IN THE MATTER OF THE STATEMENT OF APPEAL BEFORE THE EBRD ADMINSTRATIVE TRIBUNAL

A

Appellant

-v-

THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Respondent

JUDGMENT

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17 September 2012,

as corrected on 22 October 2012

ERRATUM TO JUDGMENT DATED 17 SEPTEMBER 2012 IN THE MATTER OF THE STATEMENT OF APPEAL BEFORE THE EBRD ADMINSTRATIVE TRIBUNAL

- Paragaph 6 referred incorrectly to Section 3.03(c) of the Disciplinary Procedures (which, as noted in paragraph 10 of the Judgment, provided the procedural basis for the Disciplinary Committee's separate review). Paragraph 6 has been amended to refer correctly to Section 4 of the Procedures for Reporting and Investigating Suspected Misconduct (PRISM).
- Paragraph 8 referred incorrectly to the date of the notice of accusation of misconduct as 6 June 2010. Paragraph 8 has been amended to refer to the correct date of 6 July 2010.
- In Paragraph 13, the first line of paragraph 5 of the quotation from the VPHR's decision read "your knowingly acquired". This had been corrected to read "you knowingly acquired".
- In paragraph 27, the incorrect wording "the Banks" appeared in two places ("the Banks non-objection" and "the Banks clients"). This has been corrected to read "the Bank's".

Overview

1. By a letter dated 22 June 2011, the Bank's Vice President of Human Resources ("VPHR") informed the Appellant that the outcome of an Administrative Review under the Bank's Disciplinary Procedures had resulted in the upholding of allegations pertaining to two projects in which the Applicant had been involved. The Sustained Allegations were deemed to fall "at the higher end within the range of seriousness" and consequently the Applicant was sanctioned by termination of appointment without notice (as well as the forfeiture of any resettlement allowance and payments in lieu of annual leave).

2. The Appellant seeks to overturn this decision ("the Decision") on two grounds: (i) the accusation should not have been sustained, and (ii) in any event the disciplinary measure was disproportionate to the misconduct.

3. The Appellant has requested, and the Bank has not opposed, that he be granted anonymity under Procedural Rule 9.02(a).

4. This judgment is given by a Panel of the Tribunal comprising Judges Sarah Christie, Stanislaw Soltysinski, and Jan Paulsson (President).

Procedure

5. The Appellant was, as of the date of the Decision, a Senior Banker with the Bank's Natural Resources Team. The Bank's Office of the Chief Compliance Officer ("OCCO") had received a complaint (on 8 February 2010) alleging that the Appellant had received corrupt payments from a Mr. X in return for the Appellant's support of Bank projects in which Mr. X or his company, Y Consulting Inc., had been engaged by Bank clients. Payments had notably been deposited into bank accounts, so the complaint alleged, owned by Ms. Z, the Appellant's sister.

6. The inquiry in this case was carried out in accordance with Section 4 of the Procedures for Reporting and Investigating Suspected Misconduct (PRISM) (since replaced by the Conduct and Disciplinary Rules and Procedures that entered into effect on 15 March 2011).

7. On 28 May 2010, the Inquiry Officer concluded a report comprising 184 paragraphs. The report determined that the complaint, and additional information obtained by OCCO, supported the allegations of misconduct as defined by Bank's Code of Conduct for Personnel.

8. On 6 July 2010, the Appellant was formally accused of misconduct.

9. On 20 July 2010, a written response of the Appellant was communicated under cover of a letter from his legal advisors, in which he denied the accusations.

10. Pursuant to section 3.03(c) of the Bank's Disciplinary Procedure, the VPHR appointed a committee of three staff members ("the Committee") to consider the allegations and the Appellant's response thereto.

11. By a letter dated 11 March 2011 to his lawyers, the Bank informed the Appellant that no documents made available to the UK police would be relied upon in the context of the Bank's own disciplinary proceedings unless they were "identified by the Committee as being relevant to the accusations against your client under the Bank's Disciplinary Procedure." To that letter was attached a detailed list of 261 documents (or categories of documents) provided to the UK police.

12. On 11 April 2011, the Committee conducted an interview with the Appellant. On 15 April, the Committee provided a note of that interview to the Appellant. On 13 May 2011, the Committee submitted its Report, comprising nine single-spaced pages, concluding that the Appellant had failed to observe the Code of Conduct

13. In his Decision, the VPHR sustained the allegations of misconduct in the following particulars:

> *"(1) breach of Rule 2 (a) of the Code of Conduct: due to the financial arrangement struck between you and Mr X, you did not discharge your duties with the interests and objectives of the Bank in view, but rather put your own financial interest first and in conflict with those of the Bank;*
> *(2) breach of Rule 3 (a) of the Code of Conduct: due to your financial arrangement with Mr X, you involved yourself in a direct conflict of interest between your personal interests and your official duties and this amounted to an Actual Conflict of interest under Rule 3 (a) of the Code of Conduct;*
> *(3) breach of Rule 3 (b) of the Code of Conduct: you did not recuse yourself nor seek guidance as to that Actual Conflict of Interest;*
> *(4) breach of Rule 8 (a) of the Code of Conduct: your financial arrangement with Mr X concerning the sharing of success fees constituted a breach of Rule 8 (a) of the Code of Conduct in that it constituted an actual conflict of interest between your own personal interests and those of the Bank;*
> *(5) breach of Rule 8 (c) of the Code of Conduct: you knowingly acquired a direct financial interest either (i) for your own account or (ii) for the account of your sister in transactions undertaken by the Bank, either representing a breach of that rule; and*
> *(6) breach of Rule 8 (a) of the Code of Conduct, on the basis of apparent conflict of interest."*

14. On 4 August 2011, the Appellant submitted his Statement of Appeal to this Tribunal. The two grounds were identified as follows: "the accusation of misconduct should not have been sustained or … the disciplinary measure was unduly harsh in relation to the misconduct."

The merits

15. Most managerial decisions involve the exercise of discretion which is subject to review only to the extent that discretion is abused. For example, the promotion of staff is a matter of managerial prerogative, and will not be overruled by the Administrative Tribunal unless there is proof of abuse, such as unlawful discrimination. Disciplinary decisions, however, constitute a distinct category due to the seriousness of their consequences, and therefore are subject to plenary review as to (i) the alleged facts, (ii) their proper characterization as misconduct, (iii) the legal bases for the sanction imposed, (iv) proportionality of the sanction, and (v) due process.

16. (i) As to *the facts*, it is a consequence of the Appellant's successful application for anonymity that the Tribunal's account in the present judgment must perforce be circumspect lest the recital of the facts permit identification.

17. Mr. X shares the same Eastern European home country with the Appellant. Mr. X emigrated to the West, establishing himself in the US and created small businesses in particular selling kitchens and brokering insurance. He set up Y Consulting Inc. in 2007, apparently having a "main office" at Mr. X's residence yet claiming on its website to be "an American consultancy and risk management firm with offices throughout the world." Its business address seems to be a house in rural Pennsylvania; the entity is not listed with the 140 million records of businesses maintained on the Dunn and Bradstreet database. Still, Y Consulting Inc. represented three large EBRD clients and two prospective clients in their dealings with the Bank. In most of them the Appellant was the "Operation Leader". Y Consulting Inc. was apparently never retained by any other EBRD clients than these five.

18. Prior to October 2009, the Appellant listed his residence as being in a particular numbered flat in a particular London building. A version of his sister's CV dating from early 2009 listed the same residence for her.

19. With respect to Project A, Mr. X approached the Appellant by telephone and email in September 2007 on behalf of his client, describing its financial needs. The following month, the Appellant made a personal trip to Philadelphia, the purpose of which was to meet Mr. X; upon the Appellant's return to London he received an email from Mr. X referring to their meeting and the possibility of the Bank participating in projects of interest to Mr. X, specifically Project A. The Appellant asked his superior within the Bank for permission to travel to Frankfurt to explore the Bank's possible involvement in the Project.

20. The original arrangement (dated 3 October 2007) between the principals of Project A and Y Consulting Inc. called for a 0.675% success fee, computed by reference to all funds obtained by the borrower. Curiously, on 24 December 2007 this agreement was supplemented to add, in effect, a supplemental $1.2m for the successful achievement of *equity* financing – even though the Bank by then had already proposed to provide it. A further contract was signed by a special project vehicle which contemplated that this entity would be receiving Y Consulting Inc.'s services, and thus that entity paid a $1.7m advance to Y Consulting Inc. On 10 April 2009, however, Project A entered into yet another deal with Y Consulting Inc. which resulted in payments of some $2.9m to Y Consulting Inc.; the same day, Y Consulting Inc. acknowledged that it had not performed any services for the special project vehicle and agreed to return the $1.7m. In sum, Y Consulting Inc. retained some $1.2m.

21. These outflows from and inflows to Y Consulting Inc. were made in installments. For example, it received $1,486,811 for Project A on 18 June 2009 and repaid $850,000 to the special project vehicle one week later. The difference is $636,811. Just about 50% of that amount ($310,141) was remitted, as confirmed by the City of London Police, to Ms. Z's account in Jersey pursuant to an invoice for that amount on account of "various projects". While the Bank does not contend that it is certain who created the invoices, its examination of the PDF files containing the first invoice identify the Appellant by name, meaning that it seems to have been created on a computer with his surname as the username. (The Bank has produced screen shots from the source documents.)

22. As for Project B, it involved a significant success fee of USD 5m paid by the Bank's client to Y Consulting Inc. There is no trace of Y Consulting Inc.'s substantive involvement by way of advice or other assistance; nor did the Bank's client, a sophisticated entity which had previously successfully raised capital directly with the Bank, appear to need any intermediary. A USD 40m equity investment was disbursed to B at the end of September 2009; one day later a success fee installment of USD 4.9 m was paid to Y Consulting Inc. The following month, a document apparently signed by Ms. Z was given to Y Consulting Inc, requesting payment of USD 2,478,580.89 – a share apparently in excess of 50%, given that there had also been a USD 100,000 initial fee – on account of "various projects". The payment in that amount was quickly made into Ms. Z's account in Jersey, as confirmed by the City of London Police. Again, there is no indication that Ms. Z had any substantive involvement in this Project.

23. The Bank has inquired of its clients in both of the Projects. Their senior officials have confirmed never having heard of Ms. Z.

24. On 20 August 2010, the Appellant's lawyers communicated to the Bank what they referred to as "our client's Statement in Reply", and stated that "We do not believe that the Bank has given our client sufficient information with which to refute the allegations made against him." The "Statement" itself was a single-page, unsigned document on law firm's notepaper, worded in the first person singular and "categorically" denying "any wrongdoing". The Appellant therein asserted that there were "very good objective reasons for companies wanting to raise finances through EBRD and elsewhere, to hire [Y Consulting Inc. and Mr. X] in particular." He stated that he had not sought to promote Y Consulting Inc., and that he was unaware of his sister's involvement in Y Consulting Inc. He

expressed concern that comments made by him in documents and conversations in connection with the circumstances under examination might be misinterpreted due to the fact that "English is not my mother tongue". (The Appellant, it must be noted, had a graduate degree in Economics at a world-renowned UK university, had been with the Bank since 1994, and had become one of its youngest ever Senior Bankers.)

25. Apart from this letter, the Appellant's lawyers chose, instead of responding to the detailed and specific factual determinations made in the course of the Bank's internal investigation, to request lists of additional documentation which they surmised might be in the Bank's possession, and which they perhaps hoped might contain exculpatory elements. The Bank has stood its ground, insisting that the record which underlay the Decision is sufficient to legitimize it.

26. With respect to the facts, the Appellant has contented himself with denying allegations rather than offering any comment, let alone alternative explanations, with respect to the substantial evidence provided by the Bank. Section 3.03(a) of the Disciplinary Procedures requires staff members accused of misconduct who "wish to dispute the accusation" to "file a written statement in Reply exploring in reasonable detail the grounds on which he disputes the accusation." The denials proffered by the Appellant in this case have not come close to satisfying this requirement of reasonably detailed explanations. At the heart of this case are clearly the substantial payoffs that found their way into the Appellant's sister's bank account. In the circumstances, the Appellant's bland statement that "I was not aware of [Ms. Z's] involvement in [Y Consulting Inc.] or the relevant projects, or the arrangements between her and [Y consulting Inc.] or the payments" is unconvincing.

27. Given the Appellant's request for anonymity and the Bank's non-objection thereto, the Tribunal will not give a detailed account of the records put before it since that would likely reveal his identity to many persons familiar with the large transactions with which he was relevantly involved. Suffice it to say that the hundreds of documents relied upon by the Bank in reaching its Decision, of varying pertinence and length, in their totality amply confirm the factual circumstances accounted for in this Judgment, particularly with respect to Y Consulting Inc.'s financial arrangements with the Bank's clients in Projects A and B, and the payments made into the Appellant's sister's off-shore bank account.

28. (ii) (iii) and (iv) That the facts *constitute misconduct*; that there is a *legal basis for the sanction imposed*; and that the sanction was *proportionate* – these are issues which may in other contexts give rise to doubt and the need for making close distinctions. The present case involves apparent premeditated actions by a senior official tantamount to grave and conscious disloyalty to the institution in circumstances evidently susceptible to harming both its reputation and its operations. This conduct is captured by the most basic elements of the rules, explicitly warrants the sanction of dismissal, and allows no hesitation with respect to proportionality. Indeed, none of these issues are debated by the Appellant, who instead has contented himself with summarily denying the allegations against him, and on complaining about the way his case was handled procedurally.

29. The Tribunal finds that the record convincingly demonstrates that the Appellant had a personal relationship with an outside consultant to the Bank's clients with respect to significant projects on which he was Operations Leader, that this plainly created an apparent conflict of interest which the Appellant did not notify to the Chief Compliance Officer, and that the financial relationship between that consultant and his sister, with whom he shared his residence, also plainly created an apparent conflict of interest which he similarly kept to himself. This was arrant misconduct under Rules 3(a) and (b) and 8(a) and (c) of the Bank's Code of Conduct dealing with Conflicts of Interest and Financial Interest respectively – indeed under the more general Rules 1 and 2.

30. Moreover, the Tribunal is satisfied that this conflict of interest was indeed real. In cases of financial impropriety the evidence is generally circumstantial rather than direct, which means that there is always a conceivable possibility of extraordinary coincidences which provide an innocent explanation, yet at some point that possibility becomes too tenuous to be reasonable.

31. The Bank has presented credible evidence to the effect that the Bank's engagements in the two Projects were on terms that were very substantially detrimental to the Bank's interest – perhaps as much as $335m in the case of Project A; correspondence relating to Project B indicates that its principals had been led to believe by Mr. X that the Appellant was willing to inflate the project valuation by the use of an irrationally low discount rate. It does not fall upon the Tribunal to make determinations as to these contentions, but they serve as striking illustrations of the magnitude of the pathologies that may arise unless the imperative of undivided loyalty is strictly enforced.

32. These conclusions justify the sanctions taken by the Bank. This determination is powerfully supported by the evidence of even graver misconduct, namely that the Appellant was in all reasonable probability a knowing party to the arrangements that resulted in substantial payments into his sister's bank account as a reward for the consultant's clients securing financing from the Bank, and that his connection with the consultant therefore influenced him in the performance of his duties as an officer of the Bank.

33. The Bank asserts that the Appellant received more than USD 2.5m in kickbacks delivered via Ms. Z's nominal account. The amount may not be precisely ascertainable, nor is there specific proof of his actual receipts from his sister. Neither is necessary in the present circumstances, however, to sustain the finding of misconduct.

34. (iv) This leaves *due process*. The Appellant has chosen, in essence, not to provide explanations of the challenged conduct and circumstances, but rather to insist that: "The accusation of misconduct should not have been sustained due to the prejudicial, unfair, biased, and non transparent disciplinary process."

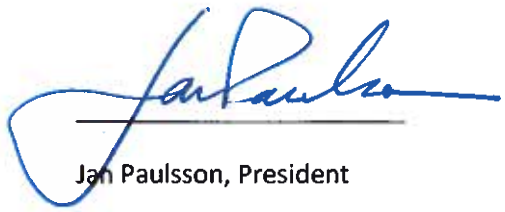
35. First and foremost, this complaint focuses on the alleged prematurity of the Bank's decision "to involve law enforcement agencies". The Appellant contends that he should have been given the opportunity to respond to the allegations before the police authorities were alerted. He

contends that this meant prejudgment as to his dismissal, a constraint on his ability to comment on the evidence due to the ongoing police investigation, and the wrongful rejection of his plea that the disciplinary process be suspended prior to the police investigation.

36. This line of defense faces a number of significant hurdles. Above all, criminal acts and employment misconduct are very different matters. They may overlap, in the sense that criminal conduct may also be grounds for dismissal, but they are not co-extensive; an employee's conduct may constitute misconduct incompatible with continued employment even it if does not constitute a crime, both because of differences in the definition of wrongdoing in staff rules as opposed to the criminal code, and as to differences in the standard of proof. It follows that a criminal investigation may be inconclusive, indeed irrelevant, to an employee's susceptibility to dismissal. There may be circumstances when the Bank's determination of facts, for the purposes of ascertaining violations of terms of employment, are conclusive, and there are no grounds to await the outcome of a criminal investigation which might ultimately be dropped as a matter of prosecutorial discretion in light of matters of no consequence to the propriety of the accused's dismissal.

37. At the same time, the Bank, like any other party, must be concerned not to expose itself to the charge that it covered up, let alone was complicit in, conduct of evident concern to public law enforcement. To turn over evidence of criminal activity is a commonplace expression of civic duty; nor are there any fiduciary obligations that might impinge on the Bank's position in this regard. An employer is not required to act as its employee's defense attorney. Nor can it reasonably be suggested, as appears implicit in the Appellant's stance, that upon referral to police authorities the employer is paralyzed and cannot pursue its own investigations – nor of course proceed to dismissal – until the criminal investigation has run its course. The idea that someone found likely to have engaged in the kind of improprieties attributed to the Appellant should be entitled to pursue his representation of the Bank in macro-economically significant projects needs only to be stated to be rejected out of hand. Of course the Bank's internal findings must be subject to external control, which of course is that of the present Tribunal. The Appellant's failure to answer the credible evidence in substance in the context of the internal investigation has now been compounded by his non-responsiveness before the present Tribunal; to forego this opportunity was his choice, and suggests that he had little to say. The evidence proffered by the Bank thus stands unrebutted, and satisfies the Tribunal.

FOR THESE REASONS, the Tribunal hereby dismisses the appeal.



Jan Paulsson, President

For the Tribunal