

**APPEAL BEFORE
THE ADMINISTRATIVE TRIBUNAL OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

Staff Member “A”,*

Appellant

v.

Case No. 2017/AT/05 (2)

**European Bank for Reconstruction
And Development,**

Respondent.

Supplemental Decision by the Administrative Tribunal

27 September 2017

*** Appellant has requested anonymity, and the Tribunal has granted that request.**

I. Background

1. The Tribunal issued a decision in this case on 4 August 2017. That decision is incorporated herein.
2. In that decision, the Tribunal remanded to the parties a consideration of several remedial issues. In particular, the parties were instructed to consider: (a) the amount of Appellant's performance based compensation for 2015; (b) the amount of Appellant's salary increase for 2015; and (c) reimbursement of Appellant's legal costs.
3. After remand, the parties reported that they reached agreement with respect to the performance based compensation, but continue to disagree on the amount of Appellant's salary increase and the amount of legal costs that are appropriately reimbursed.

II. The Bank's Position

4. With respect to Appellant's salary increase for 2015, she had been given an increase of .7%. The Grievance Committee ("GC") awarded Appellant an increase of 0.8%. The Bank is willing to pay the 0.8%, but Appellant requests an increase of 3.5%.
5. The Bank supports its position as follows: "The same salary increase of 0.8% for 2016 was awarded to all of [Appellant's] peers in the Office of the Chief Economist who had a salary with a compa-ratio of 87% (i.e. the same compa-ratio as [Appellant]) and who had a performance rating for 2015 of 'meets expectations' (i.e. the same performance rating as [Appellant])."
6. With respect to legal costs, the Bank states that Appellant submitted legal costs totaling £21,400 (plus VAT). The Bank President had originally awarded £1,000 (plus VAT). On remand, the Bank increased the amount it was willing to pay to £5,310 (plus VAT).
7. The Bank arrived at its proposal by taking the £21,400 requested by Appellant and reducing it by the amount of attorney charges relating to: (a) mediation, (b) the preparation of witness statements and (c) apparent duplications in charges. With this reduction, the Bank proposes a new total of £17,700 (plus VAT). The Bank then asserts that Appellant achieved a 30% level of success, resulting in the fee offer of £5,310 (plus VAT).
8. The Bank opposes mediation-related fees (totaling £2,200) because:

The Bank does not consider legal costs relating to mediation to be recoverable. Mediation is intended to facilitate informal dispute resolution without the participation of lawyers. As noted in Section 5.03(a) of the Grievance Procedures: "There shall be no legal representation of either the Staff Member of the Bank at any meeting with the mediator, unless, in exceptional cases, the

mediator determines that such legal representation is indispensable for the success of the Mediation or any phase of it.... However, the mediator shall have no power to award costs.” In the present case, it was not the mediator that determined that the participation of lawyers is indispensable, but the express condition of [Appellant] for lawyer participation, which the Bank was forced to reluctantly accept in order for the mediation to take place. As a result, the Bank, too, had to provide for legal representation, thus incurring additional costs (in addition for the costs of the mediation).

9. The Bank opposes reimbursement of fees relating to the preparation of witness statements (totaling £600) because:

The witness statements are intended to record what the witnesses saw, heard or felt. A mere recording (“drafting”) of the witnesses’ statements does not require the expertise of legal counsel and the statements should in any event be drafted by the witnesses themselves. Witness statements are an objective recording of facts aimed to assist the GC in its fact-finding and should not be tempered.

10. The Bank asserts that attorney’s fees totaling £900 billed on 13 January (“Client conference and written legal advice”), 17 January (“Reading GC Hearing Transcript”) and 27 February 2017 (“Reading GC preliminary recommendation and advising client”) were duplicative. It frames the objection as follows:

These entries appear to be somewhat duplicated in section 9.1 of the Statement of Appeal which reads as follows:

The preparation and submission of this appeal (including reading the 18th April 2017 GC Recommendation, reading the President’s 5th May 2017 Decision, reading the Transcript of the GC hearing, revisiting the pleadings before the GC, reading all other submissions made to the GC by the Bank, reading the relevant international administrative tribunal case law, preparing, drafting and submissions of the Statement of Appeal, all client conferences and communications with the client including legal advice, and all communications with the GC and AT Secretariat) has led to 27 hours of work, at £200 an hour, amounting to £5,400 + VAT.

III. Appellant’s Position

11. With respect to the salary increase, Appellant states:

The Bank still has not justified why in 2014 the Appellant's salary increase was 3.5% and in 2016, when she only worked a single month, it was 1.6% (and her compa ratio in 2016 was 84% which is very close to 87%). In addition, the Bank has only provided information on the salary increases of those rated good and with a compa ratio of 87% (most likely a single additional person). There is

no information on the salary increases of all other people rated good (which was in fact requested by the GC) - and whose compa ratios may not have been exactly 87%, but maybe 90% or 85% or 95%. In addition, it makes little sense that the Appellant revised bonus would mirror the 2014 amount, and the salary increase would be more than 4.5 times lower. The reasonable amount, we submit, is 3.5%.

12. With respect to legal costs, Appellant states she is willing to accept reimbursement of 50% of the attorney's fees. She states, however, that "her partial win before the Tribunal does not affect the fact that she was successful before the GC."
13. Appellant opposes the deduction of mediation-related attorney's fees because there is an "inequality of arms between the parties, including during the mediation which she attended with her 2.5-month-old baby."
14. Appellant does not address the arguments raised by the Bank in Paragraphs 9 and 10, above.

IV. The Tribunal's Evaluation

15. Salary Increase. The Bank has provided factual support for its decision to accept the GC's recommendation of a salary increase of 0.8%. Appellant has not provided evidence showing that the GC incorrectly evaluated the evidence before it. The Tribunal affirms a salary increase of 0.8%.
16. Legal Costs – Success Rate. Appellant prevailed on only some of her claims, having lost on the most significant relief she was seeking. The fact that Appellant largely prevailed before the GC must be balanced by the fact that this Tribunal has rejected many of the GC's conclusions that were favorable to Appellant. The Tribunal concludes it would be inappropriate to compensate her for all of her legal costs.
17. Appellant first consulted her attorney on 16 February 2016, soon after she was informed that she would receive an oral warning and be placed on a PIP. Since that time, Appellant has fully succeeded on the following requests for relief: the oral warning was rescinded; the PIP was rescinded; her performance rating was increased; and her performance based compensation was increased. She received no relief on the following: her non-promotion was sustained; her request for compensation for her non-promotion was denied; her request that all harassment claims be referred to OCCO was denied; and her request that her Line Manager be disciplined was denied. Lastly, Appellant was only partially successful on the remaining claims: she was awarded £3,000 in moral damages, much less than the three years of salary she had requested and much less than the £43,790.40 that the GC awarded; and she received a salary increase of 0.8%, much lower than the 3.5% she had requested.

18. The vast majority of the hours spent by Appellant's attorney in this case were accrued in preparation of the 16 September 2016 Request for Administrative Review ("RARD") and in the preparation for and conduct of the GC proceedings. However, much of Appellant's success in the case (rescission of the oral warning and PIP and upgrading of performance rating) came about on 8 March 2016 as a result of decisions made by the Chief Economist prior to the RARD. As a result, most of the attorney's time in the RARD, GC and Tribunal processes was devoted to arguments that produced very limited success.
19. An award of legal costs in this case should take account of Appellant's ultimate successes and failures throughout the grievance process. However, consideration must also be given to the correlation between the number of hours devoted to this case by the attorney and the success rate attributable to those hours. In this case, there is virtually no correlation between the bulk of the attorney's time and Appellant's successes as of 8 March 2016.
20. Assessing Appellant's level of success cannot be a strictly quantitative analysis. However, upon consideration of all the facts, the Tribunal concludes that Appellant should be awarded 30% of the total fees requested.
21. Legal Costs – Attorney Hours Spent in Mediation. The Bank protests that the mediation process is designed to be utilized by the involved parties, without the intercession of attorneys. It therefore seeks to deduct the £2,200 billed for the lawyer's attendance at mediation and the legal advice he gave before and after mediation. The Tribunal initially notes that, even if legal counsel had not participated in the mediation, there is no sound basis for removing hours spent in advising his client in advance of the mediation. Mediation is not likely to be a process with which most staff are familiar; the advice of counsel on how mediation works and how to conduct oneself in mediation is likely to make the process run more smoothly. The Tribunal therefore does not find it appropriate to eliminate the attorney's time spent preparing Appellant for the mediation.
22. With respect to the mediation itself, the Bank cites Section 5.03(a) of the Grievance Procedures: "There shall be no legal representation of either the Staff Member of the Bank at any meeting with the mediator, unless, in exceptional cases, the mediator determines that such legal representation is indispensable for the success of the Mediation or any phase of it.... However, the mediator shall have no power to award costs." The Tribunal fully supports the policies underlying the admonition that legal representation should be allowed only in exceptional circumstances. Mediation in this context works best when it is informal and unburdened by legalisms.
23. In citing Section 5.03(a) of the Grievance Procedures, however, the Bank presents only a partial picture of the options available in mediation. Specifically, Section 5.01 of the Grievance Procedures states that the Vice President, Human Resources ("VPHR") normally agrees to mediation, but may refuse to mediate if a written reason is provided.

The Bank could have declined to mediate in this case because of Appellant's insistence that she have legal representation. Instead, the Bank agreed; even if it did so reluctantly, it still assented to mediation with the participation of Appellant's legal counsel. Obviously, the mediator agreed as well.

24. Given these facts, it is inappropriate to penalize Appellant retroactively for using her attorney in the mediation. The Bank could have refused to participate in the mediation process and decided not to do so. The Tribunal therefore reinstates all of the mediation hours to the total hours expended by Appellant's counsel.
25. Legal Costs – Attorney Hours Spent in Preparing Witness Statements. The Bank rejected £600 in counsel fees, arguing that a witness statement is merely a recitation of facts that does not require the work of an attorney. However, a witness will not know what issues are in dispute or what facts might be material unless he/she is provided some guidance. An attorney's assistance in these respects is entirely appropriate. Even with respect to Appellant's own written statement, it was appropriate for her counsel to guide her through the factual maze of this case, to point out the facts that are relevant, and to help her craft her statement to the GC.
26. The Bank seems to imply that there was something unethical in counsel's assistance to his client or to witnesses in preparing their statements. The Tribunal rejects this assertion. Unless concrete facts are presented to the contrary, the Tribunal assumes that Appellant's counsel carried out his duties in a manner fully consistent with his legal and ethical obligations. The Tribunal finds nothing in this record to suggest otherwise.
27. The Tribunal restores all of the fees related to counsel's role in the preparation of the witness statements.
28. Legal Costs – Redundant Billing. The Bank objects that three of counsel's billing entries in the fee petition "appear to be somewhat duplicated in section 9.1 of the Statement of Appeal" (emphasis added). By the very language of its objection, the Bank signals uncertainty over its argument. The Bank could have probed this issue with Appellant's counsel during the period of the remand to obtain greater certainty. Absent particularized facts showing that there has, in fact, been a duplication of hours, the Tribunal will not reduce the hours based on conjecture. The hours on 13 January, 17 January and 27 February 2017 (totaling £900) should be restored.
29. Legal Costs – Conclusion. The Tribunal does not approve any of the reductions in hours proposed by the Bank. Appellant should be reimbursed for 30% of the total hours expended by her counsel in this matter.

V. Conclusions

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

1. Appellant is awarded a salary increase of 0.8% for 2015.
2. Appellant is entitled to reimbursement of 30% of her total legal costs.

For the Administrative Tribunal

/s/

Michael Wolf