IN APPEAL BEFORE THE
EBRD ADMINISTRATIVE
TRIBUNAL

ZBIGNIEW KOMINEK, ROBERT ADAMCZYK,
MARK KING, &
NODIRA MANSUROVA

Appellants

vs.

THE EUROPEAN BANK FOR RECONSTRUCTION
AND DEVELOPMENT

Respondent

JUDGMENT

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22 April 2013

Procedure

1. On 12 November 2012, the Appellants filed their Statement of Appeal and supporting documentation, seeking review of two decisions which they said precluded their access to the Bank's Grievance Committee ("GC") and a ruling to the effect that the Committee should hear the merits of their cases.

2. The two decisions will be identified below, in their proper place in the chronology of salient events.

3. On 14 June 2011, the Appellants, being staff members as well as Chair and members of the Bank's Staff Council, lodged Requests for Administrative Review from a decision by the Bank's President on 15 March 2011 to issue Revised Grievance Procedures ("GPs"). They argued that the revisions were breaches of their contracts of employment. That decision is not the focus of this Judgement.

4. On 6 July 2011, the Bank challenged the GC's jurisdiction to hear the Requests.

5. On 1 September 2011, after further written pleadings on the jurisdictional challenge, the GC unanimously recommended to the Bank's President that he find that the GC had jurisdiction. Although the President was under a duty pursuant to Article 10.02(d) of the GPs to decide within 15 working days whether he accepted the recommendation, the matter was stayed by agreement.

6. Ultimately, the President issued a decision on 24 August 2012 in which he stated that he accepted the recommendation "to the extent ... that the GC has jurisdiction to consider the Request" but not "with respect to the GC having jurisdiction to consider the Request in relation to other provisions of the Grievance Procedures (2011)."

7. On 5 September 2012, the Appellants wrote to the GC stating that the President's decision, even making allowance for the agreed suspension, had exceeded the 15-day time limit by 23 calendar or 17 working days, and should therefore be deemed ineffective insofar as it purported to reject the recommendation; to the contrary, by having failed to act in a timely fashion, he should be deemed to have accepted the recommendation in its entirety.

8. On 13 September the Bank asked the GC to reject the Appellant's contention, arguing that the President's 24 August decision was valid and effective.

9. On 14 September, the GC issued a Direction to the affect that it could not proceed in the circumstances, noting that in its view "the timing of the President's decision" was "a matter within the exclusive purview of the Administrative Tribunal".

10. The two challenged decisions are thus:

(i) the GC's Direction of 14 September 2012, inasmuch as it rejected the Appellant's argument that the untimeliness of the President's decision

meant that he should be deemed to have accepted that the GC had jurisdiction to hear the merits of the Appellant's cases,

and in the alternative

(ii) the President's purported rejection, on 24 August 2012, of the GC's jurisdiction to proceed to the merits.

NATURE OF THE PRESIDENT'S PURPORTED DECISION

11. Article 1.03(a)(i) of the GPs provides that:

> "where the Bank is required to act within a specified time period pursuant to the Terms of Conditions of Employment of a Staff Member and fails to do so, an Administrative Decision is deemed to have been taken as a result of such failure."

12. The function of this rule is evident in cases where Staff Members are faced with inaction, and need to be able to refer to a refusal as grounds for their grievance.

13. In this case, the Appellants argue something quite different, namely that the President's failure of timely decision should be deemed a lapse of his ability to reject the recommendation, and hence the equivalent of his having accepted it.

14. The Appellant's argument is difficult to follow. They refer to the "calibre" of the GC and the "contempt" shown by the untimely reaction to its recommendation. The Tribunal does not see how these characterisations relate to any relevant rule. Nor is the Appellants' invocation of the World Bank's Staff Rules of any assistance to them; to the contrary the fact that a failure of reaction within 30 days to a Peer Review recommendation under those Rules results in the recommendation being

deemed final rather puts an emphasis on the absence of a corresponding rule in the GPs.

15. This ground of appeal is denied. The President's decision was indeed a rejection of the GC's authority to hear the merits of the Appellants' complaints. We now turn to the correctness of that decision.

VALIDITY OF THE PRESIDENT'S DECISION

16. Section 10.02(d)(iii) of the GPs is explicit in establishing that when the GC has recommended its jurisdiction be upheld and the President does not accept that recommendation:

> "the Staff Member may thereupon appeal the President's decision in respect of jurisdiction to the Administrative Tribunal."

17. It is therefore the task of the Tribunal now to determine whether the merits of the Appellants' case should be examined by the GC. No inference from the present judgment should be permitted as to whether the Appellants' substantive grievance is well founded.

18. Section 8.01(b) of the GPs allows Staff Members to seek Administrative Review (and thus come before the GC under section 8.01(d)) if an Administrative Decision:

> "allegedly alters, in a material adverse manner or allegedly is in breach of, her/his Terms and Conditions of Employment ...."

19. The Appellants argue that they have alleged such *alteration* or *breach*. The Bank denies that they have done so. The GC took the view, in its 33-page, single-spaced Report to the President, that the Bank's jurisdictional challenge was "unpersuasive in its entirety" (paragraph 92) and recommended that the President

concur with this conclusion. For his Part, the President declined to do so in terms reproduced in Paragraph 6 above.

20. The Tribunal can make no conceptual sense of the President's purported distinction between the GC's jurisdiction "to consider the Request" but not to do so "in relation to other provisions of the Grievances Procedures (2011)". Its practical effect however is clear: to foreclose the GC's consideration of the merits of the Appellants' grievance with respect to the adoption of the GPs (2011) and its alleged alteration on breach of their Terms and Conditions of Employment. In so doing, he effectively foreclosed consideration of the merits as though the GC had no jurisdiction. Under Section 10.02(d)(iii) of the GPs, the Tribunal has plenary authority to review that decision.

21. In the premises, the Tribunal has no hesitation in overruling the President's decision. Voluminous arguments and numerous documents have been submitted to the Judges, who have read them and concluded that this matter has been treated by the Bank as exceedingly complex when it is in effect quite simple. Indeed, it seems important that ordinary Staff Members perceive that the options for vindicating their rights are straightforward, lest they be intimidated by the ostensible prolixity (and attendant costs) of the grievance system.

22. The Appellants have contended that the adoption of the GPs as announced on 15 March 2011 failed to put into place a fair procedure, and altered or breached their Terms and Conditions of Employment. The Bank appears to be disturbed by the implications of this assault on a piece of internal legislation which it considers was the

product of fair and careful consultations, and affects Staff Members in a general way that should not be deemed an adverse alteration or a breach of their employment contract lest all internal reforms be paralysed by contingent speculation about their possible disadvantages. The Tribunal understands this concern. For example, if it is true as the Appellant contends that a proper reading of the GPs (2006) is that the GC had plenary authority to decide its own jurisdiction to hear the merits of a grievance and that the GPs (2011) took away that authority, it may nonetheless be said that the overall process cannot be said to have given rise to a *materially* adverse change, or a breach, given the ultimate power of the Tribunal to ensure that all admissible complaints will be heard. Still, it is a matter for debate, and that debate cannot be eluded by the Bank by insisting on its President's view that the Appellants are wrong in substance.

23. The Tribunal considers that the Bank has misunderstood the nature of a jurisdictional inquiry. (For its part, the GC in its Report scrupulously limited itself to the task at hand, making it clear in paragraph 87 that it has no present view as to the lawfulness of the President's adoption of GPs (2011) or as to their effect on the Appellants' Terms and Conditions of Employment.) Most of the Bank's arguments in fact belong to the merits stage, which now needs to take place before the GC.

24. A prominent revelation of the Bank's misdirected approach appears in paragraph 1.3.5 of the its formal Response before the Tribunal dated 26 February 2013, where it summarises its position, to the effect that the Appellants' "remedy" of access to the GC is:

"unfounded to the extent that the Terms and Conditions of Employment, the Appellants, the internal law of the Bank, and generally recognised principles of international administrative law, were not breached by the decision of the Bank's President, pursuant to Section 10.02(d) GPs, in response to the Grievance Committee's Report."

The invocation of these fundamental legal sources does not alter the fact that what the Bank's President did was to preclude consideration of the merits of the grievance in the manner vouchsafed by the relevant rules. That was a trespass onto the province of ultimate decision-making.

25. The Tribunal needs only observe, in this context of a purely jurisdictional inquiry, that the Appellants are not required to allege a direct and personal effect of the challenged decision; that is simply not an element of section 8.01(b). Whether the presence or absence of such an effect has an incidence on the merits is another matter.

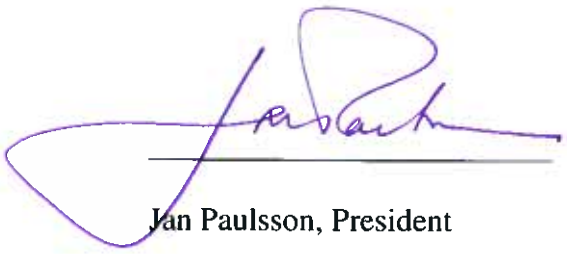
ORDER

For these reasons, the Administrative Tribunal, acting by a Panel comprising Judges Giuditta Cordero-Moss, Boris Karabelnikov, and Jan Paulsson (President), hereby:

(a) allows the appeal against the President's decision of 27 August 2012, and

(b) orders that the grievances articulated in the Appellants' Requests of 14 June 2011 be considered by the Grievance Committee on the merits.

The Tribunal does not believe that a case has been made for anonymity. The Appellants here are pursuing a matter of principle and cannot be faulted for exercising their right to do so.



Jan Paulsson, President

for the Tribunal

22 April 2013