018. She filed an extension of time only on 26 September 2018, which was outside the time limit.

80. However, the Applicant may be excused from filing her claims before the Tribunal in a timely manner if there had been exceptional circumstances in her case. She has alleged that the

abuse she suffered was exceptional and thereby constitutes exceptional circumstances. She also claims that her health and status on disability leave constitute exceptional circumstances.

81. The record shows that the Applicant went on sick leave on 22 June 2018. She contends that, even before that time, her health had been affected due to her employment circumstances. As discussed in the preceding section, the record demonstrates that, during the relevant time period, the Applicant visited the emergency room once in October 2017 and once in May 2018. In addition, she did not go on sick leave and subsequently disability leave until 22 June 2018, which was the deadline for her to file her later sexual harassment claim before the Tribunal.

82. The record further shows that the Applicant had contacted both her Director and Ombuds Services in the time period after EBC closed the case relating to the 23 October 2017 incident. The Applicant contacted individuals in the Bank to discuss her complaints related to her contract throughout November 2017. In addition, the Applicant contacted the Director on 27 January 2018 to complain about the later alleged incident of sexual harassment. The Applicant continued to address her contract issues with the Director throughout June 2018.

83. The Tribunal has stated in *ED (No. 3)*, Decision No. 236 [2000], para. 27, that allegations of exceptional circumstances require reliable contemporaneous proof and cannot be based on “applicants’ own descriptions of their emotional states without substantiation.” In that case, the Tribunal noted that the applicant had not submitted any evidence, such as medical reports. *Id.* In contrast, in *Mustafa*, Decision No. 195 [1998], the applicant submitted medical records that proved that he had an illness and was required to be on bed rest for one month. *Id.*, para. 5. In that case, the Tribunal decided that the applicant had presented exceptional circumstances to excuse his failure to file a timely application. *Id.*, para. 10. Here, the Applicant has submitted evidence that demonstrates she visited the emergency room twice, once immediately following the 23 October 2017 incident and again in May 2018. The record does not, however, suggest that the Applicant’s medical circumstances at these times were such that she could not file a timely application, or at least request an extension.

84. Furthermore, the record shows that the Applicant continued to address her concerns with her Director and Ombuds Services from the time that she received notification that EBC had closed the first case to the time that she went on sick leave. In *ED (No. 3)* [2000], para. 27, the Tribunal noted that the applicant was “vigorously pursuing other claims against the Bank” during the relevant period. Specifically, the applicant in that case filed a separate application and request for provisional relief with the Tribunal, in apparent contradiction of his claim that he was unable to write an email during the relevant time. *Id.*, paras. 26–27. In the present case, the Applicant was likewise in communication with others to address her concerns during the time period in which she should have filed either a request for an extension of time or her claims with the Tribunal.

85. The Applicant also claims that she was on disability leave during the operative time, but the record shows that she did not go on sick leave until her latest deadline for filing an extension of time or her claims before the Tribunal. The Applicant has not adduced any documentation to prove that her alleged illness prevented her from filing an extension of time before the Tribunal for her claims relating to the two relevant incidents, nor has she proven what abuse she suffered that caused her to be unable to file her claims before the Tribunal.

86. The Tribunal therefore finds that there are no exceptional circumstances in this case, and that the Applicant did not file her claims relating to the 23 October 2017 incident and the later alleged incident of sexual harassment in a timely manner.

MERITS

WHETHER THE NON-RENEWAL OF THE APPLICANT’S CONTRACT WAS IMPROPERLY MOTIVATED

87. The Applicant contends that the non-renewal of her contract was made in retaliation for her having raised complaints concerning harassment, sexual assault, and discrimination. The Applicant also suggests that the decision to not renew her contract was improperly motivated by racism.

88. The Bank responds first that there was no abuse of discretion, as the non-renewal decision was made with a reasonable and observable basis. The Bank further contends that the Applicant

has failed to meet her burden of proof to establish a *prima facie* case of retaliation, and further notes that the Applicant's first documented complaints concerning harassment, sexual assault, and discrimination occurred after her Manager first communicated to her that her contract could not be extended beyond 31 December 2018 due to budget constraints. The Bank also contends that the Applicant has failed to meet her burden of proof to establish that the non-renewal decision was improperly motivated by racism.

89. The Tribunal first examines whether there was a reasonable basis for the non-renewal decision. The Tribunal has a rich jurisprudence related to the non-renewal of term appointments.

90. In *CP*, Decision No. 506 [2015], para. 36, the Tribunal recalled that there is no right, absent unusual circumstances, to the extension or renewal of temporary appointments. "Even so, the decision not to extend a Fixed-Term contract, like all decisions by the Bank, must be reached fairly and not in an arbitrary manner." *Tange* [2019], para. 111.

91. As the Tribunal stated in *AK*, Decision No. 408 [2009], para. 41:

Decisions that are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack a reasonable and observable basis, constitute an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment.

See also ET, Decision No. 592 [2018], para. 91; *DO*, Decision No. 546 [2016], para. 33; *Desthuis-Francis*, Decision No. 315 [2004], para. 19; *Marshall*, Decision No. 226 [2000], para. 21; *de Raet*, Decision No. 85 [1989], para. 67.

92. The record shows that the Applicant was first informed on 25 September 2017 that her contract could only be renewed until 31 December 2018 due to budgetary constraints, and she was later notified on 12 June 2018 that her contract would not be renewed for the same reason. The record further shows that the decision was prompted by a budget overrun in the Applicant's unit and was taken following a series of discussions involving staff reductions as a way to reduce costs. Specifically, in early June 2018 it was announced that, in addition to already proposed cost reductions as a part of the business review, the Applicant's unit would also have a \$500,000.00

budget cut in the upcoming fiscal years. The Tribunal is satisfied that the record demonstrates that there was a reasonable and observable basis for the non-renewal of the Applicant's contract.

93. The Tribunal will next consider the Applicant's contention that the non-renewal decision was made in retaliation for her complaints concerning harassment, sexual assault, and discrimination.

94. The Applicant submits that she engaged in protected activities when she complained about "racism, sexism, sexual assault, etc." To the Applicant, because her Manager was aware of her complaints, it "[a]ppears that [he] felt as if the easiest solution was to simply not renew the Applicant's contract as a way to be rid of her."

95. The Bank contends that the Applicant has failed to meet her burden of proof to establish a *prima facie* case of retaliation, and further notes that the Applicant's first documented complaints concerning harassment, sexual assault, and discrimination occurred after her Manager first communicated to her that her contract could not be extended beyond 31 December 2018 due to budget constraints.

96. The Bank's Code of Conduct describes retaliation in the workplace as follows:

Retaliation is "any direct or indirect detrimental action recommended, threatened, or taken because an individual engaged in a [protected activity]." (SR [Staff Rule] 8.02) [...]. Retaliation in the workplace encompasses a range of behavior, from something as small as a remark to something as serious as an administrative action affecting a staff member's work program or employment. When taken as a means of retaliation, other examples can include: reprimand, discharge, suspension, demotion, denial of promotion, and denial of transfer. Any staff member who in good faith raises a concern is protected from retaliation.

97. In *O* [2004], para. 47, the Tribunal explained that an applicant alleging retaliation must discharge his or her burden of proof by

establish[ing] 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.

98. In *Bodo*, Decision No. 514 [2015], para. 77, the Tribunal observed that

an 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 her claims or evidence of actual or perceived retaliation and discrimination by the Sector Manager, the Applicant has given the Tribunal little to deliberate on.

99. In *AH*, Decision No. 401 [2009], para. 36, the Tribunal found:

It is not enough for a staff member to speculate or infer retaliation from unproven incidents of disagreement or bad feelings with another person. There must be a direct link between the alleged motive and the adverse action to amount to retaliation.

100. The Tribunal stated in *Bauman*, Decision No. 532 [2016], para. 95:

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.

101. The evidence the Applicant has provided to support her claim of retaliation includes only her inferences that her Manager "felt as if the easiest solution was to simply not renew the Applicant's contract as a way to be rid of her" in response to her complaints of discrimination and harassment. The Tribunal notes that the Applicant's complaints, as reflected in the record, were not for alleged misconduct on the part of her Manager and that the record reflects that her Manager was responsive to the Applicant's complaints.

102. The record shows that the Applicant first contacted the Ethics Helpline on 13 April 2017, when she emailed that she “wanted to speak with someone about work opportunities, biases and the ethical standards involved.” She specified in the email that she was concerned with

the rules regarding preferred candidates, unannounced in situ promotions and creating jobs/opportunities for someone. In particular a person was given great preferential treatment introduced on a temporary basis and then extensive lengths taken in redoing advertisements to secure an appointment even without qualifications otherwise required.

The record suggests the Applicant’s concerns were motivated by the hiring process for the level GF positions. An EBC representative replied to the Applicant’s email on 14 April 2017, asking the Applicant to call her to discuss her concerns. The Applicant responded on 18 May 2017, stating that she had called the EBC representative asking about a time to talk. The record does not indicate whether any further discussions on this matter ever occurred. The Tribunal notes that there is nothing in the record that would suggest the Manager was aware of these early inquiries to EBC, nor has the Applicant made any such assertion.

103. The record reflects that the Applicant next contacted EBC with regard to the 23 October 2017 incident. The Bank asserts that it has “disclosed all of Applicant’s emails to EBC in relation to her concerns of misconduct.” Because the Manager was unaware of the Applicant’s April 2017 inquiries to EBC and because the Applicant’s next contact with EBC occurred after the Applicant was informed that her contract would be renewed for one year, the Tribunal finds that there is no “direct link between the alleged motive and the adverse action to amount to retaliation.”

104. The Applicant also contends that she had “long warned management” that there were racial biases in her unit. In this regard, the record shows that the Applicant’s first documented allegation of racial bias occurred on 4 October 2017, when she emailed the Vice President regarding the departure of her then-Director from her unit. The Tribunal notes that this first documented allegation was after the Applicant was informed on 25 September 2017 by her Manager that her contract would not be renewed past 31 December 2018 for budgetary reasons.

105. The Tribunal therefore finds that the Applicant has not met the burden of establishing a *prima facie* case of retaliation.

106. The Tribunal will next consider the Applicant's assertion that the decision not to renew her contract was motivated by racism.

107. In support of this assertion, the Applicant claims that, around the time she was notified that her contract would only be renewed for one year, three black consultants in the unit were terminated while three new hires were announced (one black GF-level staff, one white GF-level staff, and one white consultant). The Bank submits that a decision was made in FY17 to reduce the number of STCs in SECPO and fill available staff positions in order to "ensure a more stable workforce" that was not limited to the 150-day rule.

108. Principle 2.1 of the Principles of Staff Employment provides that the Bank "shall not differentiate in an unjustifiable manner between individuals or groups within the staff." Staff Rule 3.00 ("Office of Ethics and Business Conduct (EBC)"), paragraph 6.01(e), makes clear that wrongful discrimination by Bank staff members including "on the basis of age, race, color, sex, sexual orientation, national origin, religion or creed" constitutes prohibited misconduct. Staff Rule 3.01 ("Standards of Professional Conduct"), paragraph 4.01, states that supervisors' treatment of staff shall not be influenced by "the race, nationality, sex, religion, political opinions or sexual orientation of the supervisor or the staff member."

109. The Tribunal has made clear that it will not hesitate to rescind discretionary decisions if there is evidence of discrimination on prohibited grounds. *AI*, Decision No. 402 [2010], para. 39. Moreover, it is long established that decisions which are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lacking a reasonable and observable basis constitute an abuse of discretion and will be set aside. *See ET* [2018], para. 91; *DO* [2016], para. 33; *AK* [2009], para. 41; *Desthuis-Francis* [2004], para. 19; *Marshall* [2000], para. 21; *de Merode*, Decision No. 1 [1981], para. 47.

110. In *Sekabaraga (No. 2)*, Decision No. 496 [2014], para. 31, the Tribunal

recognized that it may be challenging to obtain evidence to support a discrimination claim. Statements indicating discrimination on the part of the decision-maker and other forms of direct evidence are likely to be available only in the most egregious cases. Claims must often rely principally on circumstantial evidence from which discrimination may be inferred. In a case like the present, an applicant carries the initial burden of establishing a *prima facie* case of discrimination. If the applicant meets this burden, the Bank then must provide a non-discriminatory rationale for its decision. The applicant may then challenge the Bank's stated rationale and provide evidence to show that it is a pretext for a discriminatory decision. *AI*, para. 41.

111. The Tribunal will first consider whether the Applicant has met the burden of establishing a *prima facie* case of discrimination. As explained by the Tribunal in *AI* [2010], para. 42:

There is no magic test; the proof needed to establish a *prima facie* case will vary from case to case, depending on the facts and circumstances of each case. But as indicated by the Tribunal in *Bertrand*, [Decision No. 81 [1989], para. 20,] the Applicant must at least provide "detailed allegations and factual support" for his claim of racial discrimination. Applicants make *prima facie* cases of racial discrimination if they adduce evidence from which the Tribunal can reasonably infer such discrimination.

112. As further explained in *AI* [2010], para. 46, "The Tribunal's jurisprudence requires that a staff member must provide evidence of discrimination specific to his or her case." To that end, "[e]very applicant must show that he or she – and not other people – [has] been the victim of discrimination." *Id.*, para. 47.

113. The Applicant submits, as proof of her assertion, that three black consultants were "terminated" and three new hires were announced around the time she was informed that her contract would only be renewed for another year. The Tribunal first notes that the referenced hiring decisions occurred months before the 25 September 2017 conversation between the Applicant and her Manager, in which the Applicant was informed that her contract would only be renewed for one year. The Tribunal also notes that the three new hires referenced by the Applicant included one black female GF-level staff, one white male GF-level staff, and one white female STC. The Tribunal also considers the Bank's explanation that a decision was made in FY17 to reduce the number of STCs in SECPO and fill available staff positions in order to "ensure a more stable

workforce” that was not limited to the 150-day rule. The Tribunal finds that these circumstances do not provide evidence of discrimination specific to the Applicant’s case.

114. The Applicant also asserts that the white male GF-level staff and white female STC “took over her post.” With regard to the GF-level staff, the Tribunal notes that he was hired months before the Applicant was notified that her position would be renewed for one year and over a year before she was notified of the non-renewal decision. The Tribunal also considers the Bank’s assertion that the GF-level staff was hired for a different work program than the Applicant’s. With regard to the STC, the Tribunal notes that she was first hired as an STC before the Applicant was notified of the one-year renewal. The Tribunal further notes that, contrary to the Applicant’s assertion, the STC was not hired as a GF-level staff until nearly a year after the non-renewal decision. The Tribunal is not convinced that the two white employees were hired to replace the Applicant.

115. The Applicant also suggests that her Manager “did not think she was a good fit,” which to the Applicant was related to her race and nationality. To support this assertion, the Applicant points to her Manager’s statement in her FY17 performance review, which reads:

[The Applicant] had a good year. Her role supporting the HR committee Secretary and her Board work is appreciated by her clients and peers. Looking into the future I would suggest to [the Applicant] to explore other alternatives to SEC that are in line with her career objectives.

The Tribunal finds nothing in this statement that suggests an improper motive for the non-renewal of the Applicant’s contract.

116. The Tribunal notes that the Applicant has alleged that she was subject to racial discrimination in her work environment. While the Tribunal did not find jurisdiction over the Applicant’s claims that the Bank failed to address her claims of harassment and discrimination, the Tribunal notes that none of the Applicant’s claims was specific to conduct of her Manager, who made the non-renewal decision. The Tribunal further notes the Applicant’s allegation that, during the 23 October 2017 incident, Ms. X, the co-worker, suggested that the unit was “getting rid of” the Applicant because of where she was from. The Tribunal notes that, following the

incident, Ms. X was instructed that comments about the Applicant's hiring were inappropriate and Ms. X was made by the Manager to apologize to the Applicant. The Tribunal has not been presented with evidence that the Manager agreed with the comments of Ms. X or that Ms. X had a role in the non-renewal decision, which was made by the Manager. Without more, the Tribunal is not convinced that the Applicant's allegation meets the standard of *prima facie* evidence for her claim that improper motivations led to the non-renewal decision.

117. The Tribunal also considers that the Bank has offered a non-discriminatory rationale for the non-renewal decision. The Applicant has challenged the validity of the Bank's rationale, claiming that new staff were hired despite budget limitations and that "there was no budgetary implication to the Unit while the Applicant was on disability." The Tribunal considers that the Bank has sufficiently demonstrated that, in order to meet budgetary limits, staffing changes were made that included replacing certain positions with lower-level staff. Furthermore, the Applicant's status on STD would not have had an impact on budget calculations, as the decision on disability benefits is not determined by Bank management; management thus would not be able to account for disability benefits when making budgetary decisions.

118. The Tribunal notes that proof of improper motivation of purpose is not an easy matter, as prejudice can be concealed and the existence of prejudice that leads to discrimination sometimes has to be established by inference and circumstantial evidence. However, for the purposes of the *prima facie* case, the Applicant must at least provide "detailed allegations and factual support" for her claim of racial discrimination. Because the Applicant has not established a *prima facie* case for either retaliation or racial discrimination as a motivation for the non-renewal decision, the Tribunal does not accept that claim by the Applicant.

WHETHER THE NON-RENEWAL OF THE APPLICANT'S CONTRACT VIOLATED DUE PROCESS

119. The Applicant contends that the non-renewal of her contract violated due process because she was not informed of "the honest and true reason for the termination of her contract" and because she was not given the opportunity to address performance concerns. The Bank contends that due process was observed with regard to the Applicant's non-renewal, as the non-renewal

decision was not related to performance, and that the Applicant was informed with six months' notice that the non-renewal was due to budget reasons.

120. In *CS*, Decision No. 513 [2015], para. 77, the Tribunal stated that

the Bank must give an honest reason for the non-renewal of a Term appointment. This is congruent with the Tribunal's observation in *Skandera*, Decision No. 2 [1981], para. 28, that:

It is in the interest of the Bank that the employment of qualified employees not be terminated on the basis of inadequate facts or ill-founded justifications, and one way to assure this is to furnish the staff member at the time of termination with a specific and true assessment which will provide a fair opportunity to the individual to dispute, and possibly to seek rectification of the decision of the Bank.

121. The record shows that the Applicant was informed on 12 June 2018 that her contract would not be renewed due to budgetary constraints. As discussed in the previous section, the record demonstrates that the decision was prompted by budget cuts in the Applicant's unit and was taken as part of an overall strategy to reduce costs through staff reductions. The Tribunal is therefore satisfied that the Applicant was given an honest reason for the non-renewal of her appointment, in compliance with due process.

122. While the Applicant also contends that she was not given fair notice to address performance concerns, the Tribunal notes that her performance was not cited as a reason for the non-renewal. The Tribunal thus finds this contention unconvincing. The Tribunal also notes that there is nothing in the record to support the Applicant's claim that disability was a factor in the non-renewal.

123. Following these considerations, the Tribunal dismisses the Applicant's claim regarding a due process violation.

WHETHER THE NON-RENEWAL OF THE APPLICANT'S CONTRACT WAS IN VIOLATION OF A PROMISE
MADE BY THE APPLICANT'S MANAGER

124. The Applicant contends that she was promised a “3–5 year” extension of her contract and that the non-renewal of her contract was in violation of that promise. The Bank avers that no such promise was made and that there is nothing in the record that would support a finding of such a promise.

125. In *Tange* [2019], para. 79, the Tribunal explained that a

promise to a staff member may be made through an unequivocal statement, that is, “a clear and irrefutable commitment or assurance” (*Moss*, Decision No. 328 [2004], para. 45) or may be inferred from “circumstances which lead to the ‘unmistakable implication’ that a promise was made.” *EM*, Decision No. 578 [2018], para. 63.

126. As evidence of the alleged promise, the Applicant includes a number of emails written by herself in which she references an expectation of a longer contract. The Applicant also references performance discussions with her Manager, during which, according to the Applicant, he said that “he saw great things for her future.” Without more, though, the Tribunal finds that the record does not contain the kind of “unequivocal statement” or any circumstances leading to an “unmistakable implication” that a promise was made to renew the Applicant’s contract for “3–5” years. As such, the Tribunal dismisses the Applicant’s claim that the non-renewal decision was made in violation of her Manager’s promise.

CONCLUDING REMARKS

127. The Tribunal takes any claims of harassment and discrimination seriously. However, the Tribunal is restricted from having a complete review of the Applicant’s claims for two reasons. First, EBC reviewed the Applicant’s claims with respect to the 23 October 2017 incident and closed the case, having found that sufficient managerial actions were taken in response to the incident. The Applicant was informed that, if she was unsatisfied with the outcome, she had 120 days to file an application with the Tribunal, yet she did not do so until it was too late. EBC also opened an initial review into the Applicant’s allegations of sexual harassment but closed the case

due to insufficient evidence, as the Applicant declined to be interviewed. The Applicant was notified that EBC had closed the case, but again she did not file her Application with the Tribunal until it was too late. Second, the Applicant's own actions have prevented the Tribunal from having any jurisdiction over the Applicant's claims, as she did not exhaust internal remedies as required by the Tribunal's Statute. The Tribunal is bound to follow its jurisdictional limits in each case, no matter how serious the allegations may be.

128. The Tribunal, however, considers the allegations by the Applicant regarding her work environment somewhat troubling. The Tribunal stresses the importance of maintaining a workplace free from discrimination and harassment in the Bank, and the Tribunal welcomes the Bank's recent efforts to demonstrate its commitment in this regard, such as establishing a Task Force on Racism.

129. The Tribunal notes the Bank's assertion that its obligation "with respect to the protection of staff's safety pursuant to Principle of Staff Employment 2.01(b) is a procedural one," but considers that there may be circumstances in which the availability of procedures to respond to harassment and discrimination may not always be, in itself, sufficient. In light of the serious issues the Applicant's complaints have raised, the Tribunal invites the Bank to take a broader view of its obligations in response to such complaints, especially where a complaint may be indicative of a more widespread issue.

130. The Tribunal acknowledges the general importance of the issues raised by the Applicant and for that reason finds that a contribution to the Applicant's legal fees and costs is warranted.

DECISION

- (1) The Application is dismissed; and
- (2) The Bank shall pay the Applicant's legal fees and costs in the amount of \$7,200.00.

/S/ Andrew Burgess
Andrew Burgess
President

/S/Zakir Hafez
Zakir Hafez
Executive Secretary

At Washington, D.C., * 16 November 2020

* In view of the public health emergency occasioned by the COVID-19 pandemic and in the interest of the prompt and efficient administration of justice, the Tribunal conducted its deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary.