IN THE APPEAL BEFORE THE EBRD ADMINSTRATIVE TRIBUNAL

Appellant

vs

European Bank of Reconstruction and Development

(the "Bank" or the "Respondent")

Decision on Cases EBRDAT 2018/AT/01 and EBRDAT 2018/AT/04

by the Administrative Tribunal

composed of

Spyridon Flogaitis (Chair of the Panel)

Giuditta Cordero-Moss

Michael Wolf

27 December 2018

1. Introduction

This decision is rendered in the cases EBRDAT 2018/AT/01 (the "First Appeal") and EBRDAT 2018/AT/4 (the "Second Appeal").

Briefly, the two Appeals regard Appellant's request that 100% of her salary be paid to her while she is on a sick leave, because her illness is service-incurred. The Staff Handbook does not differentiate between service-incurred and other illness, and provides that only 70% of the salary be paid under a sick leave. Hence, Appellant also requests that the Staff Handbook be amended to permit payment of 100% of the salary when the illness is service-incurred.

This decision must be read in conjunction with a decision taken by this Tribunal on 12 November 2018 (the "Joinder Decision") on the joinder of the First Appeal and the Second Appeal.

After the Joinder Decision, Respondent submitted its response (the "Response"). In the Response, Respondent requested that both appeals be dismissed for lack of jurisdiction. Regarding the First Appeal, Respondent submitted that Appellant failed to identify a challengeable administrative decision. Regarding the Second Appeal, Respondent submitted that an appellant may not submit the same matter for review in more than one proceeding.

The Tribunal having considered the two appeals in question in its Joinder Decision, and having developed there the facts of the cases, turns now its attention to the matters constituting the admissibility of the substantive issues raised.

2. The First Appeal

Regarding the First Appeal, the Tribunal is of the opinion that the request was presented in a timely manner.

The Tribunal observes that Appellant seeks three reliefs:

(i) That the Bank top up the Working Incapacity Benefit (WIB), so that her pay during sick-leave correspond to 100 % of her salary instead of 70%;

(ii) That the Bank amend the Staff Handbook, so that service-incurred illness entitle employees to receive 100% of their salary instead of 70%;

(iii) costs and moral damages for Bank's insistence on parallel procedures.

Appellant withdrew a further request for relief, the request that her medical bills be fully covered, because that request was satisfied.

2.1 The request that 100% of the salary be paid

Regarding the request under (i) above, the Tribunal observes that there is an Individual Administrative Decision which was challenged by Appellant and that is an implicit or explicit administrative decision regarding Appellant's salary which was taken by the administration and which is proven and detected and in the First Appeal attacked through the pay slip dated 24 August 2017.

The Tribunal observes that Appellant has not alleged that this Administrative Decision violates the terms and conditions of the Appellant's employment (the "internal law"), and recognizes that it correctly applies the Staff Handbook. It is not disputed that the internal law does not make a distinction between service-incurred illness and other illness, and that for both types the remuneration is reduced to 70%.

The Tribunal agrees that principles of international administrative law are part of the law that it has to apply. However, there is no principle of international administrative law imposing to pay 100% of the salary in case of service incurred illness.

Hence, the Administrative Decision confirmed and applied, but did not violate the internal law.

On the basis of the foregoing, the majority Tribunal is of the opinion that Appellant has no protected legal interest in this part of the First Appeal, and dismisses it. For the opinion of the minority, reference is made to the dissenting opinion enclosed hereto.

2.2 The request that the Staff Handbook be amended

Regarding the request under (ii) above, the majority of the Tribunal is of the opinion that it lacks legally protected interest, because the challenged rule existed before the problem arose and was not appealed against and because the rule by itself does not produce any immediate and direct effect to the situation of the Appellant.

That the request does not fall under the Tribunal's jurisdiction is confirmed by article 2.01(b) of the Appeals Procedures.

Pursuant to article 2.01(b), the Tribunal's jurisdiction is limited to Administrative acts which alter or are in breach of the internal law prevailing immediately before the Administrative Decision was taken. The wording of this provision does not seem to open for other bases for jurisdiction. Reference is made to the considerations made in sections 2.2.1 to 2.2.4 below.

In the present case, the Staff Handbook was not altered or breached, meaning that the Staff Handbook provisions that are challenged in the Appeal are the same provisions that existed when the Appellant became an employee of the Bank. Therefore, there has been no Regulatory Administrative Decision that has altered the Appellant's terms of employment and that falls within the scope of Article 2.01(b) of the Appeals Procedures.

It needs also to be added that changes in the regulatory provisions of the Bank, which are decided upon by the authorized organs, pertaining to all staff members generally, i.e. a change of policy, cannot be challenged as changing the basis of a contract, because when employed, the staff members accept that they will work in a living working environment, where the employer has the right to change at any time its working policies, if in a general and not personal manner. After all, the result of the letter of article 2.01(b) is to exclude from the process of administrative review terms of employment that already existed when an employee entered into the working relationship with the Bank and one of them is that any new staff member implicitly or explicitly accepts the right of the Organization to change its employment policies.

The Tribunal furthermore agrees that principles of international administrative law are part of the law that it has to apply. To override however the wording of article 2.01(b), there should be a clear basis in international administrative law, which the Tribunal is not aware of. Therefore, the majority is not convinced that there is a general principle of international administrative law giving the Tribunal jurisdiction on Administrative acts that were excluded from the right to appeal.

Therefore, in the opinion of the majority, the requirements set forth in Rule 2.01(b) of the Appeals Procedures are not met, and this part of the First Appeal is not admissible.

For the opinion of the minority, reference is made to the dissenting opinion enclosed hereto.

2.2.1 The basis for jurisdiction

The question is how to interpret the provision defining the Tribunal's jurisdiction, article 2.01(b) of the Appeals Procedures.

The provision reads as follows:

> (b) A Staff Member may only appeal an Administrative Decision which allegedly alters, in a material adverse manner, or allegedly is in breach of, his Terms and Conditions of Employment in force immediately before the Administrative Decision was taken.

This provision applies both to Individual and to Regulatory decisions, see article 1.03 (a) of the Appeals Procedures. Administrative Decision is defined as "an Individual Decision or Regulatory Decision taken by the Bank in the administration of the staff of the Bank."

The question is whether the provision in article 2.01 (b) of the Appeals Procedures gives jurisdiction over a decision that properly applies the internal law as it was at the time when the Appellant entered into the employment of the Bank.

2.2.2 Literal interpretation

An interpretation according to the provision's wording suggests that the Tribunal only has jurisdiction on Administrative Decisions that allegedly alter or breach the internal law as it was in force prior to the Administrative Decision.

This interpretation leaves out Administrative Decisions that apply existing internal law without altering or breaching it.

This interpretation entails that employees do not have access to the Tribunal if they want to challenge the internal law, as long as it has been properly applied and it has not been altered.

This interpretation is based on the letter of the provision.

The provision is clear in defining the Tribunal's jurisdiction as covering "only" decisions altering or breaching the internal law "in force immediately before the Administrative Decision was taken."

Because of this clear language, the exclusion of appeals challenging the existing internal law may be deemed to be intentional. The rationale of this exclusion may be assumed to be that employees are deemed to have accepted the internal law when they agreed to work in the Bank.

2.2.3 Extensive Interpretation

The Tribunal discussed, in its deliberations, an extensive interpretation of article 2.01 (b). The extensive interpretation overrides the limitations to jurisdiction contained in the letter of article 2.01 (b) of the Appeals Procedures. This extensive interpretation is based on the interaction between the provision defining jurisdiction (article 2.01 (b) of the Appeals Procedures) on one hand, and, on the other hand, (i) the Preamble of chapter 14 of the Staff Handbook, as well as (ii) section IV of Annex 14.1.

(i) Chapter 14 of the Staff Handbook regards dispute resolution. The Preamble reads, i.a., as follows:

> The Directive on the Administrative Review Process and the Appeals Procedures establish a graduated appeal mechanism under which a staff member can seek redress of any administrative decision that adversely affects him/her.

The extensive interpretation of article 2.01 (b) of the Appeals Procedures is based on the observation that staff members could not seek redress of "any" administrative decision, if article 2.01 (b) was read literally as permitting only appeals to decision that alter or breach the internal law.

It must be noted, however, that the Preamble of Chapter 14 of the Staff Handbook specifies that:

> In the event of a discrepancy between this Chapter 14 and the provisions of the Directive on the Administrative Review Process/Appeals Procedures, the latter will prevail.

(ii) Annex 14.1 to the Staff Handbook contains the Directive on the Administrative Review Process. Annex 14.1 does not regulate appeals before the Administrative Tribunal, but it regulates the procedure of administrative review before the Administrative Review Committee. Appeals before the Administrative Tribunal are regulated in the Appeals Procedures, which are contained in Annex 14.2 to the Staff Handbook.

Both annexes were recently reviewed and entered into force simultaneously in 2018.

Section IV, paragraph 3 regulates which Administrative Decisions are subject to the Administrative Review Process. In particular, paragraph 3 (c) lists certain Administrative Decisions that are not subject to Administrative Review Process. This list includes, i.a., Individual Decisions taken by the President and Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors. Paragraph 3 (c) does not contain a limitation corresponding to the limitation contained in article 2.01 (b) of the Appeals Procedures. Hence, paragraph 3 (c) of Annex 14.1 excludes from the Administrative Review Process all Administrative Decisions listed therein, not only those decisions that alter or breach the internal law. It should be noted that it would not have been reasonable to include the limiting language in article 3 (c). The purpose of this provision is to exclude certain decisions from the Administrative Review Process, and inserting the limiting language in the provision would have had the effect of permitting Administrative Review Process for those decisions.

Paragraph 3 (d) refers to the list in paragraph 3 (c) and reads as follows:

> Administrative Decisions that fall under paragraph 3(c) above may be reviewed by the Tribunal in accordance with the Appeals Procedures. For purposes of Section 2.01(a) of the Appeals Procedures, there are no appropriate channels for administrative review of such decisions and, therefore, no requirement to exhaust such channels prior to recourse to the Tribunal.

Hence, paragraph 3 (d) of Annex 14.1 provides that the decisions listed in paragraph 3 (c) "may be reviewed by the Tribunal in accordance with the Appeals Procedures".

The extensive interpretation of article 2.01 (b) of the Appeals Procedures is based on the observation that there is no indication that the Appeals Procedures were intended to limit the Tribunal's jurisdiction under paragraph 3 (d).

It must be noted, however, that paragraph 3 (d) does not purport to establish jurisdiction for the Administrative Tribunal. Paragraph 3 (d) does not say that appeals against those decisions "shall" be admitted by the Tribunal. It would not be appropriate if it did so, because Annex 14.1 does not regulate the jurisdiction of the Administrative Tribunal. Paragraph 3 (d) refers to

article 2.01 (a) of the Appeals Procedures. This latter provision contains the requirement that all channels for administrative review shall be exhausted before an appeal can be admitted before the Administrative Tribunal. Paragraph 3 (d) explains that there are no review channels for the decisions listed in paragraph 3 (c). Therefore, those decisions may be appealed directly before the Administrative Tribunal.

Paragraph 3 (d) specifies that the decisions listed in paragraph 3 (c) may be reviewed by the Tribunal "in accordance with the Appeals Procedures". This reference to the Appeals Procedures indicates that review is subject to the Appeals Procedures, including the limitations contained in article 2.01 (b) of the Appeals Procedures.

2.2.4 The opinion of the majority

In the opinion of the majority, consisting Spyridon Flogaitis and of Giuditta Cordero-Moss, the wording of article 2.01 (b) is clear and shows the intention to exclude from the Tribunal's jurisdiction those Administrative Decisions (both Individual and Regulatory) that do not alter or breach the internal law. Clear language establishing jurisdiction of the Tribunal cannot be overridden unless there are manifest reasons for doing so.

Chapter 14 of the Staff Handbook states, in the Preamble, that the review process shall be available for all Administrative Decisions. However, it also says that the Appeals Procedures shall prevail in case of discrepancy. Hence, in the opinion of the majority, the Preamble of chapter 14 of the Staff Handbook may not be seen as a manifest basis to override the wording of article 2.01 (b) of the Appeals Procedures.

Annex 14.1 to the Staff Handbook excludes from the Administrative Review Process certain Administrative Decisions without any limiting language (section IV, paragraph 3 (c)). In paragraph 3 (d), it says that those decisions may be reviewed by the Administrative Tribunal. However, in the opinion of the majority, Annex 14.1 does not purport to regulate jurisdiction for the Administrative Tribunal. Furthermore, it says that review by the Administrative Tribunal shall take place according to the Appeals Procedures. Hence, in the opinion of the majority, paragraph 3 (d) of section IV of Annex 14.1 may not be seen as a manifest basis to override the wording of article 2.01 (b) of the Appeals Procedures.

The majority is of the opinion that case law from The Administrative Tribunal of the IMF does not have significance on this particular issue, because the provision on jurisdiction of the Administrative Tribunal of the IMF does not correspond to the provision on jurisdiction of this Tribunal. In particular, article II of the Statute of the Administrative Tribunal of the IMF does not

limit the tribunal's jurisdiction to acts that alter or breach the internal law, as article 2.01 (b) of this Tribunal's Appeals Procedures does. Article II of the Statute of the Administrative Tribunal of the IMF gives jurisdiction on any acts, as long as they adversely affect the appellant. Article II reads as follows:

> 1. The Tribunal shall be competent to pass judgment upon any application:
>
> a. by a member of the staff challenging the legality of an administrative act adversely affecting him; [...]

Given the lack of limiting language in the Statute of the Administrative Tribunal of the IMF, the majority is of the opinion that the case law based on this Statute may not be seen as a manifest basis to override the wording of article 2.01 (b) of the Appeals Procedures.

2.2.5 The opinion of the minority

The minority, consisting of Michael Wolf, has a different opinion, that is explained in a dissenting opinion enclosed hereto.

2.3 The request for damages

Regarding the Request under (iii) above, the Tribunal observes that the request is based on the assumption that the Second Appeal was filed as a consequence of the Bank's directions, and that the Bank thus insisted that Appellant follow parallel procedures. The Tribunal, however, does not agree with this description of the facts.

Appellant started first the procedure for administrative review on the basis of the rules relating to Individual Administrative Decisions. The Bank responded that the first request for review was not admissible, because it did not regard a breach or alteration of Appellant's Terms and Conditions of Employment, but regarded the content of the Terms and Conditions of Employment. The Bank argued, therefore, that the first request for review had not identified an Individual Administrative Decision as object of the review, but had directed the request for review at the regulatory framework.

Appellant seems to have taken the Bank's response as a direction to initiate a procedure for review of a Regulatory Administrative Decision, and started the second request for review based on the rules applicable to Regulatory Administrative Decisions - without, however,

discontinuing the first request for review. The Bank responded that the second request for review was not admissible, because it regarded an issue that had already been finally decided in the first administrative review.

The Tribunal is of the opinion that the Bank did not suggest that Appellant initiate parallel procedures. The Bank objected to the admissibility of the first request for administrative review because the request did not identify an Individual Administrative Decision as object for the review, but instead addressed the regulatory framework. Appellant understood this to be an instruction to initiate a procedure for the review of a Regulatory Administrative Decision. However, the Bank cannot be responsible for Appellant's misunderstanding of the Bank's arguments.

Therefore, there is no basis to order the Bank to pay costs and moral damages for having insisted on parallel procedures, because the Bank did not insist on parallel procedures.

3. The Second Appeal

Regarding the Second Appeal, the Tribunal observes that it is directed against the President's decision of 13 June 2018, in which the President of the Bank rejected the second request for administrative review for being indistinguishable from the first request for administrative review. As was observed above, the Second Appeal duplicates the First Appeal, using a different classification.

The Tribunal observes that, generally, it is not admissible to submit a new appeal on an issue that has already been finally decided, not even if the issue is classified according to different parameters (e.g. as being a Regulatory Decision rather than an Individual Decision). Therefore, the Second Appeal is rejected.

4. The request for publication pursuant to Rule 4.01(g) of the Appeals Procedures

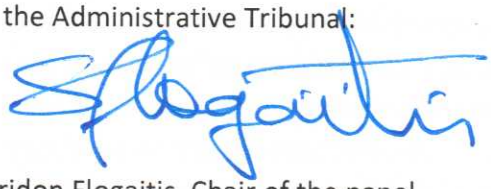
Appellant also requested that a description of the Appeals be published in order to permit submission of amici curiae briefs pursuant to Rule 4.01(g) of the Appeals Procedures. This provision is applicable when an appeal regards a Regulatory Decisions.

The majority observes that the part of the Appeal challenging a Regulatory Decision has been rejected for lack of jurisdiction. Therefore, there is no basis for requesting application of Rule 4.01(g) of the Appeals Procedures. This request is rejected.

5. Decision

Based on the above, the joined appeals are rejected for lack of jurisdiction.
The Appellant is not entitled to legal costs.

For the Administrative Tribunal:



Spyridon Flogaitis, Chair of the panel

Dissenting opinion by Michael Wolf

I dissent from my colleagues' conclusions for the following reasons.

Both appeals arise out of the same facts and same internal law. The Bank maintains a Worker Incapacity Insurance benefit (the "WIC scheme" or "WIC benefit") that predates Appellant's hiring. Section 8.4.2 of the Staff Handbook states: "The working incapacity benefit will be payable if, as a result of illness or injury, the employee has been absent from the Bank on medical leave for a continuous period of 26 weeks." The amount of the benefit is set by Section 8.4.4: "The maximum benefit payable annually as the working incapacity benefit will be 70% of the amount of the employee's gross base salary immediately before the incapacity commenced, as adjusted annually to reflect the annual salary adjustment authorised for Bank employees generally in the employee's place of work...." The WIC scheme makes no distinction between illness or injury incurred on the job or off the job; the 70% maximum compensation applies to both situations.

On 12 January 2017, Appellant was notified that she was at risk of redundancy as a result of a departmental reorganization. Appellant shortly thereafter took medical leave. After an extended absence and exhaustion of her medical leave, she was provided WIC benefits, including 70% of her gross base salary. Appellant requested that the Bank pay 100% of her salary under the WIC scheme, rather than the 70% benefit prescribed by Section 8.4.4, because she allegedly suffered from a work-related illness. The Bank rejected Appellant's request that her benefit be "topped up," as she put it. She was advised that all benefits under the WIC scheme are paid at the same rate, regardless of the cause of the illness or injury.

In her first appeal, Appellant alleged that her first WIC payment constituted a denial of her request for 100% compensation and was an appealable individual decision. The Bank initially contested the receivability of this claim on the ground that, although Appellant alleged an individual decision, her complaint derived from a regulatory matter and that Appellant had not alleged a reviewable administrative decision. In its latest filing, the Bank takes the position that the first appeal does not satisfy Section 2.01(b) of its Appeals Procedures and Rules of Procedure, which states that a staff member

> may only appeal an Administrative Decision which allegedly alters, in a material adverse manner, or allegedly is in breach of, his[/her] Terms and Conditions of Employment in force immediately before the Administrative Decision was taken.

Appellant also filed a second appeal that asserted essentially the same facts and claim as in the first appeal, but this time she cast the appeal as a regulatory challenge. The Bank argues that the second appeal is not receivable because it merely duplicates the first appeal.

I believe the Bank has misread its own rules with respect to the first appeal, and my colleagues have now affirmed the Bank's misinterpretation of the scope and enforceability of Section 2.01(b). In my view, Appellant's challenge to a regulatory decision, as applied to her, falls squarely within the Tribunal's jurisdiction. Although I have doubts about the viability of the merits of Appellant's claim, the question of the merits cannot be reached if we do not take jurisdiction – and that is the only issue currently before the Tribunal. I would reserve my decision on the merits of the first appeal until after the substance of that case has been fully briefed.

Chapter 14 of the Staff Handbook is titled "Dispute Resolution;" Annex 14.1 to Chapter 14 is a "Directive on Administrative Review Process". Both documents result from a revision of the dispute resolution process that took effect 1 February 2018. Annex 14.2 is titled "Appeals Procedures and Rules of Procedures" (the "Tribunal's Rules" or "Annex 14.2").

Section 1.02 of the Tribunal's Rules states: "These Appeals Procedures set out the processes by which any of the following individuals may appeal an Administrative Decision...." An "Administrative Decision" is defined as follows in Section 1.03 of Annex 14.2:"

> Administrative Decision" means an Individual Decision or Regulatory Decision taken by the Bank in the administration of the staff of the Bank; where the Bank is required to act within a specified time period pursuant to the Terms and 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.

On its face, these provisions give this Tribunal jurisdiction over "regulatory decisions."

Annex 14.1 similarly states in Section I that the new administrative review procedures may address "individual decisions" and "regulatory decisions." Section II of this ARP Directive defines two different kinds of regulatory decisions:

> **Regulatory Decision(s) taken by the President, the Board of Directors or the Board of Governors:**
>
> A policy or directive of the Bank affecting the terms and conditions of employment of all EBRD staff members or a category, or group of EBRD staff members sharing common circumstances.

Regulatory Decision(s) implementing Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors:

Procedures of the Bank adopted at a decision-making level below the President and affecting the terms and conditions of employment of all EBRD staff members or a category, or group of EBRD staff members sharing common characteristics, or which are in the same circumstances.

This distinction between two kinds of regulatory provisions becomes important because the definition of an "administrative decision" in Section II of Annex 14.1 states:

> a decision taken by the Bank in the administration of staff of the bank which produces direct legal consequences to the legal order and affects one or more staff members' rights and obligations, and complies with the provisions of Section IV, paragraph 3 of the Directive on the Administrative Review Process.

Section IV, Paragraph 3, in turn, states:

> **3. Administrative Decisions subject to the Administrative Review Process**
>
> (a) The following Administrative Decisions are subject to review in accordance with the Administrative Review Process set out in this Directive:
>
> (i) Individual Decisions; and
>
> (ii) Regulatory Decisions implementing Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors which allegedly alter, in an adverse manner, or allegedly are in breach of, the terms and conditions of employment of a Staff Member in force immediately before such Administrative Decision is taken.
>
> (b) Subject to paragraph 3(c) below, with respect to any Administrative Decision which is subject to the Administrative Review Process, the steps set out in this Directive have to be exhausted prior to any Appeal before the Tribunal.
>
> (c) The following categories of Administrative Decisions are not subject to the Administrative Review Process in accordance with this Directive:

i. Individual Decisions taken by the President;

ii. Individual Decisions taken by any of the committees established under the Retirement Plans; and

iii. Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors.

(d) Administrative Decisions that fall under paragraph 3(c) above may be reviewed by the Tribunal in accordance with the Appeals Procedures. For purposes of Section 2.01(a) of the Appeals Procedures, there are no appropriate channels for administrative review of such decisions and, therefore, no requirement to exhaust such channels prior to recourse to the Tribunal.

Significantly, Section IV, Paragraph 3 of Annex 14.1 post-dates Annex 14.2.[1]

I have quoted all these provisions at length for two reasons. First, it is apparent, at least to me, that the intersecting rules in Annexes 14.1 and 14.2 are confusing and contradictory. I doubt the Bank sought to create a set of appeal standards that only a lawyer could parse, but that is essentially the outcome. These rules are supposed to be written so that staff members can understand them and guide their conduct by them. The above provisions do not achieve these objectives.

Second, the creation of two different types of "regulatory decisions" requires two different procedures, one of which gives this Tribunal original jurisdiction. One procedure (for regulatory decisions that implement other regulatory decisions) an Appellant must use the administrative review process. See ¶3(a) and (b). In that event, this Tribunal does not have jurisdiction over the Appellant's claims until after completion of administrative review. For other, non-implementing regulatory decisions, the Tribunal has original jurisdiction in the sense that administrative review is not required. See ¶3(d). The limiting language found in Paragraph 3(a)(ii) (which mirrors the language in Section 2.01(b) of Annex 14.2) is <u>not</u> duplicated in Paragraph 3(d). Annex 14.2, in its definitions, does not distinguish between these two different kinds of regulatory decisions. However, both Annex 14.1 and Annex 14.2 give this Tribunal jurisdiction over <u>all</u> regulatory decisions. There is no indication in Paragraph 3(d), Section IV of Annex 14.1 that its scope was to be limited by Section 2.01(b) of the Tribunal's Rule. If that had

[1] The version of the Handbook prior to 1 February 2018 did not distinguish between different types of regulatory decisions. See Annex 14.1, Sections 1.03 and 3.03 of the Staff Handbook dated 1 January 2017.

been the intention, then the limiting language from Section 2.01(b) would have been included in Paragraph 3(d)

This exploration of the rules may seem arcane, but it is essential, in my view, to understanding the tortured path that this case has taken. It is common in international administrative cases that individual and regulatory decisions will intersect in a single case. In those cases, Tribunals take jurisdiction when an international organization applies a regulatory rule to an individual who then alleges an adverse consequence. Both the underlying regulation and the application of the regulation are joined together in a single grievance or appeal. See, e.g., *Mr. R v. International Monetary Fund,* IMFAT Judgment No. 2002-1 at ¶¶21-25. That is essentially what happened in this case. Appellant is contesting the validity of a regulatory decision (limiting the WIC benefit to 70%) as it was applied to her. She initiated the appeal process in the first appeal after the 70% WIC payment was made evident in her paycheck.

This status leads to the question whether Section 2.01(b) truly bars the first appeal, as my colleagues hold. The majority opinion states that, when read literally, Section 2.01(b) "exclude[s] from the process of administrative review terms of employment that already existed when an employee entered into the working relationship with the Bank...." The stated rationale is that a new employee "implicitly or explicitly accepts the right of the Organization to change its employment policies." In effect, this rationale makes all regulatory decisions by the President, Board of Directors or Board of Governors immune from challenge by any new employee hired after the date when the deadline for administrative review of a new regulation has passed. Employees, such as Appellant in this case, who are first affected by a particular regulation well after their hiring date are now effectively barred from challenging the intertwined individual and regulatory decisions.

A hypothetical example shows the unfairness of such a rule. Suppose the Bank were to promulgate a new regulation that provides a <u>benefit</u> to staff. Section 2.01(b) would arguably preclude a challenge to this new benefit because it does not, on its face, <u>adversely</u> alter the Terms and Conditions of employment. In fact, staff might not immediately perceive any inherent flaw in the benefit as written. Then, suppose that a year later, a staff member alleges the regulation has been applied to her exactly as written, but that the regulation is discriminatory in its application; she alleges that this flaw was not noticeable to her at the time of promulgation but became apparent only after it was put into practice. The literal reading of 2.01(b) would again preclude the exercise of jurisdiction over such an appeal; under the majority's reading, enforcement of the regulation as written <u>must</u> be affirmed because this Tribunal has no jurisdiction to consider the appeal – even though a core principle of international civil service law is that organizational laws must be non-discriminatory. A reading of 2.01(b) that excludes this Tribunal's jurisdiction in such cases would itself violate

international norms because it effectively shields discriminatory regulations from being challenged.

I believe this outcome conflicts with the Bank's own rules. Paragraph 3(d) of Section IV of Annex 14.1 does not exclude any Presidential regulatory decision from this Tribunal's jurisdiction.[2] Paragraph 3(a)(ii) of Section IV of Annex 14.1 uses the same language as Section 2.01(b) in the Tribunal's Rules but only with respect to regulatory decisions that implement other regulatory decisions; it does not address the other type of regulatory decision (i.e., those issued by the President, the Board of Directors or the Board of Governors). The Bank could have included the explicit language from Section 2.01(b) in Paragraphs 3(c) and 3(d), but it did not.

Paragraph 3(c) of Section IV addresses regulatory decisions by the Bank's President, et al. and removes those decisions from the normal Administrative Review Process. However, Paragraph 3(d) gives the Tribunal original jurisdiction to review the same regulatory decisions that are exempted under Paragraph 3(c). The Tribunal cannot exercise its jurisdiction over regulatory decisions under Paragraph 3(d) if we interpret Section 2.01(b) so broadly that it precludes all staff from challenging regulatory decisions by the President, et al., simply because a particular regulation was promulgated prior to a staff member's hiring (or more than 60 days prior to the hiring). Such an interpretation effectively bars appeals based on claims of discrimination (or other similar claims) that may not be readily apparent when a regulation is first adopted and only became apparent at a later time.

I also note that the preliminary "overview" to Chapter 14 of the Staff Handbook states:

> The Directive on the Administrative Review Process and the Appeals Procedures establish a graduated appeal mechanism under which **a staff member can seek redress of any administrative decision that adversely affects him/her.**

See also Paragraph 14.7 of Chapter 14: "The mandate of the Administrative Tribunal, as set forth in the Appeals Procedures, is to review and pass judgment on applications by staff members challenging an Administrative Decision that adversely affects them, following exhaustion of prior remedies as applicable." If Section 2.01(b) is interpreted as the Bank and

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[2] The majority points to the fact that Paragraph 3(d) uses the word "may" instead of "shall" when addressing this Tribunal's jurisdiction. I think the use of the word "may" does nothing to detract from the clear grant of jurisdiction to the Tribunal in regulatory cases under Annexes 14.1 and 14.2. Such wording merely makes clear that the Tribunal may decline to exercise such jurisdiction.

my colleagues propose, it would conflict with the mandate of Chapter 14 to allow any administrative review decision to be reviewed under the chapter's procedures.[3]

The Bank's and majority's interpretation of Section 2.01(b) also breaches international jurisprudence: there cannot be a right without a remedy. If the Bank offers staff the right to challenge "any" administrative decision, it cannot then implicitly bar appeals arising out of regulatory decisions pre-dating the hiring of an employee who is not adversely affected by the regulation until it is applied much later. A staff member alleging injury from a regulatory decision should be able to file a timely appeal and have it heard. That is the promise of Chapter 14, and it should be kept.

It is also a rule of international jurisprudence that, if an employing organization adopts conflicting or unclear regulations, the presumptive interpretation should be the one that favors staff. In ILOAT Judgment No. 3734 (2017), the Tribunal stated at Consideration ¶4:

> The principles of statutory interpretation are well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning and any ambiguity in a provision should be construed in favour of the staff member and not the organization.... It is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation.

The above-discussed Bank rules are clearly ambiguous. Moreover, a literal interpretation of Section 2.01(b) of the Tribunal's Rules conflicts with Paragraph 3(d), Section IV of Annex 14.1 and the preamble to Chapter 14. The latter provisions should take precedence over Section 2.01(b) because they ensure the right of staff to have access to a fair dispute resolution process.[4]

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[3] The majority points to the statement in Chapter 14 that, in the event of conflict between Chapter 14 and "the provisions of the Directive on the Administrative Review Process/Appeals Procedures, the latter will prevail." I doubt very much that the language quoted by the majority reflected an intent by the Bank to grant staff the right to bring certain regulatory appeals directly to the Tribunal under Paragraph 3(d), Section IV of Annex 14.1 and then implicitly took away much of that right by means of the much older rule in Section 2.01(b) of Annex 14.2. If that was the Bank's intent, it would have included the language from Section 2.01(b) directly in Paragraph 3(d), just as it did with Paragraph 3(a).

[4] I note that Chapter 14's overview also states: "Article 4 of the Headquarters Agreement signed with the UK government states that 'within the scope of its official activities the Bank shall enjoy immunity from jurisdiction,' with limited exceptions. Like other international organisations, the Bank has therefore established an internal system in order to provide independent mechanisms for the resolution of disputes with staff."

Lastly, I would treat the payment in question to be an individual decision, since it represents the Bank's decision to reject Appellant's request that she continue to be paid the sick leave rate of 100% of salary. Alternatively, the Bank's communication to Appellant that it treats work-related illnesses the same as non-work-related illnesses under the WIC scheme is a "decision." Either way, the individual decision actually satisfies the requirements of Section 2.01(b). Before the payment/communication, Appellant was receiving 100% of her pay. Afterwards, she was receiving only 70% of her pay. That change in pay has been alleged to "alter[], in a material adverse manner, [one of Appellant's] ... Terms ... of Employment." For purposes of jurisdiction, an allegation should be sufficient. Therefore, quite apart from the arguments above, I believe the majority should have found the first appeal receivable because it complied with even a literal interpretation of Section 2.01(b).

For the foregoing reasons, I dissent with respect to the first appeal. I would take jurisdiction over the case and permit the parties to submit briefs on the merits. I do not find it necessary to reach the jurisdictional arguments with respect to the second appeal.

Michael Wolf

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