

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

A.

v.

European Bank for Reconstruction and Development

Decision by the Administrative Tribunal

18 April 2017

1. Introduction

1. The Appeal is presented by Mr A. (the “Appellant”, or the “Staff Member”) against the President’s Administrative Review Decision dated 1 December 2016 (the “PARD”) in relation to a report of the Grievance Committee dated 14 November 2016 (the “GC Report”).
2. The GC Report was rendered in a procedure that the Staff Member had initiated with the aim to obtain a review of the Performance Appraisal Report evaluating his performance for the year 2015 (the “Performance Appraisal”).
3. The GC Report pointed out that a performance review of staff members is a decision taken in the exercise of the management’s discretionary power, and as such can be reviewed only if it is found to be abusive. Referring to article 7.03 (b) (iv) of the Grievance Procedures, the GC Report pointed out that the Grievance Committee has the power to recommend to uphold a staff member’s request, i.a., if the administrative decision was taken in violation of applicable procedures in a manner that affected the outcome (para 11 of the GC Report).
4. The GC Report contains a detailed evaluation of the process leading to the Performance Appraisal, as well as of the applicable regulation. In particular:
 - (i) Prior to the mid-year evaluation in July 2015, there was little communication between the Line Manager and the Staff Member on the latter’s performance (paras 22-24 of the GC Report). Neither the Staff Member nor the Respondent (the “Bank”) filled in or updated the core accountabilities. The GC Report finds in para 28 that this was most unfortunate, and in para 64 (i) that this was not in compliance with the mid-year review employee guide, which provides, i.a., that the staff member and the line manager shall discuss performance against accountabilities, specific objectives and behavioural competencies (para 18 of the GC Report);
 - (ii) The Performance Appraisal was based on feedback given by non-staff members of the Advisory Committee of the Venture Capital Investment Programme (the “Advisory Committee Members”). The GC Report finds in para 21 and 36 that this was in violation of the ESS2015 guidelines for the year-end review, article 4.17 of the Staff Handbook, as well as the system applied for registering the feedback. These sources provide, i.a., that in preparation of the process leading up to the Performance Appraisal, the line manager and the staff member shall discuss and agree on colleagues from whom feedback will be requested, typically 3-5 colleagues (para 19 of the GC Report). The GC concluded that “colleague” for this purpose is limited to staff members (i.e., employees) of the Bank (para 20-21 of the GC Report);
 - (iii) The Performance Appraisal was based on feedback given by a senior banker the Staff Member reported to (the “Operational Leader”), without the Staff Member being informed of this circumstance (paras 43 and 44 of the GC Report). The Staff member was also not informed of the feedback by the

Advisory Committee Members. This was in violation of the ESS2015 guidelines for the year-end review. These guidelines provide, i.a., that the staff member shall be informed of the identity of the feedback providers (para 19 of the GC Report);

- (iv) The feedback from the Advisory Committee Members was not requested in connection with or in the framework of the formal process of year-end review, but independently by the Line Manager (para 39 (iii) of the GC Report). This was a violation of the applicable procedural rules (para 40 of the GC Report);
 - (v) After one of the colleagues nominated by the Staff Member had given her feedback, the Line Manager contacted her to discuss her feedback. This resulted in her changing her feedback. The GC Report deems this to be a material breach of the applicable procedures (paras 41 and 42 of the GC Report);
 - (vi) The Line Manager failed to give weight to the feedback that was given, in compliance with the procedures regulating the formal process of year-end review, by the two colleagues nominated by the Staff Member (para 58 of the GC Report);
 - (vii) The Line Manager failed to give weight to the feedback that was given, outside of the formal procedures, by a former colleague of the Staff Member (para 61 of the GC Report).
5. The GC Report concludes that the Performance Appraisal was an abuse of the exercise of managerial discretion (para 64 of the GC Report).
6. It is also worth noting that the GC Report repeatedly expresses serious doubts about the creditworthiness of the Line Manager's testimony (paras 38 (iv), 39 (v), 54 and 61 of the GC Report).
7. The GC Report recommends that:
- The Performance Appraisal be set aside;
 - The Bank take appropriate steps to ensure that the actual performance of the Staff Member be recorded;
 - The Staff Member be awarded 3.000 GBP as a compensation for the abusive evaluation of his performance.
8. The PARD upheld the Administrative Decision confirming the Performance Appraisal and rejected the GC Recommendations. In particular, the PARD affirmed that:
- (i) It was legitimate for the Bank to seek feedback from the Advisory Committee Members, as their views are indispensable for the functioning of the programme;
 - (ii) It was legitimate for the Bank to seek feedback from the Operational Leader, in view of his role. It would have been preferable to obtain this feedback in the

framework of the formal procedure for year-end evaluation, but failure to do so did not have an impact on the substance of the Operational Leader's comments. Moreover, the formal procedure for year-end evaluation does not prevent the Line Manager from seeking feedback in alternative ways and throughout the year;

- (iii) It was not appropriate for the Line Manager to approach a feedback provider and discuss her feedback, with the result that she modified her original feedback. However, this had no impact on the Performance Appraisal, since her overall feedback remained positive.

2. The Appellant's position

9. The main grounds for the Appellant's position are as follows:

- The PARD does not give adequate reasons for departing from the GC recommendations;
- The PARD ignores the GC Report's findings of breach of the applicable law, or dismisses them as not having had an impact on the evaluation

10. In particular:

- (i) The PARD gives no reasons for not agreeing with the GC Report on the circumstance that the Advisory Committee Members were not eligible as participants in the year-end appraisal (para 18 (i) (a) of the Appeal);
- (ii) The PARD does not comment on the GC Report criticism as to the creditworthiness of the Line Manager's testimony (para 18 (i) (b), (c) and (d) of the Appeal);
- (iii) The PARD does not explain why the feedback from the Advisory Committee Members is indispensable, although the duty or possibility to give such feedback is not formalized in any procedures or description of responsibilities (para 18 (i) (e) of the Appeal);
- (iv) The PARD fails to comment on the following findings in the GC Report, that the GC deemed to be a breach of procedural rules – this being equivalent to not accepting the findings in the GC Report without giving any reasons (para 18 (ii) of the Appeal):
 - failure to disclose the role of the Operational Leader in the year-end appraisal;
 - failure to attach weight to the feedback given by the two colleagues nominated by the Staff Member;
 - failure to attach weight to the feedback given by a former colleague;

- (v) The PARD fails to give reasons for its disagreement with the findings in the GC Report that the inappropriate contact with a feedback provider on her feedback had an impact on the final evaluation (para 18 (iii) of the Appeal).

11. The appeal further informs that, pending the proceeding before the GC, the Respondent started a procedure to “dismiss/demote” the Appellant, whereupon the Appellant resigned from his position. The letter of resignation is submitted as an exhibit.

12. The Appellant requests that the Administrative Tribunal:

- Set aside the PARD;
- Order implementation of the recommendations in the GC Report, that the Appellant interprets as recommending to change the year-end appraisal into “meets expectations”;
- Order Respondent to pay moral damages in the amount of 30.000 GBP.

3. The Respondent’s position

13. The Respondent asserts that the GC recommendations are not binding. It accepts that the findings in the GC Report are accurate on the facts, but disagrees on the assessment of certain facts (para 2.3 of the Response). The main grounds for the Respondent’s position are as follows:

- The Respondent points out that the feedback regulated in the provisions that are alleged violated is meant to be a supplement to the personal observations of the Line Manager, not a substitute thereof (para 4.4 of the Response);
- The year-end evaluation is an exercise of discretionary power and as such can be the object of the Administrative Tribunal’s scrutiny only to the extent the exercise of discretion was abusive (para 4.10.1 of the Response);
- The exercise of discretion is abusive if there is no reasonable and observable basis for the assessment made (para 4.10.2 of the Response);
- The reasons contained in a PARD may be brief (para 4.10.3 of the Response).

14. In particular:

- (i) The Advisory Committee Members are eligible to participate in the year-end appraisal. Even though, as external members, they are not employees of the Bank, their function in the organization is essential to the activity and provides valuable insight that is useful to evaluate as feedback (para 5.7-5.10 in the Response); also, while it is true that a literal reading of the Guidance for the year-end evaluation excludes people not employed in the Bank as eligible feedback providers in the process, a “teleological” interpretation permits it (para 5.11 of the Response);

- (ii) The feedback by the Operational Leader was correctly sought and taken into consideration, and any irregularities are only minor formal flaws (para 5.14 of the Response); this feedback was not taken in the frame of the formal procedure provided for the year-end appraisal, but evaluation of staff members can be made on the basis of information obtained in alternative ways at any time of the year, in accordance with article 4.17 of the Staff Handbook (para 5.15 and 5.16 of the Response); furthermore, in view of the contacts that had taken place, the Appellant could not have been unaware of the circumstance that feedback from the Operational Leader would be considered (para 5.16 of the Response); moreover, seeking the Operational Leader's feedback outside of the formal procedure for year-end appraisal was the only possible way to obtain such feedback, as the Appellant would not have accepted it as part of the formal framework (para 5.17 and 5.18 of the Response);
- (iii) Contact with a feedback provider by the Line Manager took place, and it was inappropriate (para 5.20 of the Response) and unfortunate (para 5.25 of the Response). However, the Respondent does not agree with the assessment of this contact made in the GC Report. While the GC considered the contact to have the purpose of obtaining from the feedback provider a different feedback, the Respondent maintains that the purpose was to better understand the feedback that had been given (paras 5.20 and 5.21 of the Response). Moreover, the Respondent does not agree that the contact has had an impact on the evaluation, since the feedback was still largely positive even after it had been changed (paras 5.24 and 5.25 of the Response);
- (iv) Regarding the Appellant's request that a new evaluation report be issued with the evaluation "meets expectations", the Respondent points out that the GC did not recommend to issue a "meets expectations" evaluation, but to request the Respondent to take appropriate steps to record the actual performance of the Appellant (para 6.4 of the Response);
- (v) The Respondent points out that issuing a new evaluation report would be impossible. In support, the Respondent refers to ILOAT decision 3171, which highlighted that the employment relationship was terminated, as it is in the instant case.

15. The Respondent requests the Administrative Tribunal to:

- Dismiss the appeal;
- Dismiss the request for a new evaluation report
- Dismiss the request for moral damages.

4. The TRIBUNAL evaluation

16. Procedural irregularity may be a basis for review of an administrative decision by the Administrative Tribunal according to AT Rule 3.03(b), and can lead to annulment of an administrative decision if the violation had material impact on the decision. Although not expressly mentioned in the AT Rules, the requirement of materiality is

mentioned in article 7.03(b)(iv) of the GC's rules of procedure in the Staff Handbook, stating that a procedural violation may be a ground for reversing a discretionary decision if it "affected the outcome" of the decision. The Tribunal finds that the requirement of materiality applies also before the Tribunal.

17. Under AT Rule 7.01(b) the Tribunal is supposed to "take full account of" the GC's findings of fact, unless there is manifest error.
18. The Grievance Committee found the following facts to support its conclusion that procedural violations took place (summarized in para 64 of the GC Report):
 - (i) Obtaining feedback from the Advisory Committee outside of the formal frame of the 360 review process.
 - (ii) Contacting one nominated feedback provider to induce her to change her feedback (para 41-42 and 46);
 - (iii) Obtaining feedback from the Operation Leader without informing the staff Member (para 43-45 and 46);
 - (iv) Not attaching any weight to the positive feedback provided by the Appellant's nominated colleagues (paras 58-59);
 - (v) Not attaching any weight to the positive feedback by a former colleague (paras 61-62)

The violation under (i) was expressly found to have had a material impact on the final evaluation of the Appellant's performance (para 40); all violations were collectively found to have affected the outcome (para 65).

19. It may be discussed to what extent assessing whether the procedural violations had a material effect on the administrative decision is a matter of fact. If it is deemed to be a matter of fact, the Tribunal owes deference to the GC evaluation, unless a party "seeks to assert that the Findings of Fact contain a manifest error" in accordance with AT Rule 7.01 (a). The Respondent objects to the GC interpretation of the facts mentioned under 3.b above, and with the GC evaluation that the procedural violations had an impact on the final evaluation. However, the Respondent does not argue that the GC Report contains a manifest error. In this circumstance, the Tribunal may take full account of the GC findings. However, if materiality is not deemed to be a matter of fact, the Tribunal may independently evaluate whether the procedural violations, as found by the GC, had an impact on the administrative decision.
20. The question whether the issue of materiality is a matter of fact or an inference drawn from the facts is a matter of some legal debate. Furthermore, deference to a trial body's factual findings is usually required because of that body's ability to observe and question witnesses, whereas the appellate body does not have such access. In this case, the GC did not hold a hearing. Therefore, the reasons for owing deference to the GC findings may be deemed to be less compelling. In view of the above, the Tribunal finds it appropriate in this case to assess independently whether the procedural violations had an impact on the administrative decision.

21. A performance evaluation is rendered by the management in the exercise of its discretionary power. It is therefore outside of the Tribunal jurisdiction to scrutinize its content, save for what may violate the applicable law.
22. In particular, according to AT Rule 3.03(b), the Tribunal may review an administrative decision if it “was carried out in violation of the applicable procedure”. Compliance with procedural rules ensures that discretionary powers are exercised in an objective and legitimate way. Conversely, violation of procedural rules prompts proof that the discretionary power was exercised within its proper frame. Hence, the Tribunal must determine whether the administrative decision was affected by the procedural irregularities that were found by the GC. The scope of the Tribunal independent evaluation is thus limited to assessing whether the procedural violations had an impact on the Performance Appraisal.
23. The Respondent accepts that the procedural violations took place, but argues that they did not have an impact on the Performance Appraisal. To such extent, the Tribunal finds that there is no basis for the Appellant’s complaint that the PARD does not sufficiently explain why it rejected the GC Report. In particular, the Respondent argues as follows:
- (i) Advisory Committee Members are eligible to give feedback under a “teleological interpretation of the Guidance for the year-end evaluation (para 5.11 of the Response). Feedback from Advisory Committee Members is useful and desirable, in view of their function (paras 5.7-10 of the Response);
 - (ii) Feedback by the Operational Leader was correctly sought and taken into consideration, and any irregularities are only minor formal flaws (para 5.14 of the Response); this feedback was not taken in the frame of the formal procedure provided for the year-end appraisal, but evaluation of staff members can be made on the basis of information obtained in alternative ways at any time of the year, in accordance with article 4.17 of the Staff Handbook (para 5.15-5.16 of the Response);
 - (iii) Contact with a feedback provider took place, and it was inappropriate (para 5.20 of the Response) and unfortunate (para 5.25 of the Response). However, the Respondent does not agree that the contact had an impact on the Performance Appraisal, since the feedback was still largely positive even after it had been changed (paras 5.24 and 5.25 of the Response). The Respondent also disagrees with the GC Report’s finding that contact had the purpose of obtaining from the feedback provider a different feedback. Although the Respondent does not contest that the feedback was changed as a consequence of this interference, it maintains that the purpose was to better understand the feedback that had been given (paras 5.20 and 5.21 of the Response).
24. The Tribunal agrees that a performance evaluation may be rendered on the basis of a plurality of sources that need not be confined to the formal framework of the 360 review process. The Tribunal disagrees with the GC Report to the extent it suggests that a Line Manager may only receive performance feedback from staff members. The Tribunal also agrees with Respondent that the formal framework of the 360

review process is a support, and not a substitute for the managerial exercise of discretion.

25. However, formal frameworks for review processes are established with the purpose of, i.a., ensuring objectivity in the exercise of the evaluator's discretion. In the instant case, by determining how, and from what sources, information shall be obtained, the ESS2015 guidelines for the year-end review create the assumptions for a transparent and objective decision and are meant to have an influence on the outcome of the procedure. In addition, the Bank's internal law also provides for the necessity to promptly inform staff members of any negative feedback, so that the staff member may correct his or her performance (Staff Handbook sec. 4.18.2). Given that these rules have been violated, it is necessary to determine whether the Performance Appraisal was rendered in a way compatible with the principles underlying the mentioned guidelines.
26. Feedback received from the Advisory Committee Members and the Operational Leader outside the formal framework was never reduced to writing. The GC found the Line Manager's quotations of comments by Advisory Committee Members from memory to not be credible (e.g., GC Report at para 54: "We do not consider that Mr. Curatolo provided the extent of the negative feedback that is attributed to him in Mr. Werner's statement."). Even accepting the Bank's argument that management is entitled to seek feedback outside the frame of the 360 review process, the Tribunal finds that undocumented performance comments outside the 360 system are not adequate proof that the Line Manager made a fully informed and objective decision.
27. Moreover, the Line Manager failed to promptly inform the Appellant that the Advisory Committee Members allegedly gave their negative comments. These comments were supposedly given in July and September, well before the evaluations were prepared. Failure to inform the Appellant immediately of alleged deficiencies violates the Bank's internal law, see para 25 above, and is not in compliance with principles of international jurisprudence (e.g., WBAT Decision 434, para 40: "Lapses in performance should be identified when they occur and should be addressed expressly and promptly. They should not be held in reserve until only to be disclosed at the end of the review period", quoting WBAT Decision 337, para 54 (2005).) The Tribunal is of the opinion that this violation had an impact on the Performance Appraisal, because the Appellant was not given the opportunity to correct his alleged deficiencies before the end of the year.
28. In summary, the Performance Appraisal was rendered in part on feedback submitted within the formal 360 review process, and in part on feedback obtained outside the formal framework. The feedback obtained outside the formal framework is undocumented, obtained improperly according to the GC, and not communicated to the Staff Member, who therefore was deprived of the opportunity to improve his performance. According to the GC Report, para 57, the process towards the Performance Appraisal resembles more the quest for corroboration of a pre-existing view of the Line Manager, than taking account of evidence that should have allowed the Line Manager to arrive at a more balanced view. The Tribunal finds that the procedural irregularities that were established by the GC had an impact on the Performance Appraisal.

29. Furthermore, part of the feedback that was submitted within the formal 360 review process was obtained in an improper way, see paras 18 (ii) and 23 (iii), above. The GC found, and the Respondent does not object to this finding, that the Line Manager inappropriately contacted a feedback provider, and that the feedback provider, as a result of this, changed her feedback. The Respondent objects to the GC interpretation of the Line Manager's intentions when he took contact with the feedback provider, and points out that the feedback, although changed as a consequence of this incident, remained largely positive. Therefore, the Respondent argues that this incident did not have an impact on the Performance Appraisal. The Tribunal is of the opinion that it is a basic principle of due process that individuals involved in evaluation processes should trust that their feedback is treated confidentially and solely for the purposes inherent to the formal process. In particular, they should not be exposed to undue influence. The findings described in paras 40-42 of the GC Report are alarming. Even though the feedback from the contacted staff member remained largely positive, the Tribunal finds this to be a material breach of procedural rules relating to the review process that has an impact on the overall credibility and impartiality of the review process.
30. The Tribunal finds that the improper contact the Line Manager had with a feedback provider (an improper contact which the Respondent admits took place) undermined the process and the procedural safeguards in that process that were designed to protect staff. One of the requirements of a properly implemented discretionary decision is that the decision-maker be fully informed. The decision-maker must then take account of all relevant information. The decision-maker may not make a determination prior to assessing the relevant facts and may not seek out information that conforms to a pre-determined outcome. Nor may a decision-maker attempt to influence the information to be transmitted and considered as part of the decision-making process. In this case, the Line Manager violated these fundamental precepts. He had every right to develop his own negative view of Appellant's performance during the course of their working relationship. He did not have a right, however, to influence feedback providers to alter their views of Appellant's performance so that they conformed to the Line Manager's views.
31. The Line Manager's improper contact with one feedback provider and his concealment of feedback from the Advisory Committee members were not minor procedural irregularities. They breached fundamental principles that govern the performance appraisal process. The question in this circumstance is not merely whether the Line Manager's deviation from procedure in this case affected the outcome of the particular Performance Appraisal. By contacting and influencing feedback providers in secret, the Line Manager subverted the entire appraisal process, which is designed to ensure fair and informed decision-making. A Line Manager who manipulates the input of performance information undermines the requirement that discretionary decisions be informed and unbiased. This kind of deviation from established procedures is *per se* material. On the basis of the foregoing, the Tribunal concludes that the Performance Appraisal must be set aside and, it follows, that the PARD must be set aside.
32. The Appellant requests that a new evaluation be issued with the conclusion that he "meets expectations".

33. The Respondent makes reference to ILOAT decision 3171, where it was deemed impossible to issue a new evaluation. However, in that case the reason for refusing to order a new evaluation was that the supervisor, who was the only person who could have made an evaluation of the staff member's performance, had been found to have harassed the staff member, see ILOAT decision 3170. Under those circumstances, there were legitimate doubts about the objectivity of the supervisor, and thus about the advisability to request a new evaluation report. The facts in ILOAT decision 3171 are sufficiently different from the facts in this case that its reasoning does not apply to the instant case.
34. The Tribunal does not have the power to substitute its own evaluation for the Respondent's evaluation, and does in any case not have any basis to express an evaluation of the Appellant's performance. Therefore, the Tribunal requests the Respondent to take appropriate steps to ensure that the actual performance of the Appellant is duly recorded in accordance with the applicable procedures. The Line Manager should not be involved in this process. Should the Respondent determine that there is no alternative to an evaluation by the Line Manager, the Respondent is requested to issue a letter of recommendation taking account of the evaluation of services since the date of employment of the Staff member to the date of termination, but excluding the Performance Appraisal that was set aside. The Tribunal retains jurisdiction on the implementation of the remedy described herein. Should there be a disagreement between the Parties on the re-evaluation of the Staff Member's performance for 2015, it may be brought to the Tribunal for decision.
35. The Appellant requests an amount of damages 10 times higher than the amount recommended by the GC Report. The reasons are that the PARD is unlawful, that it disregarded the GC Report, and that the Appellant has been pursuing the case for about one year. The Tribunal is of the opinion that moral damages may be awarded in case illegal conduct has caused serious distress or other non-monetary damage, such as reputational damage. The finding of facts made by the GC shows that the law governing the procedure leading to the Performance Appraisal was materially breached in several respects. The Appellant informs the Tribunal that he eventually felt compelled to terminate his working relationship with the Respondent. The Tribunal has insufficient basis to evaluate the consequences of the Respondent's illegal activity in respect of this latter circumstance, but has no doubt that the Respondent's illegal conduct has caused considerable distress for the Appellant. However, the Tribunal does not have any elements that would indicate that the amount of damages recommended by the GC should be increased. On this basis, the Tribunal deems it appropriate to award moral damages in the same amount that was recommended by the GC.

5. Decision

On the basis of the foregoing, the Tribunal, acting by a panel composed of Judges Giuditta Cordero-Moss (President), Michael Wolf and Spyridon Flogaitis, hereby decides as follows:

1. The Request that the Performance Appraisal be set aside is granted;
2. The Respondent is requested to render a new appraisal of the Appellant's actual performance for the year 2015 that complies with the applicable procedures or, if this is not possible, to issue a letter of recommendation taking account of the evaluation of services since the date of employment of the Staff Member to the date of termination, but excluding the Performance Appraisal that was set aside. The Tribunal retains jurisdiction on the implementation of the remedy described herein. Should there be a disagreement between the Parties on the re-evaluation of the Staff Member's performance for 2015, it may be brought to the Tribunal for decision;
3. The Appellant is accorded moral damages in the amount of 3.000 GBP.

For the Administrative Tribunal



Giuditta Cordero-Moss