

**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 124**

23 February 2022

Ms. N

v.

Asian Development Bank

**Shin-ichi Ago, President**

**Anne Trebilcock, Vice President**

**Chris de Cooker**

**Raul C. Pangalangan**

**Silvia Cartwright**

1. The Asian Development Bank Administrative Tribunal (the Tribunal) has been seized of an application filed on 27 June 2021 by the Applicant, who was 51 years old at the time when she commenced employment with the Asian Development Bank (the “Respondent”, the “ADB” or the “Bank”) at the end of November 2018. After the usual exchange of pleadings, the case was listed on 6 January 2022. The Applicant has requested that her name be kept anonymous and, for reasons discussed below, her request is granted.

2. The Applicant, having ended her employment under a confidential Settlement Agreement with the Bank and having applied and qualified for an Incapacity Pension, asks the Tribunal to review and vacate the decision made by the Administration Committee of the Staff Retirement Plan (AC-SRP) to set her Incapacity Pension at 50% partial incapacity, and to fix it instead at 70%.

**I. THE FACTS**

*Applicant’s Employment at the Bank*

3. On 28 November 2018, the Applicant began her employment with the Bank as an International Staff (IS) at Level 6, in the Sustainable Development and Climate Change Department.

4. On 3 December 2018, she reported for duty at ADB headquarters. The next day, on 4 December 2018, she consulted the ADB clinic for a health problem that was eventually diagnosed as Bell's Palsy, the medical condition that afflicted her for the entire duration of her service with the Bank and for which she later qualified for an Incapacity Pension.

5. On 4 December 2018 she was initially diagnosed with a "pinched nerve." That diagnosis was corrected on 12 December by the acting head of the ADB clinic, who diagnosed Bell's Palsy and who further recommended that she be assessed by neurologist Dr. Edmundo G. Sanieel (Dr. EGS) and rehabilitation specialist Dr. Geraldine Montes (Dr. M).

6. From 14 December 2018 to 22 February 2019, pursuant to their medical advice, the Applicant was on sick leave. The Applicant returned to work on 25 February 2019, after Dr. EGS recommended that she was "fit to work."

7. Throughout 2019, the Applicant's condition persisted and she continued intermittently to require medical leave and a reduced workload. She alleges that during this period her supervisors were neither sympathetic nor supportive of her plight and that, for instance, the ADB "did not provide appropriate occupational health support at her work, such as reduced lighting and seating arrangements, as advised by her doctors."

8. The Bank disputes the allegations made by the Applicant with regard to her support at work and in fact from 5 August 2019 to 4 February 2020, with the Applicant's agreement, in what the Bank claims was an effort "to provide [her] with a new environment in which to recover," she was given a short-term assignment to the Pacific Department (PARD), later extended until 4 March 2020, at the end of which she requested to remain in PARD. Accordingly, the Applicant's short-term assignment to PARD was converted to a lateral transfer. The Applicant alleges her workload increased by "350-425% without discussion or her agreement, and against medical advice and certificates," which the Bank denies.

9. Her probation was extended by 6 months to provide her PARD supervisor with more time to assess her performance.

10. On 9 January 2020, the Applicant was examined by Dr. Asadang Dusadi-Isariyavong (“Dr. A”), the Bank’s Principal Medical and Health Specialist (Staff Health) and the new ADB head doctor, who advised the Applicant to avoid a stressful working environment and limit her working hours. The Applicant alleges that she complained about the increase in workload to the Bank’s Vice-President for Administration but was told, she alleges, to “put her head down and do the work.” On 5 March 2020, Dr. EGS expressed concerns about the increased workload as reported by the Applicant and its negative impact on the Applicant’s recovery. On 21 March 2020, the Applicant, with the approval of the head of ADB security and the Budget, People and Management Systems Department (BPMSD), moved to Bhutan “to remain safe from the COVID-19 pandemic,” where she remained until December 2020 when she returned to Manila in preparation for her separation from the Bank. Throughout 2020, the Applicant continued to be on periodic medical leave with doctors regularly stating that her condition had been aggravated and her recovery impeded by extreme fatigue, exhaustion and stress caused by her workload.

11. The Applicant and the Bank differ on how the Bank dealt with medical advice to reduce her workload. The Applicant alleges that “no action [was] taken to reduce her workloads, and her disability [was] systematically ignored.” The Bank disputes this and says it took actions throughout her employment to adjust and reduce her workload. The Bank further contends that the Applicant’s pace of recovery to enable her to operate at full capacity was slower than expected. In addition, performance concerns were identified and, as of October 2020, the Applicant’s employment was already being considered for termination.

#### *Application for Incapacity Retirement*

12. On 28 October 2020, the Applicant filed a memorandum applying for “incapacity retirement under Section 3B.4 of the Staff Retirement Plan” citing “health reasons and disability that arose after joining the ADB.” She attached the certification from her doctor recommending incapacity retirement due to health reasons and copies of her latest medical reports. She furnished that memorandum to the Tribunal but without the mentioned attachments.

13. On 4 November 2020, Dr. EGS issued a certification diagnosing the Applicant as having “left Bell’s Palsy, severe” and ‘migraine headaches, episodic.’ His prognosis was that the left face nerve injury was permanent and would “continue to interfere with her work... Her symptoms may worsen in the future....” On 9 November 2020, the Applicant furnished the Bank Dr. EGS’s *Addendum to Clinical Summary of*[the Applicant], containing the range of partial disability, which concludes:

It is estimated that her disability due to her permanent left facial nerve injury results in loss of work efficiency **by as much as fifty to seventy percent.** (emphasis supplied by the Applicant)

It is this medical opinion that underpins the Applicant’s central plea in this case, namely, that the Bank should have assessed her partial incapacity at 70% rather than at 50%.

#### *Confidential Settlement Agreement*

14. On 6 November 2020, the Applicant signed a confidential Settlement Agreement with the Bank providing for the end of her employment effective 31 March 2021, with her last working day to be 31 December 2020. In the Agreement the Applicant waived her claims against the Bank except for “benefits that the Applicant may be entitled to under the SRP or the Defined Contribution Plan (DC Plan),” as described by the Bank in its Answer and not disputed. The record does not show what compensation the Applicant received in exchange for that blanket waiver and the end of employment.

15. The confidential Settlement Agreement was understandably not submitted by the parties to the Tribunal. At the same time, the Applicant does not contest the Bank’s description of the Settlement Agreement and, while she disagrees as to the exact dates when they respectively signed it, she confirms in her Reply that she “entered into the settlement agreement on 6 November 2020.” The Applicant has not challenged its validity and, indeed, has carefully framed her case to pertain mainly to pension benefits that fall outside the scope of the Settlement Agreement.

*Incapacity Pension application process*

16. On 23 October 2020, the Applicant contacted the Retirement Benefits and Investment Unit (BPOD-RIU) to ask about her pension and how to apply for an Incapacity Pension.

17. On 27 October 2020, BPOD-RIU responded with a summary of the main features of that benefit and how to apply for that pension and calculate it. BPOD-RIU explained that section 3B.4 of the Staff Retirement Plan (SRP) contained the provision on Incapacity Retirement and provided the procedures for applying for incapacity retirement under the ADB Staff Retirement Plan (SRP). In the application for incapacity retirement, the SRP “Participant” must attach (i) a medical certification from the attending physician recommending retirement from the ADB due to health reasons; and (ii) copies of the latest medical reports. For partial incapacity, the Applicant was advised to request the attending physician to indicate the percentage or degree of incapacity. The next steps would be for the BPOD-RIU to forward the medical certificate to a physician designated by the SRP’s Administrative Committee for review. That physician would then certify whether the Participant’s incapacity was total or partial, in accordance with the Plan’s definition of incapacity, and the Administration Committee will either approve or disapprove the recommendation on the degree of incapacity.

18. As stated above, on 28 October 2020, the Applicant applied for incapacity retirement under section 3B.4 of the SRP.

19. The Applicant also provided permission for BPOD-RIU to share the medical reports she had submitted as part of her request for an Incapacity Pension with Dr. A, the Bank’s head Medical Doctor, and the Administration Committee.

20. On 10 November 2020, BPOD-RIU sent Dr. A a memo requesting his review of the Applicant’s request for an Incapacity Pension under the SRP and further seeking approval of the recommendation of the percentage or degree of incapacity. After his review, Dr. A stated that “the Applicant has been certified by a licensed neurologist as partial incapacity of 50%-70% to perform the work of her education attainment. I recommend the partial incapacity of 50% and her clinical

condition to be reviewed yearly to maintain the partial incapacity pension status.”

21. On 16 November 2020, BPOD-RIU emailed the Applicant and advised her that Dr. A had determined her degree of incapacity to be 50%. Dr. A did not consult Dr. EGS prior to reaching his view, the Bank explaining that it was because the Applicant withheld her consent and barred Dr. A from contacting Dr. EGS directly. The Applicant instead gave express written permission in her 30 September 2020 email for Dr. M, her rehabilitation specialist, to contact Dr. EGS. The Applicant explained to Dr. M that she did not give Dr. A that permission in order to “ensur[e] continuity, and long term knowledge of my case.” The record does not show whether Dr. M contacted Dr. EGS.

22. In further correspondence on 16 November 2020, the Applicant said she wished to proceed with the application but said “I believe it was indicated the incapacity is between 50-70%, so I think it is good to indicate this range to the SRP Administration Committee.”

23. Believing there to be no appropriate specialist in Bhutan, on 27 November 2020 Dr. A proposed to contact International SOS (ISOS) “to find an independent occupational health specialist in other countries for detailed assessment.” On 18 December 2020, Dr. A emailed ISOS requesting an independent assessment by an experienced occupational health specialist to evaluate the Applicant’s incapacity. On 30 December, ISOS asked Dr. A to send the Applicant’s Job Description and ADB-internal definition of incapacity. On 4 January 2021, Dr. A replied that he was still waiting for the job description. He provided the ADB definition of “incapacity” as “physical and/or mental illness or injury that is likely to be permanent or of long duration and for which reason [a staff member] can no longer continue working for ADB in a position commensurate with [his/her] training and experience.”

24. On 28 December 2020, the Applicant returned to Manila to settle her affairs. She was last required to report to work on 31 December 2020. She was separated from the Bank on 31 March 2021 but continued to receive her full salary during that three-month period.

25. Dr. Rogelio V. Dazo Jr. (Dr. D), the accredited occupational health practitioner at ISOS,

was designated by the SRP-AC as the physician to assess the Applicant's incapacity. Prior to the appointment, Dr. D was provided with a copy of her position description.

26. According to the Applicant, on or about 4 February 2021, the AC-SRP provided the Applicant and Dr. D with medical reports from the following doctors: Dr. EGS (17 December 2018; 27 December 2018; 8 January 2019; 4 February 2019; 20 February 2019; 19 March 2019; 24 April 2019; 14 May 2019; 5 July 2019; 6 August 2019; 7 January 2020; 5 March 2020; 28 July 2020; 25 September 2020; 4 and 6 November 2020;); Dr. Mendoza (27 December, 2018); ADB rehabilitation consultant, Dr. M (4 January 2019; 22 February 2019; 2 August 2019); ADB doctor Dr. A (5 August 2019; 21 August 2019; 6 March 2020); Dr. Valencia (1 July 2020); medical staff in the Bhutan military hospital (1 July 2020; 17 July 2020; 12 October 2020; and 23 October 2020), where the Applicant had been seeking treatment since relocating to Bhutan in March 2020; as well as an additional report of Dr. M (10 Feb. 2021), containing a Muscle Manual Testing (MMT) score of 3/5 on the orbicularis oculi, and 2/5 on the left frontalis after two years of treatment.

27. Following his examination of the Applicant, Dr. D concluded in his report of 17 February 2021 that the Applicant's incapacity was 50%. Dr. D's report cited the MMT scores as giving an average of 2.5/5 MMT score, which was equivalent to 50%. Dr. D's report stated that "the report also provides final recommendations on the current medical condition of [the Applicant] and will be the basis of issuance of work incapacity/disability." The report noted the chief complaint was "non[e] resolving facial paralysis of more than two years." It also noted the Applicant's "vision has been severely compromised since the Bell's Palsy attack last December 2018. By the nature of her work, it will aggravate her condition such as excessive tearing, chronic headache and neck stiffness as a result she may not perform her duty in full capacity."

28. On 25 February 2021, the Secretary to the Administration Committee submitted a memorandum to the Administration Committee (Chair, Vice-Chair, and Member), recommending that they a) confirm Dr. D as the designated physician to certify the Applicant's medical condition to determine her eligibility for incapacity retirement; b) accept the medical findings of Dr. D as satisfactory under the SRP and approve the Applicant's partial incapacity retirement at 50%; and c) pay the Applicant an Incapacity Pension, in line with that partial incapacity. The memo notes

that “notwithstanding the proposed range of 50% to 70% incapacity specified by [Dr. EGS], [Dr. A] has recommended a partial incapacity retirement at 50% based on his assessment of [the Applicant’s] condition.” The memo footnotes this by stating “[The Applicant] has requested for this to be specifically reflected in this memo.” Attached to the memo was the 4 November 2020 medical report of Dr. EGS and medical certificates provided by the Applicant, and the medical assessments provided by Dr. D and Dr. A. The same memo has been signed by the Administration Committee Chair, Vice-Chair and Member. The Bank says this shows the Administration Committee approval of the recommendations.

29. On 17 March 2021, BPOD-RIU notified the Applicant that the Administration Committee had determined that she would be eligible for an Incapacity Pension. The memorandum stated:

The Administration Committee of the Staff Retirement Plan (SRP) has approved your incapacity retirement effective 31 March 2021 at 50% level of incapacity. ...

As required under the SRP, you will undergo a medical examination annually to determine your continued eligibility for the incapacity pension. In addition, to the medical report that you need to submit each year, you also need to confirm that you have not been gainfully employed in the past year.

Upon reaching age 62 (normal retirement date), your incapacity pension will be recalculated as a normal retirement pension, with highest average remuneration (HAR, based on salary cap) increased at the same rate as your incapacity pension would have increased by then, and your eligible service to include the period from the date of incapacity to normal retirement date. ...

30. On 18 March 2021, the Applicant emailed the BPOD-RIU requesting a reconsideration of the assessment of her Partial Incapacity at 50%, and for the Administration Committee to instead reconsider her Partial Incapacity at 70%. The Applicant wrote, “I am concerned about the suggested percentage of incapacity in the letter, given the medical certificate indicates an incapacity of 50 TO 70%. Suggesting an incapacity of 50%, the lowest/bottom possible



percentage in the range, does not do justice to the stark reality of the disability and indicates a deep lack of consideration, humanness and disregard for my incapacity condition.” [emphasis in the original] The Applicant asked, in the event that there was a failure to reconsider the rate of incapacity, to advise her of the appeal process.

31. On 29 March 2021, BPOD-RIU emailed the Applicant, outlining the process that the Administration Committee had followed in reaching its conclusion, and stating that the Administration Committee decision was final, subject to appeal in accordance with the procedures of ADB’s Administrative Tribunal. The email stated, “The Administration Committee approved the designation of [Dr. D] as the physician certified to assess your permanent, partial or total inability to work and his assessment that your condition provides a 50% partial incapacity, which aligns with the assessment of [Dr. A] and [Dr. M].”

32. The Applicant’s employment with the Bank ended on 31 March 2021. During the entire three-month period from the Applicant’s last working day at the Bank on 31 December 2021 and her official separation from the service, the Bank paid the Applicant her “full 100% salary.”

#### *Appeal to the Administrative Tribunal*

33. The Applicant contests the decision of the AC-SRP made on 17 March 2021, affirmed on 29 March 2021 and effective 31 March 2021, to set her incapacity pension at 50% partial incapacity. She alleges that the AC-SRP’s decision was manifestly unreasonable or capricious as it was against the weight of the medical evidence; was illogical as no reasons were expressed by the AC-SRP for the decision; and did not take into account the evidence and findings of qualified medical doctors as recorded in the certificates submitted by the Applicant to the AC-SRP. The Applicant did not challenge any other aspect of the AC-SRP decision.

34. The Applicant prays for the following relief:

- a) the Application be granted;
- b) the AC-SRP’s decision of partial incapacity at 50% be set aside, and instead be

- substituted with a decision of 70% partial incapacity;
- c) in the alternative, that the Bank pay the Applicant damages in a sum to be assessed by the Tribunal; and
  - d) that the Bank pay the Applicant's costs of and incidental to this application in the sum of AU\$30, 000.

35. The Applicant further requests the Tribunal to award her moral damages for the delay, trauma and anxiety she has suffered in the course of her employment at the Bank, and the consideration of her disability which arose as a result of the Bank's actions towards her during her contract of employment.

36. The Respondent denies all the Applicant's allegations and submits that the Application is without merit and should be dismissed in its entirety. The Respondent urges the Tribunal to find that the Applicant is not entitled to any form of relief requested, nor to any legal fees or costs.

## II. PRELIMINARY MATTERS

### *The Applicant's request for anonymity*

37. The Tribunal's Rule 6, para. 3 (February 2021) allows the Applicant to request anonymity. The Applicant has requested that her name be kept anonymous, citing *one*, concerns about "possible discrimination" that she may face on account of the "sensitive health and medical issues" involved, and *two*, fears of retaliation from Bank staff whom she had criticized in the course of making her case.

38. The first ground cited by the Applicant request is meritorious, and in order to protect the Applicant from any form of discrimination on the basis of disability and to preserve the confidentiality of her medical records, the request for anonymity is hereby granted. Accordingly, the case title will be "Ms. N v. Asian Development Bank." The second ground lacks merit. Her identity is already known to the Bank staff she had dealt with and the Applicant did not support with any evidence her imputation to them of a tendency toward vendetta.

*Oral Proceedings*

39. Under Article VIII of its Statute, the Tribunal shall decide in each case whether oral proceedings are warranted. The Tribunal notes that neither party has sought an oral hearing. The Tribunal has been furnished with more than ample documentation satisfactorily illustrating the facts, and both the Applicant and the Respondent have been able to support their positions fully. In these circumstances, the Tribunal does not find it necessary to order an oral hearing in this case.

*En banc*

40. This is the first time the Tribunal has been called upon to consider a direct appeal from a decision on an incapacity pension and it is also the first case to be considered under the Tribunal's revised Rules of Procedure. The Tribunal therefore decides, in accordance with Article V (5) of the Statute, that this Application warrants consideration by a panel consisting of all its members.

*The Scope of Review in Light of the Settlement Agreement*

41. As stated above, the parties signed a confidential Settlement Agreement under which the Applicant waived her claims against the Bank except for "benefits that the Applicant may be entitled to under the SRP [Staff Retirement Plan] or the Defined Contribution Plan (DC Plan)." No copy of the Settlement Agreement having been submitted, the Tribunal will limit itself to the description of its contents as set forth by the Bank in its Answer, and which have not been refuted by the Applicant.

42. The Tribunal has considered other cases where the reviewability of such agreements has been put before it. In *Ms. C*, Decision No. 58 [2003], the Tribunal upheld a Global Settlement Agreement.

The Tribunal concludes that such an agreement is valid, and therefore binding, among the parties, as long as it has been entered into voluntarily and in good faith, and that concluding such an agreement for speedy completion of investigation does not conflict with public

policy. .... All these facts point to a fully informed agreement, and there is no evidence of coercion whatever.

43. As the World Bank Administrative Tribunal explained in *Kirk v International Bank for Reconstruction and Development*, Decision No. 58 (WBAT), cited in *Ms. C*, if these agreements were lightly to be set aside by the Tribunal, “there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements. Rather than conflicting with public policy, the Tribunal’s enforcement of voluntary settlement or release provisions thus advances public policy.”

44. In the present instance, however, the Tribunal finds that the Settlement Agreement is binding on both parties, neither of whom having raised any challenge to its validity. Matters settled in the Agreement are therefore not before the Tribunal.

45. Thus when the Applicant claims “moral damages for the delay, trauma, and anxiety the Applicant has suffered *in the course of her employment at the Bank*, and the consideration of her disability which arose as a result of the Bank’s actions towards the Applicant *during her contract of employment*” [emphases supplied by the Tribunal], those claims are foreclosed by the Settlement Agreement. The Tribunal will not inquire into the Applicant’s allegations of unfair or unsympathetic treatment she received from the Bank in relation to her employment in general, and will limit itself only to such matters as they relate to the question of her Incapacity Pension.

46. The Tribunal however retains its jurisdiction to review the appeal regarding the determination of the Applicant’s pension benefits and to grant remedies if upheld.

#### *The Main Question on the Merits*

47. The Tribunal notes that the “50-70%” range of the Applicant’s reduced work capacity came from her doctor’s medical certificate that she submitted to the Administration Committee. The

Applicant challenges why, within this range, the Administration Committee chose the lowest possible percentage of 50% rather than, as she suggests, the highest, which is 70%.

48. The question before the Tribunal is thus whether the Bank's decision to set the Applicant's partial incapacity at 50% was taken in accordance with its own rules, and reached in a fair and reasonable manner.

### *Standard of Review*

49. As noted above, this is the first application that the Tribunal has considered involving a direct "appeal" of a decision of the Administration Committee of the SRP. Such an "appeal," without recourse to the usual internal grievance mechanisms, is made possible pursuant to section 8.2(b) of the SRP which provides that decisions of the AC-SRP shall be conclusive and binding "subject to appeal in accordance with the procedures of the ADB's Administrative Tribunal," and Article II (3) of the Statute.

50. The Tribunal reiterates its basic competence with respect to the scope of review over discretionary decisions, first expressed in *Lindsey*, Decision No.1, (1991), 1 ADBAT Reports 5, para.12:

*[The Tribunal] can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.*

51. The Tribunal reiterated this competence in *Ms. G (No. 2)*, Decision No. 107 (2016), X ADBAT Reports 87, para. 65, where it also noted that the "Tribunal's role is not to substitute its views for managerial decisions properly taken."

52. These decisions are in step with similar rulings rendered by other international administrative tribunals. For example, the World Bank Administrative Tribunal applied this principle in a disability pension case, *Courtney (No. 2)*, WBAT Decision No. 153 [1996]:

29. The scope of the review undertaken by the Tribunal varies according to the nature of the case before it. Thus, in matters that fall exclusively within the discretion of the Respondent, the function of the Tribunal is limited to examining whether those decisions are arbitrary, discriminatory, improperly motivated, based on error of fact, carried out in violation of a fair and reasonable procedure or otherwise tainted by an abuse of power (*Saberi*, Decision No. 5 [1981], para. 24; *Suntharalingam*, Decision No. 6 [1981], para. 27; *Thompson*, Decision No. 30 [1986], para. 24; *Bertrand*, Decision No. 81 [1989], para. 15).

53. The WBAT also applied this in *Chhabra (No. 2)*, WBAT Decision No. 193 [1998], holding that its task was “limited to reviewing the decision of the Review Panel, by reference to the evidence before that body, with a view to determining whether the conclusion reached by the Review Panel could be reasonably sustained on the basis of that evidence and also whether the Review Panel has acted in accordance with the relevant legal rules and procedural requirements” (see also *Shenouda (No. 2)*, Decision No. 218 [2000], para. 14; *Hasselback*, Decision No. 364 [2007], para. 57).

54. The Applicant has placed great reliance on a WBAT decision, *Shenouda*, WBAT Decision No. 177 (1997), and cited the concluding paragraph verbatim. In that decision the WBAT found that the result reached by the Pension Benefits Administration Committee (PBAC) was contrary to the clear weight of the evidence, and proceeded to substitute its decision for that of the PBAC:

23. The Staff Retirement Plan contemplates that the PBAC is to reach a decision that is warranted by the diagnoses and prognoses of the doctors who have directly examined and treated the applicant. The Committee is not to rely solely upon the secondary assessment of the Medical Advisor, who does not examine the applicant and who, he himself concedes, may not necessarily be an expert in all of the wide range of illnesses that come before the PBAC. ....

55. In the ADB, decisions of the AC-SRP are discretionary, but those relating to incapacity pension are specific types of decisions, made on the basis of medical evidence and pursuant to

medical training, and thus not easily susceptible to outside review by persons who have not been trained as doctors. Nonetheless this exercise of discretion still needs to respect procedural guarantees and fundamental fairness.

56. Taking these considerations into account in the specific facts of this case, the Tribunal will inquire whether the Bank, in exercising its discretion to set the Applicant's incapacity at 50%, had acted in accordance with the applicable rules set forth in the Staff Retirement Plan; whether the Bank's decision was fair and reasonable, and made on the basis of facts properly determined; and whether the requirements of due process have been observed.

### III. FINDINGS

#### *Whether the Bank Determined the Applicant's Partial Incapacity in Accordance with the Applicable Rules*

57. The relevant rules are laid down in the Bank's Staff Retirement Plan (SRP). The SRP itself is administered by a Pension Committee, chaired by the ADB President (SRP Section 8.1.a). The Pension Committee in turn appoints the Administration Committee, which "comprises three persons, each with an alternate, appointed by the Pension Committee upon nomination by the President of ADB" (SRP Section 8.2.a).

58. The Administration Committee has the power to determine a staff member's "partial or total inability to work ... as certified by a physician ... designated" by the Administration Committee. SRP, Sec. 1.1.(i) defines incapacity as follows:

"Incapacity" means, in relation to a Participant, and as determined by the Administration Committee, the permanent partial or total inability to work in an occupation for which the Participant is suited by virtue of training and experience **as certified by a physician or physicians designated by the Administration Committee.** (emphasis supplied by the Tribunal)

59. The Tribunal finds that the Bank complied with the relevant rules and has therefore properly discharged its duty to constitute the Administration Committee in accordance with SRP Section 8.2 on the appointment and composition of the Administration Committee

60. The Administration Committee has the power over the administration of the Plan, in particular, “to determine whether any person has a right to any benefits ... and if so, the amount thereof”, more fully quoted thus:

**to determine whether any person has a right to any benefits under the Plan, and if so, the amount thereof; and to determine any question arising hereunder in connection with the administration of the Plan or its application to any person claiming any rights or benefits hereunder**, and shall decide any other matters required to be decided by it under the Plan, and its decision or action in respect thereof shall be conclusive and binding upon all persons interested, **subject to appeal in accordance with the procedures of ADB’s Administrative Tribunal.** (SRP Section 8.2.b) (emphases supplied by the Tribunal).

61. The Tribunal finds that the Administration Committee acted within its powers under the SRP when it determined whether the Applicant had “a right to any benefits” and “the amount thereof.” The Applicant had filed for an “Incapacity Pension” which is defined in the SRP:

“Incapacity Pension” means the Pension payable to a Participant leaving Service before the Normal Retirement Date on account of Incapacity, as provided in [*inter alia*] Section 3B.4. (SRP, Sec. 1.1.j).

In turn, SRP Section 3B.4 is entitled *Incapacity Retirement*, and states when the right to an Incapacity Pension arises:

A Participant leaving Service before the Normal Retirement Date on account of Incapacity shall be entitled to an Incapacity Pension payable from the date of leaving Service. (SRP Section 3B.4.a).



Section 3B.4 further refers to “partial Incapacity of a Participant” and provides that the Incapacity Pension “shall be reduced by the amount *which in the opinion of the Administration Committee* the Participant is reasonably capable of earning” (sub-para. d).

62. Finally, the Administration Committee made its determination of partial incapacity after considering the assessment of an outside physician who had submitted an independent opinion. This is pursuant to the express power of the Administration Committee “to designate a physician to determine the Applicant’s “partial or total inability to work” (SRP, Sec. 1.1. (i)), and moreover the general power to seek *inter alia* “medical . . . and other services” in the performance of its work (SRP Section 8.4). It also reviewed the reports of other medical specialists who had examined the Applicant.

63. The Tribunal finds that the Bank has determined the Incapacity Pension of the Applicant in accordance with its own rules and regulations.

***Whether the Contested Decision Was Fair and Reasonable and Based on Facts Properly Determined***

64. The Applicant contends that the contested decision was unfair and unreasonable, and more specifically, that it was:

- a. “manifestly unreasonable or capricious as it is against the weight of the medical evidence;
- b. illogical as no reasons are expressed by the AC-SRP for the decision, and the reduction in the level of incapacity is unjustified and without explanation;
- c. based on an error of fact in that the decision does not take into account the evidence and findings of qualified medical doctors as recorded in the certificates submitted by the Applicant to the AC-SRP; and
- d. failed to take into account relevant matters, namely the reports and certificates of members of the medical profession as provided by the Applicant to the AC-SRP.”

65. The Applicant asserts that the Administration Committee’s decision is “against the weight of medical evidence and contrary to its own ‘reasons’”, is thus “capricious and illogical,” and is “not supported by the medical evidence which is available to the AC-SRP.”

66. The Applicant rejects the statement of the Administration Committee that Dr. D’s assessment had “aligned with the assessment of [Dr. A] and [Dr. M].” She contends that it was Dr. EGS, whose expertise is neurology, whose diagnosis was more relevant and authoritative. Dr. A never actually examined the Applicant, and merely endorsed the diagnoses of Dr. EGS. On the other hand, the Applicant says that Dr. M, the rehabilitation doctor, was involved in her treatment only prior to 2021, before her application for incapacity pension. She argues that Dr. D’s field is occupational health, and he is not a neurologist like Dr. EGS, and that he is not “qualified to make an assessment of the level of impairment based on findings not made by him.” The Applicant further submits that the Administration Committee merely relied on the reports produced by Dr. EGS in November 2020.

67. On the other hand, the Applicant explains that when Dr. EGS’s Addendum estimates that her disability will reduce her work efficiency by “as much as fifty to seventy percent,” the “as much as” should be construed to indicate the severity of the Applicant’s condition – not as a limiter or lower threshold of her level of incapacity.

68. The Bank submits that the 50% partial incapacity was certified by a physician, designated by the Administration Committee, who was appropriately specialized to assess the Applicant’s incapacity and who, in reaching his views, considered the medical reports submitted by the Applicant as part of her application. The Bank submits that the decision on the Applicant’s incapacity accorded with the facts, was reached on a reasonable and observable basis, and complied with all rules and procedural requirements relevant to the assessment of incapacity pensions under the SRP. The Bank further submits that the Applicant has failed to discharge her burden of proving that the decision before the Tribunal’s review was flawed.

69. The Bank points out that when BPOD-RIU received the Applicant’s request for incapacity pension, the medical assessment and certificates she provided were all forwarded to Dr. A who

reviewed these, and took into consideration his recent discussions with Dr. M, to assess the Applicant as partially incapacitated at 50% for the purposes of the SRP.

70. The Bank contends that Dr. A requested ISOS to identify an independent occupational health practitioner to meet with the Applicant to undertake an assessment because Dr. EGS had not reviewed the Applicant's condition in person for a number of months (reviews took place through telemedicine on account of her relocation to Bhutan). The Bank further states that the designated "independent occupational health practitioner," Dr. D, was provided with the medical information supplied by the Applicant, with the Applicant's consent, an assessment by Dr. M, and a general job description for the role the Applicant had held with the Bank. Dr. M also met with the Applicant as part of the review.

71. The Bank notes that Dr. D's assessment explains how he came to decide the Applicant's incapacity was 50%. This conclusion was consistent with Dr. EGS's conclusion that the Applicant's incapacity was in the range of 50-70 %, and consistent with Dr. A's view after reviewing the medical information and after discussion with Dr. M.

72. The Bank submits that Dr. D is a licensed and experienced occupational health specialist who is also qualified to conduct labor case disability assessment in the Philippines. The Bank submits Dr. D had "the most appropriate specialty to certify the Applicant's permanent incapacity for work for the purposes of her Incapacity Pension application." The Bank also notes that the neurological views of Dr. EGS contained in the report and certification submitted by the Applicant were considered by Dr. D prior to reaching his conclusion. Finally, the Bank affirms that Dr. D physically examined the Applicant during the medical appointment arranged by the Bank in January prior to making his assessment.

73. In accordance with the Tribunal's past rulings, the Applicant bears the burden of proving her allegations. In *Drilon*, Decision No. 110, *Ms. G*, Decision No. 106, and *Mr. E*, Decision No. 103, the Tribunal held that the burden of proof rests on the person who makes the allegations. Even more specifically, in *Azimi*, Decision No. 88 (2009), the Tribunal held that when a managerial decision is challenged for being arbitrary or unfair, it is the Applicant who carries the burden of

proof:

The rule that the Applicant must carry the burden of showing...that the managerial act or decision being challenged was vitiated by arbitrariness or disregard of due process, is the common rule that is recognized in all judicial or quasi-judicial dispute settlements.

74. The Tribunal finds that the Bank's decision on the extent of the Applicant's incapacity was made with due regard to the medical evidence that she submitted, and that in fact, the "50-70%" range of incapacity was derived from the Applicant's own neurologist, Dr. EGS, who according to the Applicant herself was the most authoritative specialist on her case and who had actually physically examined her over the years. The Tribunal notes that Dr. EGS's findings are especially significant to the Applicant's claim on the extent of her incapacity because it was Dr. EGS who, over the course of Applicant's health difficulties, consistently endorsed a reduced workload for the Applicant.

75. The Tribunal further notes that the AC-SRP designated an outside independent physician, and that he possessed the proper qualifications to perform the task at hand, namely to determine, understanding her job description, the extent to which the Applicant's incapacity affected her ability to perform her duties for which the Applicant was "suited by virtue of her training and experience." (SRP 1.1(i)). While the Applicant would clearly have preferred the AC-SRP to have followed the higher level percentage proposed by the neurologist, Dr. EGS, his role was, however, to diagnose and treat but not to assess the level of the Applicant's incapacity for the purpose of incapacity pension entitlement under the rules of the Bank. The Tribunal concludes that the AC-SRP decision to appoint a specialist with the expertise and experience to assess the level of the Applicant's incapacity, and the fact that this specialist was completely independent of the Bank, was entirely appropriate.

***Whether the requirements of due process have been observed***

76. The Applicant contends that the Administration Committee's finding of a 50% incapacity was "opaque" and "not in accordance with due process." She alleges that she had not been provided

the basis for the assessment of her impairment until after she sought review of that decision on 18 March 2021. While she concedes that the SRP does not require the Administration Committee to furnish written reasons, such omissions can, citing the WBAT decision in *Shenouda*, “readily interfere with due process and with the transparency of decision-making by the Bank.” Finally, the Applicant argues that 50% is the lowest/bottom percentage in the range, and that the Administration Committee thus “abdicated any genuine decision about the Applicant’s condition and appears more to be an attempt to limit the Bank’s liability to the Applicant rather than a genuine calculation of her percentage of incapacity.”

77. The Bank asserts that the Applicant was fully accorded due process, and that all the Applicant’s medical evidence was considered. The Bank states that it engaged an independent expert at arm’s length to assess the Applicant’s condition, and that it gave that expert all the medical evidence furnished by the Applicant. The Bank concedes that the Applicant was not initially provided the basis of the Administration Committee decision but, following her 18 March 2021 request, was given that information on 29 March 2021.

78. The Respondent distinguishes the WBAT Decision in *Shenouda* on the basis that the Medical Advisor to the World Bank’s PBAC who made the incapacity assessment in that case had not examined the applicant and was not an expert in all illnesses that came before the PBAC. In contrast, the Applicant in the present case was examined by an independent medical expert, an occupational health practitioner, who considered the medical information provided by the Applicant, information from her rehabilitation doctor, as well as from Dr. A, and a general position description of her responsibilities, before reaching a conclusion. The independent medical expert also did not deviate from the views of Dr. EGS, the Applicant’s treating neurologist, in contrast to the case in *Shenouda*. (See also *Ms. J*, IMFAT Judgement No. 2003-1).

79. As stated above, the present case is different in that the Bank, to use the words of the WBAT, did not show any “reluctance to utilize independent medical experts in the pertinent field.” (para. 37). Moreover, the Applicant had the full opportunity to present her medical record, and that full record was considered by the Administration Committee and its independent expert.

80. The Applicant complains that the Administration Committee did not furnish her an explanation of the grounds of its 17 March 2021 decision until she challenged that decision the following day. Transparency is an element of fair procedure. The lack of a requirement in the rules for providing reasons for the decision is regrettable and should be remedied. Due process requires that the basis for the administrative decision is set out clearly. In the present case, however, the Bank provided the information requested within eleven days.

81. Subject to the observation in the preceding paragraph, the Tribunal finds that the contested decision was made in accordance with fair procedure and due process.

### ***The Applicant's request for Moral Damages***

82. In her Application the Applicant requests moral damages for the “delay, trauma and anxiety [she] has suffered in the course of her employment at the Bank, and the consideration of her disability which arose as a result of the Bank’s actions towards the Applicant during her contract of employment.”

83. The Bank argues that the Applicant’s request for moral damages relating to alleged “delay, trauma, and anxiety” which the Applicant allegedly suffered during the course of her employment with the Bank cannot be entertained in this case because, under the confidential Settlement Agreement, the Applicant has waived the right to appeal in all but matters relating to her benefits under the SRP (and DC Plan). As the Tribunal held in paragraphs 45 and 46 *supra*, it can only consider the matter of the Applicant’s Incapacity Pension under the SRP.

84. In any event, the Bank categorically rejects the Applicant’s claims that her condition and incapacity were caused or worsened by treatment she was subjected to at the Bank. The Bank notes that these allegations are not supported by evidence or the timeline of events and are also beyond the scope of her Application.

85. In her Reply, the Applicant contends, in effect, that the moral damages she seeks fall outside the purview of the confidential Settlement Agreement because the claim “does not relate

to the matters which have been settled by way of a confidential settlement agreement, but rather the trauma, stress and the five-month delay she has been subjected to in order to receive a response from the Respondent about her eligibility for an incapacity pension, the assessment of her incapacity, and the capricious and opaque decision to assess her incapacity at 50%.”

86. As the Tribunal does not entertain matters covered by the Settlement Agreement, the Tribunal will inquire into whether the Applicant has suffered any damage in relation to the processing of her claim to an Incapacity Pension.

87. As regards the Applicant’s claim of a five-month wait, while indeed it took the entire months of November 2020 to mid-March 2021 to deal with the Applicant’s application for incapacity retirement, the Tribunal notes that the timeline does not appear unreasonable. The Applicant applied for retirement on 28 October 2020, the confidential Settlement Agreement was signed on 6 November 2020, and the medical examination by the independent outside medical specialist, Dr. D, was conducted in the second half of January 2021, who presented his report on 17 February 2021, citing the final reports of Dr. EGS and Dr. M which had been transmitted to him in early February 2021. That timeline is reasonable all things considered, especially since the referral to an independent outside medical specialist is central to the fairness of the evaluation and it obviously required additional practical arrangements.

88. The Tribunal also notes the other reasons the Applicant’s claim took some time, namely, as the Bank stated in its Rejoinder:

(i) the medical report she provided from [Dr. EGS] was imprecise for the purposes of assessing her Incapacity under the SRP; (ii) the Applicant did not give permission to the Bank’s Principal Medical and Health Specialist (Staff Health) to discuss her condition with [Dr. EGS] or [Dr. EGS’s] views on her Incapacity; and (iii) due to her voluntary temporary relocation to Bhutan following the onset of the pandemic, it was challenging to arrange a physical appointment with an appropriate specialist. Following the Applicant’s advice of her intention to return to Manila in December 2020 or January 2021, an appointment was arranged with an independent occupational health specialist so a certification of her

Incapacity could be undertaken.

89. The Bank followed its existing rules and procedure in determining the Applicant's Incapacity Pension. The Tribunal reiterates that there is an omission in the Bank's rules which would require the AC-SRP to provide the basis on which it had reached its decision, in this case, Dr. D's report. Damages therefore arise solely in relation to this violation and the Tribunal grants the Applicant's request for damages in this respect, i.e. damages caused by the failure of the Bank's duty under the law of international civil service to provide a rule requiring the AC-SRP to provide a basis for its decision. All other claims are dismissed.

90. The Application being largely unsuccessful, the request for costs is denied.

### **DECISION**

For the above reasons the Tribunal unanimously decides to:

1. order the Bank to pay the Applicant US\$1,000; and
2. dismiss all other claims, including costs.



Shin-ichi Ago

/s/

President

Anne Trebilcock

Chris de Cooker

/s/

Vice-President

/s/

Member

Raul C. Pangalangan

Silvia Cartwright

/s/

Member

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

At Manila<sup>1</sup>, 23 February 2022

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<sup>1</sup> In view of the ongoing COVID-19 pandemic, the Tribunal conducted its deliberations in these proceedings remotely by way of a audio-video conferencing coordinated by the Office of the Executive Secretary in Manila.