Schlagworte: Zustelladresse für Klagen; Probezeit (Verlängerung während Arbeitsunfähigkeit; Begründung der Verlängerung); Zugang von Mitteilungen (während Arbeitsunfähigkeit; Kommunikationsmittel); Kündigung (Entschädigung)

Mots-clefs: adresse pour le dépôt des plaintes ; période d'essai, période probatoire (prolongation pendant l'incapacité de travail ; motifs de la prolongation); réception de communications (pendant l'incapacité de travail ; moyens de communications); résiliation (compensation)

Keywords: address for filing complaints; provisional period (extension for a period of incapacity to work; grounds for the extension); receipt of communications (for a period of incapacity to work; means of communication); termination (indemnification)

1/2011

Judgment of 22 August 2012

Administrative Tribunal of the Bank for International Settlements

Prof Dr Dr hc Wolfgang Hromadka, President,
Prof Dr Dr hc Jean-Marc Rapp, Reporting Judge,
Prof Dr Brigitte Stern, Panel Member,
Prof Dr Ramon Mabillard, Registrar,

X _____,

represented by Z _____, attorney at law […],

Applicant

versus

the Bank for International Settlements, international organisation with registered office in Basel,

represented by V _____ attorney at law […],

Respondent

re

extension of the provisional period and dismissal.

As to the facts

A.

[…]

B.

X _____ applied to the Administrative Tribunal of the Bank for International Settlements contesting the extension of his provisional period and his subsequent dismissal.

Article 10 of the Respondent's Staff Regulations states the following with regard to the provisional period:

“Upon appointment all members of the staff are subject to a provisional period of up to one year.

The provisional period may be dispensed with or its duration shortened in the case of a member of the staff whose efficiency has been duly recognised.

In exceptional circumstances, it may be decided to extend the duration of the provisional period; in such cases the member of staff concerned will be informed before the end of the original provisional period.

If, during the provisional period, the work of a member of the staff is found to be unsatisfactory, he or she may be dismissed upon at least one month’s notice being given.

At the end of the provisional period, the appointment of the member of staff will be either confirmed or terminated upon at least one month’s notice being given.”

C.

In July 2009 the Applicant submitted an application to the Respondent, which was seeking to fill a vacancy for […]. Thereupon the recruitment procedure was initiated.

On 1 October 2009 the Respondent offered the Applicant a position in its service for a fixed term of three years and one month. The Applicant accepted this offer, and the parties agreed that the employment contract would commence on 1 December 2009 and that the first year would constitute the provisional period.

On 30 November 2010, at 18:42, the Applicant received an e-mail from A _____, officer in Human Resources (HR), informing him on behalf of the employer that his provisional period was being extended to 31 May 2011. On 9 December 2010, the Applicant received a registered letter from his employer dated 30 November 2010 confirming such extension.

After continuing to work normally, on 16 March 2011 the Applicant was dismissed as of 31 May 2011.

[…]

D.

On 29 June 2009 the Respondent advertised the vacancy for […]. This was a position in job category G, that is, a high-level position just below that of the chief financial officer. The deadline for submitting applications was 20 July 2009.

According to witness C _____, […], the previous situation was dire, with each unit implementing its own solutions in isolation […], which generated heavy costs. The purpose of the position of […] was to remedy this situation by analysing costs and redundancies […] and make proposals for optimisation and rationalisation. What was important, according to this witness, was above all to attain these goals, with the submission of a strategy document constituting only one of several tasks entrusted to the Applicant.

Indeed, after setting out the purpose of the job, the job description gave a list of the principal accountabilities – five in all, namely:

“Strategy development and management”, involving developing and maintaining a “[…] strategy” to meet the future needs of the Bank and its customers;

“Leadership”, involving heading up the “[…] team”, which comprised over 20 persons at that time and needed to be led and developed;

“Work management”, involving in particular ensuring the permanent availability of support […];

“Business process review”, including the development of a framework for such review across the entire organisation; and lastly

“Vendor management”.

E.

After presenting himself in person on 5 July 2009 and going through the recruitment process, including in particular a number of interviews and an external evaluation of his abilities, the Applicant, a […] with a sound university education and around 17 years of professional experience in the field of […] management, was employed by the Respondent with effect from 1 January 2010 for a term of three years, the customary term at the Bank. The parties agreed that the Applicant would take up his duties on 1 December 2009. At the same time, in accordance with Article 10 of the Bank’s Staff Regulations, a 12-month provisional period was fixed (item B above). Meetings were held with the Applicant’s immediate line manager, B _____, on a weekly basis.

In his objectives for 2010/11 the Applicant was tasked with completing the restructuring of the unit by June 2010 and writing reports […] by February 2011.

B _____ considered the writing of the strategy report to be a main task, while the Applicant thought that restructuring the unit and making the necessary changes in the interest of the Bank took priority.

According to the Applicant, no particular emphasis was placed on the task of developing a strategy at the time he was hired. Nor did his line manager ask him to make strategy corrections in his work, and hence the Applicant assumed that the strategy report was secondary once the strategy was implemented.

According to the line manager, the Applicant knew how important the report in question was. As Senior Manager, he had a leading position and thus had no need of any instruction. Nor had he ever asked for any support.

The Applicant’s first performance assessment by his immediate line manager, B _____, took place on 1 April 2010. During this review, the Applicant’s work was judged to be good and it was stated that he had got off to a “solid start” in the job; it was mentioned, however, that up to that time he had chiefly been occupied with restructuring the unit and had focused on getting to know his staff, the customers and the Bank. The Applicant explained that this was due to certain day-to-day activities taking more time than normal. On 30 July 2010 the Applicant was assessed a second time. This assessment was also positive, noting in particular that his consultative and effective style of leadership was appreciated by his team; it was nonetheless pointed out that up to that time the Applicant had chiefly been restructuring his unit.

F.

From mid-September onwards, the Applicant's line manager, B _____, asked the Applicant several times during their weekly meetings (on 16 September 2010, 1 October 2010 and 8 October 2010) about his initial thoughts concerning the […] strategy. The Applicant initially promised a response during the first week of October, and then on 22 October 2010. Following a further request on 25 October 2010, the Applicant said he needed a further few weeks. That same day, his line manager told him he was disappointed at the delay. In his e-mail of 27 October 2010 the Applicant replied that "I am not satisfied myself with the status of the piece of work as I am neither satisfied with my daily job balance between 'doing' and 'thinking'", adding that he had had to get directly involved in operational tasks in recent months.

Furthermore, the Applicant claimed to have presented an initial draft strategy report in April 2010 ("vision and mandates"). The documents produced in this regard are, first, an undated description of the role of the unit managed by the Applicant and, second, PowerPoint presentations dated 28 April and 31 August 2010, and 10 March and 26 May 2011. The first of these presentations reminded the Applicant's staff of their mandate and the objectives for 2010 and 2011, indicating at the same time what the next stages would be. According to the Applicant's line manager, this represented no more than basic ideas.

During the meeting of 9 November 2010 the lack of progress on the report was discussed again. On that occasion, the Applicant complained that communication was only one-way, from him to his line manager, and that he was missing a general concept. He said the delay in producing the report was due to his working conditions and his workload, as well as his being unable to concentrate on his strategy tasks owing to operational requirements.

Whether or not the Applicant said he was "frustrated" by the Bank's general working conditions and its procedures is a matter of dispute between the parties.

During the examination of the parties, the Applicant confirmed not having used the term frustration and said rather that he had been looking forward to his future work.

During the regular meeting between the Applicant and his line manager on 12 November 2010, the Applicant confirmed that his work environment and the team were not ideal for him. The Applicant's line manager, B _____, then raised the possibility of extending the provisional period. The Respondent claims that the Applicant's line manager said that the reason was the delay in the strategy report in question, which is not indicated in the notes of B _____.

Another meeting was called for 26 November 2010 to discuss the Applicant's working conditions and the extension of his provisional period. However, this meeting was cancelled as the Applicant was unfit for work from 24 November 2010 onwards, […].

The Applicant claimed that in asking for production of the strategy report every week his employer failed to take his health into account, even though the line manager had known since September 2010 that he was undergoing treatment […].

During the examination of the witnesses, the Applicant's line manager stated that he was unaware the Applicant had problems […], the Applicant having kept these circumstances to himself. Furthermore, he said he had offered his support to the Applicant.

G.

On 30 November 2010 the Respondent, represented by A _____, HR officer, informed the Applicant by e-mail to his two e-mail addresses that the provisional period was being extended by six months to 31 May 2011. The e-mail reached the Applicant at 18:42. The Applicant stated that he only read this e-mail on 12 December 2010, since he had to follow his doctor's advice not to read his e-mails and to switch off his mobile phone, so as to avoid everything that was work-related.

The extension of the provisional period was subsequently notified by the Respondent by registered letter dated 30 November 2010 but postmarked 8 December 2010. Neither in the e-mail nor in the registered letter were reasons given for the extension of the provisional period.

According to the certificates of the physician treating him, the Applicant was declared sick and 100% unfit for work until 10 January 2011, then 50% unfit until the end of January. The Applicant was initially able to resume working at 50%, and then at 100% as from 1 February 2011.

H.

On 5 January 2011 the Applicant contacted the HR officer, A _____, and, referring to the "exceptional circumstances" mentioned in the Staff Regulations (item B above), asked for a detailed written explanation of the reasons for the extension of his provisional period.

On 21 January 2011 the first meeting took place between the Applicant and his line manager since the former's absence on medical grounds. The Applicant asked once again what were the reasons for extending his provisional period. The question of whether the line manager, B _____, informed the Applicant during that meeting about the grounds for the extension of the provisional period, and in particular whether he mentioned the Applicant's unsatisfactory performance and his frustration with the general working conditions, remains a matter of dispute between the parties. The record of the meeting simply notes that the line manager was unable to give a reply to the question of why the provisional period had been extended because it was the HR officer who was dealing with that. According to the Respondent, the reasons had been spelled out in the meetings of 9 November 2010 and 12 November 2010. In the meeting of 21 January the Applicant's line manager promised to remind A _____ that the Applicant was awaiting a reply to his mail of 5 January 2011.

That same day A _____ wrote to the Applicant by e-mail saying that the reasons for the extension of the provisional period had been explained to him by his direct line manager in the meetings of November 2010.

On 27 January 2011 the Applicant told his line manager that he intended to take action concerning the extension of the provisional period by initiating a procedure with Human Resources.

In early February 2011 a meeting took place between A _____ and the Applicant. What was discussed at that meeting is uncertain. According to the Applicant, A _____ assured him that he needed to concentrate on his work, which he was doing well, and that he should not spoil the atmosphere by initiating a procedure, since the confirmation of his appointment was not so doubtful as to make a new start impossible. The Respondent stated that the Applicant was simply told that the confirmation of his appointment depended on an improvement in his work. In giving evidence A _____ confirmed only

that it is the line manager who informs the employee of an extension of the provisional period and the reasons for such extension.

On 7 February 2011 the Applicant wrote to his line manager that he would not pursue the matter even though he had doubts about the reasons underlying the extension and about whether the proper procedure had been followed. Furthermore, he wished to focus more on the important tasks to be undertaken for the Bank ("I will not take the case further even though I do have some reservations on the validity of the reasons and the compliance of the process followed …").

I.

D _____, a member of the Applicant's team, contacted the Applicant's line manager on 7 February 2011 complaining about the Applicant's management style. He said he was the victim of mobbing by the Applicant and gave several examples. He also complained about the bad atmosphere within the unit. This having been confirmed by three other staff (E _____, F _____ and G _____), according to the Respondent, the Applicant's line manager informed him on 28 February 2011 that his appointment would not be confirmed owing to unsatisfactory performance and unacceptable management of staff. It was proposed to the Applicant that he be released from his duties on 31 May 2011. B _____ subsequently asked him to resign without notice as of 28 February 2011, which the Applicant refused to do.

The Applicant denied having been aware of the complaints from his unit concerning his management style, saying that he had always had positive feedback and that it was only later that one of the Bank staff had drawn his attention to the fact that a member of his team intended to formally complain about him.

Witnesses H _____, E _____ and I _____ confirmed that the atmosphere was good and that communication between them and the Applicant was direct, which suited them. It was true that they had felt a certain tension between the Applicant and D _____, but that was not the case for the team as a whole. They were aware that the Applicant had a difficult workload, particularly the task of restructuring the department, but he had the situation under control. The written statements of F _____, G _____ and J _____ criticising the Applicant for his style of management were only submitted to them for signature by the Respondent in November 2011, when it was clear that proceedings would be initiated. The Tribunal has no hesitation in rejecting them.

The Applicant having refused to resign of his own accord, the Respondent informed the Applicant in writing on 16 March 2011 that his appointment would not be confirmed and that consequently the employment contract would be terminated on 31 May 2011. At the same time, the Respondent offered to extend the appointment to 30 June 2011, meaning that the Applicant's children would not have to break off their education so close to the end of the school year. The Applicant refused this offer on 23 March 2011. The Respondent then confirmed on 25 March 2011 that the employment contract would be terminated on 31 May 2011.

J.

On 24 March 2011 the Applicant initiated a formal grievance procedure. At that time, the grievance panel refused to recommend that the Applicant's employment be extended.

On 17 May 2011 K _____, […], informed the Applicant that the panel had considered the extension of the provisional period and the non-confirmation of the appointment to be correct, and that it did not recommend the contract be extended beyond 31 May

2011. In a gesture of goodwill, K _____ proposed payment of an additional month's salary to the Applicant. The Applicant did not take any position in this regard.

The employment contract was terminated on 31 May 2011. In August 2011 the Applicant applied to the Administrative Tribunal of the BIS (item C above). The Applicant did not start working again till 15 March 2012, when he was employed by […].

As to the law

1.
With his application dated 15 August 2011 the Applicant acted within the deadline of 90 days laid down in Article VII of the Statute. It is true that his application to the Tribunal was sent to the address of the Respondent, who immediately forwarded it. This addressing error is of no consequence, being excusable insofar as the address of the Registrar of the Tribunal foreseen in Article VII (1) of the Statute and Article 9 (1) of the Rules of Procedure is not provided on the BIS's website but only on its intranet, to which the Applicant (or his counsel) had no access after his departure from the Bank.

Relating to a dispute within the meaning of Article II of the Statute, the case falls within the jurisdiction of the Tribunal.

A complete application in accordance with Article 12 of the Rules of Procedure having been filed with the Tribunal, the Tribunal is therefore entitled to hear the case.

2.
Pursuant to Article IX of the Statute, the Tribunal applies the regulations established by the Bank and the contracts concluded between the Bank and its officials, and shall satisfy itself, if necessary, that such regulations and contracts are in conformity with general principles of law (paragraph 1). In the absence of applicable rules, the Tribunal shall base its judgments on general principles of the law of the international civil service and, in case of doubt, on general principles of Swiss law, whereby it is understood that neither judgments delivered by other administrative tribunals of the international civil service nor those of national courts shall be binding upon the Tribunal (paragraph 2). In all cases, the Tribunal shall take into account the customs and practices of the Bank (paragraph 3).

3.
It should be examined first of all whether, as asserted by the Respondent and contested by the Applicant, the provisional period of one year agreed between the parties was validly extended.

a) According to Article 10, third paragraph, of the Respondent's Staff Regulations, the member of staff involved must be informed of its extension before the end of the provisional period. This text imposes no particular requirement as to form for the communication concerned. It can scarcely be disputed that, nowadays, with the development of the internet, a communication via e-mail may be considered appropriate, even for important personal information. Nor does Article 10, third paragraph, stipulate that reasons be given. On the other hand, in requiring that the member of staff be "informed before" the end of the provisional period, it leaves undecided the question of what is the decisive time for the effectiveness of the communication: is it the time at which it is received, read, issued or sent? In the absence of any general principle of civil service law in this regard, the Tribunal will apply that enshrined notably in Swiss law, whereby it is sufficient that a notification be received by the person involved, that it come within his/her sphere of influence, for the communication to be effective,

regardless of whether the recipient has effectively become aware of it (CR-CO I, Morin, Article 1 CO, N 15). In fact, this principle is the one that achieves the best balance between the interests of the issuer and those of the recipient (Engel, Traité des obligations en droit suisse, 1973, pp 102 ff). Applied to e-mail communications, it means that the receipt of an electronic message takes place as soon as its addressee is able to retrieve it, provided that he/she has communicated his/her electronic address to the sender in advance (cf § 312 e I BGB [German Civil Code]; Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference <DCFR> – I.-1:109 IV c).

In the case in point, the Respondent communicated this extension by an e-mail that arrived at 18:42 on 30 November 2010 in the Applicant's two mailboxes, which he had notified to the Respondent upon his appointment (Respondent's exhibit 10). In strict legal terms, this notification was sufficient and was made in time, since it was still possible for the Applicant to retrieve his e-mail that same day, given the hours customarily kept by the Bank in communicating with its staff via e-mail. It is pointless for the Applicant to claim that, being ill and having been told by his doctor to rest, he only became aware of his e-mails much later. The Respondent had until 30 November to notify its decision to the Applicant, and did so in time. The fact that the Respondent then opted to confirm its decision by backdated letter does not alter this situation, even if backdating later mail was at least a curious and displeasing thing to do.

b) The decision to extend the provisional period presupposes "exceptional circumstances" according to Article 10, third paragraph, of the Staff Regulations. The parties are in dispute as to both the interpretation of this text and its application to the present case. For the Respondent, who cites the case law of the European Court of Justice (ECJ), simple doubts on the part of the employer as to the employee's aptitude for the position suffice to constitute an "exceptional case" justifying an extension of the provisional period (Tralli judgment of 26 May 2005, case C-301/02 P, 2005, ECB, §§ 71-73). For his part, the Applicant claimed that only serious and repeated failures on the part of the employee would constitute exceptional circumstances (Application, p 27).

The text of Article 10 of the Respondent's Staff Regulations itself, in fact, allows this divergence to be resolved. It indicates that the provisional period offers three options to the Bank: that of dispensing with it or shortening its duration for a member of staff "whose efficiency has been duly recognised" (second paragraph); that of dismissing the staff member with one month's notice if his/her "work … is found to be unsatisfactory" (fourth paragraph); and that of extending its duration "in exceptional circumstances" (third paragraph). Thus, contrary to what the expression "exceptional circumstances", read in isolation, might suggest at first glance, the extension of the provisional period presupposes a situation in which the Bank's employee has not demonstrated beyond any doubt either his aptitude for the position or an unsatisfactory performance. In other words, while extension of the provisional period cannot be the rule, the fact that the employer is not yet certain that the staff member performs (or will perform) entirely satisfactorily is sufficient to justify an extension. Such a systematic interpretation of the BIS Staff Regulations thus effectively fits with the aforementioned ECJ case law.

In the present case, it is a fact that the Applicant performed satisfactorily in the first two thirds of the provisional period, as is evidenced by the assessments of April and July 2010, where the reservations expressed were secondary. On the other hand, even if the submission of the strategy documents required under his job description was not due until February 2011 according to the objectives assigned to him, it was understandable that from autumn 2010 onwards the Respondent insisted on having an initial version of these documents that was more precise and complete than merely the PowerPoint presentations previously drawn up by the Applicant. The Applicant did not, however,

submit anything to the Respondent in this regard. And even if the Applicant was undoubtedly handicapped by his workload, by the major efforts he had made to restructure his team, and obviously by his illness, it may be admitted that the Respondent had sufficient doubts to take the decision it took, even right at the end of the provisional period. At the very least, such decision gives no grounds for complaint about an abuse of discretionary power, given the restraint which the Administrative Tribunal is obliged to exercise in this area.

c) In sum, the Respondent cannot be said to have been in breach of the sufficient conditions under the Staff Regulations for extending the duration of the Applicant's provisional period. This conclusion, however, does not prejudge a review of the Respondent's behaviour with regard, notably, to its own Code of Conduct (consideration 5 below).

4.
Once the Applicant's provisional period had been validly extended following the e-mail sent to him by the Respondent on 30 November 2010, termination of the employment again remained possible solely as provided for in Article 10, fourth paragraph, subject to at least one month's notice.

In judging this second question, the Tribunal will take account of international civil service case law, according to which international organisations such as the Respondent enjoy broad discretionary power in confirming or not confirming a provisional appointment (see in particular C F Amerasinghe, The Law of the International Civil Service, vol II, p 180; ILO Administrative Tribunal, judgment no 2977, 2011, consideration 4; idem, judgment no 2599, 2007, consideration 5; idem, judgment no 1696, 1998, consideration 4). Great restraint in censuring an employer's decision in this regard is furthermore imposed by the Statute of this Tribunal, Article X (2) of which enjoins it not to "substitute its decision for the discretionary power of the Bank in matters of appointments".

In the context of this limited power of review, it must be concluded that in notifying the Applicant on 16 March 2011 that his appointment would be terminated at end-May 2011, at a time when the strategy documents had still not been submitted by the Applicant, even in draft form, the Respondent did not abuse its broad discretionary power. Conversely, the additional argument based on the Applicant's unsatisfactory leadership of his staff was much less convincing, or even unfounded, as was shown during the proceedings. This notwithstanding, and despite much hesitation, the Tribunal considers that the termination of the contract during the provisional period, which according to the Staff Regulations required no statement of the reasons, was admissible given the Bank's discretionary power.

5.
However, it remains to be examined whether and to what extent the behaviour of the Respondent infringed its own Code of Conduct as well as general principles of the international civil service, and what conclusions are to be drawn from any positive answer to this line of questioning.

a) According to Article 3, first paragraph, of the BIS Staff Regulations, members of its staff shall maintain the highest standards of conduct both at and outside the Bank. Spelling out this general rule in detail, the Respondent's Code of Conduct requires all members of staff notably to carry out their duties diligently and efficiently (Article II (1) (i)) and to treat all their colleagues with courtesy and respect, ie to avoid all harassment, abuse or anything that comes close to such behaviour (Article II (1) (iv)). Among the rules of conduct thereby imposed on the staff of the BIS

are evidently those that have been identified by general principles of the civil service. In particular, it is accepted that during the provisional period staff have numerous rights, which equally constitute obligations on their line managers and their employer (Amerasinghe, op cit, pp 164 ff), notably the right to fair conditions for performance, the right to guidance and training, and the right to be warned about shortcomings. To that, one may add that the requirements legitimately imposed by the BIS as regards maintenance of the highest standards of conduct do not disappear once proceedings are opened.

In the light of these principles, the Tribunal considers that in numerous respects the Respondent failed to comply with its obligations or fulfilled them only imperfectly.

b) During the initial provisional period it is established that the Applicant began with an almost faultless performance during the period from December 2009 to August 2010, which was praised in two positive assessments. Having had to handle routine operations alongside a major restructuring of his team, the Applicant was exposed to an excessive workload. It is understandable that the Applicant voiced occasional complaints about this. It is equally undeniable that he received next to no support or precise feedback from his line manager. On the other hand, since he was performing management functions, the Applicant should have produced at least partial results by keeping his line manager abreast of his thinking on the required strategy documents, which he failed to do. Hence, after his meeting with B _____ on 12 November 2010, the Applicant should have expected that his provisional period would be extended. However, his line manager gave him no concrete indication at all of how he might avoid such an extension. The report of 26 November 2010 on the meeting designed to clarify the positions and specify what the Respondent expected of him was much too late: even if the Applicant had not fallen ill, he would not have had time between 26 and 30 November 2010 to improve his performance as desired by the Respondent.

While the notification of the extension of the provisional period by e-mail dated 30 November 2010 was deemed to be adequate from the point of view of the formal conditions for that act (consideration 3 above), from the point of view of the development of the Applicant in his position with the Respondent it was clearly insufficient. Admittedly, it is established that the Applicant fell ill on 24 November 2010 and that his line manager attempted to reach him by telephone. However, for a manager belonging to the small group of key Bank staff members, sending an e-mail on the last day possible, without explanation, without the recipient being able to argue, and with no indication of what the employer expected going forward – this is all unusual to say the least. The follow-up letter did nothing to fill in these gaps; it was backdated, which is inadmissible, and it was just as summary in nature as the e-mail.

c) Nor did the Respondent give the Applicant an opportunity to fulfil explicit expectations during the extended provisional period. The period during which the Applicant was unfit for work, 100% from 24 November 2010 to 9 January 2011 and 50% from 10 to 30 January 2011, was obviously bound to delay the submission of the strategy documents proportionately. And the Applicant was rendered unable to rectify any deficiencies by the fact that the Respondent failed to spell them out to him clearly. Despite some uncertainties as to the exact content of the Applicant's discussions with B _____ on 21 January 2011 and with A _____ in early February 2011, it does seem that the Applicant met with evasive answers, with each interlocutor referring him to the other. What is certain is that the Applicant did not receive instructions specifying the points he should improve going forward. In fact, as is shown by an appraisal document of another BIS staff member dated 1 May 2011, submitted by the Applicant with his letter to the Tribunal of 31 July 2012, the Respondent was perfectly able in this case to give precise feedback to that staff member. Besides, the Respondent's objection to the

production of this document, which it argues is in violation of the staff member's duty of confidentiality, serves no purpose because such a duty cannot be invoked against the Tribunal, which may anyway take evidence of its own motion on the pertinent facts (Article 19 of the Rules of Procedure).

Such an attitude on the part of the Applicant's interlocutors would naturally lead him to believe that there were in fact no reasons for the extension, or that the real reasons were being concealed from him, especially as the arguments put forward changed over time:

initially, during the first provisional period, it was the Applicant's alleged "frustration" with his work environment that was referred to, although without the Respondent having succeeded in proving that the Applicant used this term; the e-mails exchanged in this context indicate only that the Applicant was complaining that his excessive daily workload did not leave him with the time needed for reflection; there is nothing shocking in this; it ought rather to have led the two sides to share thoughts on how to improve the situation;

Subsequently, it was the alleged leadership deficiencies that were held against the Applicant, but without these accusations having been put into precise language that might have helped the Applicant improve;

Finally, as early as 28 February 2011, that is, only four weeks after the Applicant had resumed working at 100%, B _____ notified him that the Respondent did not wish to confirm his appointment.

However, the Respondent had not previously given the Applicant any indication whatsoever what he should and could have improved during these four weeks to avoid the non-confirmation of his appointment. What is more, it emerges from the testimony of witnesses H _____, E _____ and I _____ that, with one exception, the restructurings that the Applicant had to implement in his team passed off without tensions, which is rather to his credit given the number of staff he managed.

d) In fact, it does appear that by 21 January 2011, the date of the Applicant's first meeting with his line manager after his return from sick leave, it had already been decided to dispense with his services. Indeed, in commenting on the draft meeting record prepared by B _____, the Bank's Legal Service expressed in particular the following opinion: "Please note that what is in the attached minutes is not, in our view, strong enough to prepare the non-confirmation after the probation period on performance grounds (not taking into account other possible elements). We should be clearer. (…)" (e-mail from L _____ to B _____ of 21 January 2011 at 17:00, in reply to an e-mail from B _____ that same day at 14:06). The production of this exhibit, required in execution of item 4 of the order of the President of the Tribunal dated 9 August 2012, was contested by the Respondent on the grounds that it concerned "documents relating to the private sphere of the Respondent and its in-house counsel", and that a firm or an international organisation should be able to "rely on the legitimate confidence that the legal opinions it receives from its counsel, whether internal or external, will remain confidential". The Respondent invoked amongst others the rules of Swiss civil procedure, in particular Article 156 CPC. This general rule on the safeguarding of interests worthy of protection during the taking of evidence does not actually give a direct answer to the problem raised by the Respondent. To stay with Swiss law, an answer might be found rather in the fact that preliminary draft federal legislation on corporate counsel of April 2009, which subject to certain conditions would have aligned in-house corporate counsel with attorneys covered by professional secrecy (Article 12), was dropped by the Federal Council, as the proposed provisions on professional secrecy for corporate counsel had the

“effect in particular of complicating certain administrative, civil or criminal proceedings” (http://parlament.ch/ F /Suche/Pages/geshaefte.aspx?gesch_id=20101121).

Consequently, supposing it applicable, Swiss positive law would in no way afford the protection claimed by the Respondent. Furthermore, it is difficult to see what argument the Respondent draws from Rule XVII, paragraph 2, of the Rules of Procedure [of the Administrative Tribunal] of the International Monetary Fund, according to which: “The Tribunal may reject the request if it finds that the documents or other evidence requested are irrelevant to the issues of the case, or that compliance with the request would be unduly burdensome or would infringe on the privacy of individuals.” In the present case, none of these criteria justifies rejecting the production of the exchanges of e-mails in question, which are pertinent to ascertaining how the Respondent followed up on the Applicant’s case.

e) Finally, even during the proceedings, the Respondent had recourse to processes which an employer striving to adhere to the highest standards should have avoided. These include the production of written testimonies (Respondent’s exhibits 14 ff) drafted by the Applicant’s line manager after proceedings had been initiated, that is, for purposes of such proceedings, and signed by persons whom the Respondent had nonetheless not put forward as witnesses. Such statements should never have been produced before this Tribunal.

f) Taken together, this accumulation of deficiencies and errors in the management of the Applicant’s case justifies granting the Applicant appropriate indemnification. According to Article X (1) of the Statute, if the Tribunal finds that the application is well founded it may quash the decision contested and, if necessary, grant an appropriate remedy. This provision does not, however, mean that the granting of a remedy is ruled out in the event that the decision not to confirm an appointment is upheld. On the contrary, the legal literature and case law in the area of the international civil service acknowledge that compensation can be justified independently of what happens to the decision on an employee’s appointment when the employer has infringed its obligations, for example as regards the due process of law (Amerasinghe, op cit, pp 183 ff; World Bank Administrative Tribunal, Decision no 157, McNeill, 1997; United Nations Administrative Tribunal, Judgment no 980 of 17 November 2000, Baldwin case; idem, Judgment no 1371 of 21 November 2007, Ba-n’Daw case).

In the present proceedings, if the Respondent had managed the Applicant’s case in an optimal or simply normal manner throughout the provisional period, in particular by giving him clear and timely indications of its expectations, the Applicant might conceivably have had his appointment confirmed, even if this is not a certainty. However, it would doubtless be excessive and unfounded to award compensation equivalent to the term of the contract still to run, ie 18 months, as demanded by the Applicant. On the other hand, given the number and definite seriousness of the management failings, and the lack of respect thereby shown towards a senior official of the Bank, who found new employment only on 15 March 2012, the Tribunal considers that compensation representing nine months’ salary is fully justified.

g) The plea for payment of interest as from 1 June 2011 on the amount awarded is justified. As to the interest rate, in the absence of an applicable rule under international law, the Tribunal will adopt that of 5 % provided for by Swiss law (Article 104 of the Swiss Code of Obligations (CO)).

6.
The Applicant’s plea for a declaratory judgment, intended to have the extension of the provisional period declared unlawful, is inadmissible insofar as the Applicant, by bringing

an action for performance, had no immediate interest in such a declaration. Such plea was anyway unfounded (consideration 3).

7.
The Applicant has in addition the right to receive a testimonial describing not only the nature and duration of his employment, but also the performance he delivered, in particular in his functions as manager of a large number of staff. While he cannot oblige the Respondent to sign a fully drafted document, as he demands in his pleas, the Applicant is nonetheless entitled to obtain from the Respondent a testimonial that takes account of the present judgment.

8.
In application of Article XIV (2) of the Statute, the Tribunal awards costs fixed at CHF 50,000 to be borne by the Respondent for part of the Applicant's expenses.

9.
The costs of the Tribunal shall be borne by the Respondent (Article XIV (1) of the Statute).

In view of the foregoing, the Administrative Tribunal finds:

1.
The Respondent shall pay to the Applicant an amount corresponding to nine months' gross salary, with interest at 5 % per annum from 1 June 2011.

2.
Within one month from the date of the present decision, the Respondent shall provide to the Applicant a testimonial describing and characterising his performance and his conduct, including as manager, together with the nature and duration of his activity. Such testimonial shall take into account the present judgment.

3.
The respondent shall bear the costs of the proceedings together with part of the Applicant's expenses fixed at CHF 50,000 (fifty thousand Swiss francs).

4.
The costs of the Tribunal shall be borne by the Respondent.

5.
All other or further pleas of the parties are rejected.

Basel, 22 November 2012

The President: The Registrar:

Prof Dr Dr hc Wolfgang Hromadka Prof Dr Ramon Mabillard