

**IN THE APPEAL BEFORE THE
EBRD ADMINISTRATIVE TRIBUNAL**

**ENRICO GRASSI
STAFF MEMBER
Appellant**

v.

**THE EUROPEAN BANK FOR RECONSTRUCTION
AND DEVELOPMENT
Respondent or the Bank**

DECISION BY THE TRIBUNAL

18 January 2016

INTRODUCTION

1. Mr. Enrico Grassi received a notice of termination by the Bank of his appointment as a senior banker in the Natural Resources Team for unsatisfactory performance, by letter from the Managing Director, Human Resources dated 5 March 2015 (Exhibit No. 1)¹. This notice followed Mr. Grassi's performance review meeting with the Director of the Natural Resources and the Appellant's line manager on 2 March 2015.
2. On 13 March 2015, Mr. Grassi sent a request for mediation to Ms. Louise Holscher, Vice-President for Human Resources. On 27 March, Ms. Holscher refused his request on the basis that she considered the Administrative Decision termination "to be conclusive in its outcome" (Exhibit No. 2).
3. On 5 June 2015, Mr. Grassi filed a Request for an Administrative Review Decision ("RARD") to the President, with a copy to the Grievance Committee. The Request was prepared for and on behalf of the Staff Member by Mr. Alex Haines, Barrister and Counsel of Bretton Woods Law.
4. The copy of the RARD filed on behalf of Mr. Grassi was sent to the Grievance Committee ("GC") Secretariat on 5 June 2015 by e-mail dispatched by Mr. Haines.
5. This e-mail, Mr. Haines requested the GC to grant an extension of two working days to file the final version of the RARD. However, the GC noted that the Grievance Procedures ("GPs") do not provide a basis for any extension of the time period in the absence of consent by both parties to suspend a deadline for filing. The Grievance Committee also noted that the initial RARD (referred to as a "draft") provided sufficient information to the Bank of the nature and content of the Staff Member's request. In its Direction No. 1, the GC considered that the RARD was filed on 5 June 2015, and amended on 8 June 2015 (one working day later). See Exhibit No. 3.
6. The Chair of the Grievance Committee informed the Bank that in light of the circumstances described above, the deadline for the Bank to file a challenge to

¹ All references to exhibits relate to exhibits attached to the Staff Member's Statement of Appeal.

jurisdiction under Section 10.02 of the GPs was fixed as 29 June 2015, rather than 26 June, 2015 (one working day later).

7. On 29th June, 2015, Ms. L. Holscher filed a request for clarification. She argued that the deadline for filing a RARD challenging the 5 March 2015 Decision, made pursuant to Section 1.04 of the GPs, was 6 June 2015, and that consequently the second (“final”) RARD filed by Mr. Grassi on 8 June, 2015, was effectively time-barred and could not be considered as an amended RARD. See Exhibit No. 4.
8. In these circumstances, the GC invited both parties to express their views regarding the scope of its jurisdiction over elements submitted by the Staff Member on 8 June, 2015. See the GC Chair’s letter to the Parties (Exhibit No. 5).
9. In its responsive submission on jurisdiction of 27 July, 2015 the Bank emphasized that “the Grievance Committee is required to give effect to the time limits provided by the GPs for filing a RARD”. Hence, the Bank invited the GC to disregard the RARD lodged on 8 June 2015. See Exhibit No. 7.
10. As for Mr. Grassi, he filed a submission on jurisdiction (*ratione temporis*) arguing that the GC should review both the draft and the final version of the RARD, including the substantive arguments and the supporting evidence. This pleading relied on alleged best practices of international organizations, for instance the IMF and AfDB, permitting the extension of the deadlines to the next working day if the last day of the time limit is not a working day. See Exhibit No. 8.
11. After having reviewed the Parties’ arguments on jurisdiction, the GC made the following recommendation to the President:

“The Grievance Committee recommends that it exercise jurisdiction over the allegations, bases of claim, facts, steps taken or requests for relief contained in the “draft” RARD submitted by the Staff Member on 5 June 2015, including the exhibits mentioned in it and provided by 10 June 2015, in the form that those elements may have been amended in terms of wording or organization in the “final” version of 8 June 2015. The Grievance Committee recommends that it not exercise jurisdiction over any additional elements that were contained only in the version of the RARD of 8 June 2015 and, as a result, were not timely

submitted. This recommendation would not preclude the possible production of documents or other evidence, or conclusions which might to be drawn following a hearing on the merits in line with the Grievance Procedures. The Grievance Committee thus recommends that its jurisdiction be upheld in this matter to the extent just stated. It expresses no views on the merits”.

12. By letter of 9 September 2015, Mr. S. Chakrabarti, the President of the Bank, informed Mr. Grassi that he had taken the decision to accept two GC recommendations, namely:

- that the GC “has jurisdiction over the allegations, bases of claim, facts, steps taken or request for relief contained in the timely filed “draft” RARD, including exhibits (...) mentioned in it and provided shortly thereafter in the form that those elements may have been amended in the final version [...]”;
- that the GC “jurisdiction not be exercised over any new material or elements that were contained only in the later version”.

The President also informed Mr. Grassi that pursuant to Section 10.02 (d)(i) of the GPs, he was entitled to submit an appeal against the President’s decision. See Exhibit No. 10.

13. In his Statement of Appeal, the Staff Member submits that the President’s decision based on the GCs recommendations was unlawful, because the final date of the RARD was 8 June 2015 (i.e. the next working day after the expiry of the three month time limit which fell on 6 June , that is to say a non-working day); and, in the alternative, “even if the final working day on which the RARD in this case could have been filed was on Friday 5th June 2015, the GC has jurisdiction over all the elements contained in the final version of the RARD”; Statement of Appeal of 5 October 2015 (item 1.9).

14. The Bank replied to the Statement of Appeal in the form of a letter of 15 December 2015, submitted by Ms. Holscher, Vice-President responsible for Human Resources (“**Bank’s Response**”).

THE APPELLANT'S ARGUMENTS

15. Mr. Grassi contends that the relevant three calendar monthly time limit fell on Saturday, 6 June 2015 (i.e. three calendar months after 5 March 2015). However, he indicates that natural justice requires that the deadline must be extended to the next working day if the time period falls on a non-working day because the Staff Member cannot be restricted to less than three full months (items 2.1 and 2.2 of the Statement of Appeal).
16. He refers to the rules of procedure of the International Monetary Fund and the African Development Bank, which provide that if the deadline lands on a weekend, then the time limit shall include the next working day, and urges that the aforementioned rules of procedure of the EBRD sister institutions be accepted as representing best practice prevalent in the internal laws of international organizations (see items 2.3 and 2.4 of the Statement of Appeal).
17. He further argues that the fact that the GPs are silent on this specific point does not preclude their proper interpretation as providing for the extension of a deadline to the nearest working day. In case of doubt regarding the interpretation of legal rules, they should not be interpreted to the detriment of Staff Members in a manner that restricts their rights. He also invoked the principle of *contra proferentem*. He asserts that the GC's reliance on the example of the three months period, calculated from 30 November and falling on 28 February, or 29 February in a leap-year, demonstrates that a Staff Member's rights would be reduced to less than three months if the deadline fell on a Saturday or Sunday (see item 2.6. of the Statement of Appeal).
18. Mr. Grassi further stresses that the GC originally confirmed acceptance of the amended RARD without any reservation (see item 3.1 of the Statement of Appeal referring to paragraph 2 of GC Direction No. 1). Since in his submission the main legal arguments and evidence in the so-called draft version lodged on 5 June 2015 and in the final version filled on 8 June 2015, are substantially the same, the GC jurisdiction should include all elements of the RARD submitted in the final version of the amended RARD lodged on 8 June. The Statement of Appeal also refers to an International Labor Organization case according to which "*although rules of procedure must be strictly complied with they must not be construed too pedantically or set traps for staff members who are defending their rights*" (see Exhibit No. 11). He further submits that the GC's construction of the

Grievance Procedures adopted by the Bank would cause “a result so pedantic as to prevent the Staff Member defending his rights effectively” (see items 3.5 and 3.6 of the Statement of Appeal).

19. On 8 January 2016, Mr. Grassi’s counsel sent to the AT Secretariat and the members of the Administrative Tribunal Panel a copy of the Administrative Tribunal’s Judgement (Kominek & Others vs. EBRD, 22 April 2013) with a note that the Statement of Appeal relies upon this judgment “as a binding precedent that the late performance of an act under the Grievance Procedures is not a bar to its effectiveness”.

THE BANK’S RESPONSE TO THE STATEMENT OF APPEAL

20. The Respondent submits that the decision of the President of 9 September 2015, accepting the two GC recommendations dated 21 August 2015, should be upheld by the Tribunal.
21. The Respondent contends that the President of the Bank lawfully decided that the GC has no jurisdiction over the second RARD filed on 8 June 2015, as it was time-barred, because it was lodged after the expiry of the applicable deadline.
22. The Bank relies on Section 1.04(a) and Section 8.03(a)(ii) of the Grievance Procedures. It quotes Section 1.04(a) of the applicable rules which states that “*references to months are to calendar months, i.e. to the same date in the final month of the period specified*”. See Item 7 of the Response to the Statement of Appeal.
23. The Bank further contends that the GPs clearly distinguish between deadlines referring to working days and monthly time limits. The Response emphasizes that Section 8.03(a)(ii) of the GPs makes no statement to the contrary. Hence, because the pertinent three months procedural time limit refers to calendar months, the rules referring to working days are immaterial, to the extent that they provide for the extension of the deadline to the next working day, if the last monthly period falls on a non-working day. The Bank also indicates that Mr. Grassi could have lodged his RARD by way of an e-mail on 6 June (Saturday), but failed to do so.

24. The Bank rejects the Appellant's argument that there is a generally recognized principle of international administrative law that where a deadline falls on a non-working day, the deadline should be effectively extended to the next working day. The Respondent submits that in the absence of a specific provision in the internal law of the EBRD, as reflected in the GPs, the interpretation advocated by the Appellant cannot be sustained.
25. The Bank also rejects the Appellant attempt to rely on the *contra proferentem* rule. In its opinion Section 8.03(a)(ii) of the Grievance Procedures, "*is clear and admits no ambiguous meaning*".
26. The Respondent concludes that given the significance of procedural time limits, which are essential to the interest of administrative certainty, the Staff Member's Appeal should be denied and the case should be returned to the GC for a hearing on the merits. See items 12.3 and 13 of the Response.

THE TRIBUNAL'S EVALUATION OF THE VALIDITY OF THE PRESIDENT'S DECISION

27. The present Statement of Appeal is based on Section 10.02(d)(i) of the Grievance Procedures. It is therefore the task of the Tribunal to determine whether the final version of Mr. Grassi's RARD submitted on 8 June 2015 was filed on time, and whether the GC has jurisdiction over all elements of his RARD.
28. At the outset of its analysis, the Tribunal notes that both Parties are of the opinion that the pertinent provisions of the GPs on time limits are clear, but they draw the opposite conclusions therefrom. The Tribunal is of the opinion that Section 1.04 and Section 8.03 of the Grievance Procedures are by no means crystal clear. Calculation of time limits referring to working days provide that "*unless stated otherwise, references to days are to working days in the Bank's headquarters*". However, references to months "*are to calendar months i.e., to the same date in the final month of the period specified unless there is no such date in that month, in which case the date shall be the final day of that month (e.g. three months from 30th November will be 28 February or 29 February in a leap-year).*"

29. As a matter of a purely grammatical interpretation, the fact that the above mentioned time limits, including the rule on the time limit for requesting an Administrative Review Decision set forth in Section 8.03, are silent on the issue whether monthly deadlines landing on a non-working day should be extended to the next working day, can be interpreted either that such deadlines shall not be extended to the next working day, or, alternatively, that all procedural time limits shall be extended to the next working day of the Bank, when the last day of the period is not a working day. The former interpretation adopted by the Bank rests on the *argumentum a silentio*. The latter interpretation, advocated by Mr. Grassi, rests on the principles of natural justice, the best practices in procedural rules of international organizations, and *contra proferentem* rule. The Appellant also contends that the Bank's interpretation unduly restricts the Staff Members rights.
30. After having analyzed the conflicting arguments of the parties, the Tribunal has reached the conclusion that the Staff Member's RARD was timely submitted on Monday 8 June 2015. In our opinion, the premise of construction of the pertinent rules of the Grievance Procedures as to time limits is not one of the primacy of linguistic arguments (i.e. a literal grammatical interpretation). We are also of the opinion that Section 1.04 and Section 8.03 of the Grievance Procedures, which we do not find to be unambiguous, call for a functional interpretation.
31. The Grievance Procedures' silence on the specific issue whether the monthly deadlines falling on non-working days should be extended to the next working day does not mean that there are persuasive arguments in favor of treating differently time limits calculated in days, on one hand, and months or years, on the other hand. It is worth recalling the opinion of the Grievance Committee of 21 August 2015. After having analyzed the rules, in particular those set forth in Section 1.04, the Grievance Committee pertinently concluded:

These rules create the anomaly of treating non-working days that fall at the end of the three moth period differently from non-working days in periods that are expressed in terms of days. In addition, a staff member whose RARD must be filed within the "three month" period given in the rule's example will have a shorter overall number of days in which to file than a staff member doing so in other months of the year. The Staff Member in this case was not, however, subject to the shorter three-month period of 30 November

to 28 or 29 February. His case was only affected by the treatment of non-working days within a period of months under the applicable rules. But it is not the role of the GC in this case to remedy this anomaly in the Grievance Procedures; it has to apply them as it understands them to be written.

32. The Tribunal agrees with the Grievance Committee's opinion that a different treatment of time limits expressed in days and other time limits constitutes an "anomaly" in light of a functional interpretation.
33. In the context of the relevant circumstances of the pending case, the Tribunal has no hesitation to "remedy" the anomaly in the Grievance Procedures by way of a liberal interpretation. Apart from absence of any reason speaking in favour of a different treatment of time limits expressed in days and months, the following arguments have been taken into account by the Tribunal.

First, the interpretation adopted by the Bank restricts the Staff Member's rights by different treatment of non-working days within monthly periods under the applicable rules. It is true that Mr. Grassi could have lodged his RARD on Saturday June 6 2015, but trans-atlantic flights and difficulty in communication with his lawyers during the last weekend could well have impeded the effective exercise of his rights.

Second, the *contra proferentem* rule also speaks in favor of the Staff Member's appeal. Third, the Administrative Rules of the EBRD sister organizations, such as the IMF and the AfBD, offer additional support to the interpretation by Mr. Grassi's lawyers. The Administrative Tribunal agrees with what the Administrative Tribunal of the International Labor Organization stated in its Judgment No. 2882, which ruled that "*although rules of procedure must be strictly complied with, they must not be construed too pedantically or set traps for staff members who are defending their rights*". Although the pertinent EBRD Grievance Committee Rules do not amount to a trap, we are of the opinion that the Bank's interpretation is exceedingly pedantic and formalistic, and would unduly hinder the Staff Member from defending his right effectively.

Fourth, drawing a line between allegations, bases of claim, facts, steps taken or requests for relief contained in the so-called draft RARD, including exhibits that were mentioned in it and provided shortly thereafter, and new materials or elements that were contained

only in the final version of the RARD², would be very difficult, indeed. Thus, the strict observance of the President's decision in relation to the Report and Recommendation on jurisdiction of the Grievance Committee could unduly restrict the Staff Member's rights and might could trigger new legal conflicts.

34. The *Kominek* case sent to the Members of the Tribunal has not been taken into account. In the Tribunal's opinion that judgment dealt with a different set of facts. It did not concern the calculation of a time limit which falls on a non-working day; moreover it involved delay by the President of the Bank, and not a Staff Member. Accordingly it is not of assistance in deciding the present controversy.

DECISION

For these reasons, the Administrative Tribunal, acting by a panel of Judges, Boris Karabelnikov, Jan Paulsson and Stanisław Sołtysiński (Chair), hereby:

- a) allows Mr. Grassi's appeal against the President's decision of 9 September 2015, and
- b) orders that the Grievance Committee shall exercise its jurisdiction over all elements of the RARD submitted on 8 June 2015.

The Administrative Tribunal is of the opinion that the Bank may consider whether, as a matter of good practice and for the purpose of avoidance of similar disputes, the Grievance Procedures should explicitly adopt uniform rules for all time limits that fall on a non-working day; but the issue is ultimately within the scope of its powers and reasonable managerial discretion.

18 January 2016

For the Administrative Tribunal



Stanisław Sołtysiński

Professor Dr Juris, LLM

² The Tribunal refers to the rather cloudy (obfuscated) border line between the scope of jurisdiction of the GP in light of the draft and the final version of the RARD delineated by the President of the Bank in his decision of 9th September, 2015.