THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Case No. 2019/AT/04

Appellant

vs.

European Bank for Reconstruction
And Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Maria Vicien Milburn, Chair
Giuditta Cordero-Moss
Chris de Cooker

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20 February 2020

I. Factual Background

1. Appellant began working for the European Bank for Reconstruction and Development ("EBRD," "Bank" or "Respondent") on 12 February 2001. His work for the Bank was undertaken pursuant to a Consultancy Services Agreement ("Consultancy Agreement") executed between Westek IT Recruitment Ltd. (hereinafter "Westek") and Ascot Computers Limited, hereinafter Ascot Ltd.). Under that agreement, Ascot Ltd. agreed to provide "consultants" who would perform work for Westek's client, which was identified initially as Hewlett Packard limited with a "Work Location" at the EBRD. From 28 March 2002, the contract identified the EBRD as the "Client". Appellant is the sole director and employee of Ascot Ltd.

2. Appellant's initial work for the Bank was on a fixed term Consultancy Agreement, but, after repeated extensions, he continued his work with the Bank for more than 17 uninterrupted years and eleven months. He alleges he did not work for any other clients in that time.

3. The earliest Consultancy Agreement between Westek and Ascot Ltd. is dated 17 January 2001, with a term of 11 February 2001 through 8 February 2002. Appellant signed the Consultancy Agreement and its multiple extensions on behalf of Ascot Ltd.

4. The EBRD did not sign the Consultancy Agreement and was not identified as a party to this Agreement, although its rights and privileges as the "client" are specified throughout the contract.

5. Pursuant to the Consultancy Agreement, Appellant worked as a "Help Desk Analyst" providing IT services to the EBRD, with the work to be performed at the Bank's headquarters in London. That Agreement identified Appellant as the "primary consultant" for Ascot Ltd. There is no evidence that anyone other than Appellant provided consultancy work under the Agreement between Westek and Ascot Ltd.

6. The Consultancy Agreement specified the hours of work, the hourly rate of pay and other terms of Appellant's work. The terms of that Agreement were "subject to amendment by Westek, who shall endeavor to give as much notice as is practicable to [Ascot Ltd.]." The Agreement also specified that Westek and the EBRD could alter the hours of work and the rates of pay "as and when required" and gave the Bank authority to provide and direct Appellant's work.

7. The Consultancy Agreement stated that it was "not a contract of employment and neither Westek nor [Ascot Ltd.] intend that the provision of services should constitute or create a relationship of employment between any of the parties. In particular [Ascot Ltd.] shall be responsible for administering and paying all employer's and employee's income tax, National Insurance and similar contributions in respect of its Consultants…."

Ascot Ltd. also agreed in the Consultancy Agreement to indemnify both Westek and the Bank with respect to various liabilities, including taxes owed or claims arising from statutory employment laws.

8. The Consultancy Agreement stated that it "shall be governed and construed in accordance with the laws of England and Wales and the parties submit to the jurisdiction of the Courts of England and Wales."

9. On 10 July 2012, the Bank and Westek entered into a "Framework Contract for Assignment Services (Technical and Professional Positions)." Under that contract, Westek agreed to "manage and co-ordinate the Bank's recruitment and temporary resourcing requirements as provided in this Agreement." The Framework Contract remained in effect during all times relevant to this appeal.

10. Part of Westek's obligations under the Framework Contract was to provide "Agency Personnel to perform the Assignment Services" designated by the Bank. The Bank reserved the right to review the *curriculum vitae* of proposed personnel and to interview them. However, Westek was responsible for the payment of compensation and benefits to Agency Personnel and for compliance with relevant statutory (e.g., tax) obligations. Appellant was "Agency Personnel" for purposes of the Framework Contract.

11. Agency Personnel under the Framework Contract were distinguished from Bank employees (i.e., staff members). Although the Bank retained input into the selection and retention of Agency Personnel, the latter were subject to the following conditions:

> Agency Personnel shall, and shall be deemed to, be employees, consultants, contractors or agents of the Agency [Westek] and nothing in this Contract shall establish the relation of employer and employee or a master and servant as between the Bank and such Agency Personnel. The Agency acknowledges that Agency Personnel are not Employees or Officials of the Bank and they are not entitled to the rights, benefits, privileges and immunities attached to the status of being an Employee or Official of the Bank.

12. After the Bank and Westek entered into the Framework Contract, Appellant (through Ascot Ltd.) continued to work at the Bank in IT services pursuant to his Consultancy Agreements with Westek. The last such Agreement ended 31 January 2019. The Bank was not a signatory to any of the extensions of the Consultancy Agreement.

13. The Framework Contract stated that "any dispute controversy or claim arising out of, or relating to this Contract" shall be resolved by arbitration under UNCITRAL arbitration rules. Neither Appellant nor Ascot Ltd. is a party to the Framework Agreement.

14. According to the record, On 8 January 2019, Mr. David Nock, an official of Westek tried to notify the Appellant that his Consultancy Agreement would be terminated . On 14 January 2019, Appellant emailed Mr. Nock asking for confirmation regarding termination and the reasons therefor. In an email of the same date, Mr. Nock informed the Appellant

that the contract was "not being terminated "but would "come to a natural conclusion on 31 January 2019 ".

15. In an email dated 24 January 2019, Mr. Navjot Wyld, Director of Infrastructure and Operations at the Bank informed the Appellant as follows:

" You have been providing services to he Bank pursuant to a commercial contract between EBRD and Westek (now…Sanderson IT Services Ltd). The Bank has decided not to extend its commercial contract with Westek beyond its contractual term.

Pursuant to the contract with Westek, the Bank does not need to provide reasons to any of Westek's assigned Personnel when deciding not to extend the contract beyond the end of its contractual term. Nevertheless, I can inform you that as a result of the reorganization and transformation of the Bank's IT function and the manner in which IT services will be delivered to users going forward, it no longer requires the services of Westek.

Should you have any further questions regarding your situation as Personnel of Westek following the expiration of the contract between the Bank and Westek, you should direct such queries to Westek".

II. Procedural Background

16. Appellant filed a Request for Administrative Review of an Administrative Decision ("RARD") on 5 March 2019. He alleged that he had "an implied contract of employment with the EBRD" and sought "to impugn the EBRD's 14th January 2019 decision to deny him a severance package in accordance with the provisions of the Staff Handbook (the 'Administrative Decision'') He asserted that he had been a *de facto* member of the Bank's staff and that the Bank had failed to accord him several of the rights and benefits available to staff who are terminated for reasons of redundancy. The RARD itemized several benefits for which monetary compensation was being sought.

17. On 26 March 2019, the President of the Bank sent an email to Appellant's counsel stating:

The company Westek is not a part of the Bank and neither Mr Nock nor…. are staff members of the Bank. Accordingly, I cannot consider the document you submitted [on behalf of Appellant] to be a request for review pursuant to the Directive [on Administrative Review Process] as I have no authority to review the decision made by Mr.Nock, on behalf of Westek.

18. As a result of the President's 26 March 2019 email, there has been no hearing before the Administrative Review Committee ("ARC"). Appellant filed a Statement of Appeal directly to this Tribunal on 11 June 2019.

19. On 8 July 2019, the Bank filed a "Challenge to the Tribunal's Jurisdiction." Appellant replied to that "Challenge" on 29 July 2019.

20. Upon invitation from this Tribunal, Counsel for the parties made oral presentations to all five members of the Tribunal on 14 January 2020 with regard to the jurisdictional dispute in this case and three related cases (EBRDAT Cases 2019/02, 2019/03 and 2019/05). At that hearing, the Tribunal members had the opportunity to pose questions to counsel on both factual and legal issues relating to jurisdiction.

III. Appellant's Position

21. The following are the principal arguments raised by Appellant in his RARD, Statement of Appeal, Reply to the Bank's Challenge to Jurisdiction and oral argument.

22. Under principles of international administrative law, the EBRD's Administrative Tribunal has the authority to look behind Appellant's written contract with Westek and determine whether he is *de facto* an employee (i.e., staff member) of the Bank. Under relevant precedent, the Tribunal may decide whether to disregard or set aside his written contract if it was used to perpetrate an unfair employment practice.

23. Appellant's working conditions with the Bank were inconsistent with him being an independent contractor. His terms and conditions evidenced the creation of an employment relationship between Appellant and the EBRD.

24. The EBRD's own internal law supports Appellant's position that he was *de facto* a staff member. In two prior Grievance Committee recommendations and reports, the Committee found that two persons working for the Bank under contracts with Westek should be treated as staff members notwithstanding multiple written contracts of limited duration. Both of those recommendations were accepted by the President of the Bank and thereby became part of the Bank's internal law.

25. The EBRDAT has already ruled in Case 2018/AT/02, that persons working for the Bank in circumstances like Appellant's have a right to avail themselves of the internal administrative review processes to determine whether they are *de facto* employees. The Bank's position that Appellant has no standing to initiate administrative review has already been rejected by this Tribunal.

26. The President's decision of 26 March 2019 was issued in bad faith, since it ignores the Tribunal's holding in Case 2018/AT/02 and pretends that the Bank had nothing to do with the termination of Appellant's Contract. The fact that a Westek official communicated the termination to Appellant does not detract from the fact that the EBRD was the decision-maker with respect to the termination of Appellant's consultancy for the Bank.

27. The reality is that the Appellant's 17 years and nine months of continuous service for the Bank were cut short because of the reorganisation and transformation of the Bank's IT function and he was not paid any redundancy amounts.

28. Jurisdiction and merit are concomitant in cases such as this because the very essence of the claim is that the Appellant was a staff member. The EBRD cannot argue that the Appellant cannot access its internal justice system because he was not a staff member until that issue has been determined by the ARC."

29. Appellant's right to invoke the Bank's dispute resolution processes is not dependent on the language used by the Bank's President in his 26 March 2019 email. The absence of reference to admissibility or "administrative decision" in that email cannot alter the fact that the Bank was rejecting her claim that he was a *de facto* staff member entitled to utilize the administrative review and appeal processes.

30. Multiple factors support Appellant's claim that he was a *de facto* staff member. For this reason, Appellant is ultimately entitled to various forms of remuneration specified in the Staff Handbook. However, the immediate remedy in this appeal should be an annulment of the President's decision of 26 March 2019 and the referral of Appellant's claims to the Administrative Review Committee for further proceedings consistent with EBRDAT Case 2018/AT/02.

31. Appellant should be awarded reimbursement of the legal fees incurred for bringing this matter to the Tribunal, since the issue of receivability in this circumstance has already been litigated before the Tribunal.

IV. The Bank's Position

32. The following are the principal arguments raised by the Bank in its Challenge to the Tribunal's jurisdiction and in its oral argument.

33. The Bank entered into the Framework Contract with commercial services provider Westek, pursuant to which Westek provided IT services to the Bank. Ascot Ltd. was a subcontractor of Westek.

34. Under the terms of the Framework Contract, Appellant has a contracting relationship with Westek. The Contract specifically states that personnel appointed by Westek under that agreement are not employees of the Bank.

35. The Westek Consultancy Agreement with Ascot Ltd. states that it does not create an employment relationship with any consultant and further states that it is subject to the laws and courts of England and Wales.

36. Appellant did not have an express or implied contract with the Bank.

37. The Bank did not make the decision to terminate Appellant's Consultancy Agreement with Westek.

38. Appellant has not identified a decision of the Bank that may be appealed to the Tribunal. The Bank President's 26 March 2019 email did not state it was an "administrative decision" on admissibility and did not constitute an administrative decision; it did not make any determination with respect to Appellant's rights or claims. The email was sent "only as a matter of courtesy."

39. Appellant had erroneously ascribed the 8 January 2019 termination decision to the Bank, when it was actually a decision by Westek. It was not an administrative decision "taken by the Bank," as required under the rules. The President's 26 March 2019 email merely pointed out this error and did not itself create an administrative decision.

40. Appellant admits there was no formal written decision from the Bank regarding the natural end of her contract. The President's email pointing out the absence of evidence cannot be converted into evidence of a Bank decision.

41. The Tribunal's decision in EBRDAT Case 2018/AT/02 is inapposite, since it involves a different contractual structure, different facts pertaining to execution of the contract and different obligations by the parties. The Tribunal's decision relied on the fact that, in light of the particular facts therein, Appellant did not have recourse to any venue for resolution of his dispute except through the Bank's internal processes. Appellant in the instant case, in contrast, is entitled to seek relief in the courts of England and Wales.

V. The Tribunal's Conclusions

42. Appellant alleges that, notwithstanding the written Consultancy Agreement and Framework Contract, he must be recognized as a de facto staff member for purposes of receiving certain Bank benefits. He contends that he is entitled to this status under prevailing principles of international law. See Amora v. ADB, ADBAT Dec. No. 24 (1997); In re Burt, ILOAT Judgment 1385 (1995); In re Bustos, ILOAT Judgment 701 (1985).[1]

43. Appellant additionally points to two prior EBRD cases in which consultants had also claimed the status of *de facto* employees, and the Grievance Committee had accepted that characterization of their status and had rejected the Bank's argument opposing jurisdiction. See Cases GC/10/2012 and GC/11/2012.

[1] For example, the Tribunal in *Amora* concluded:

> Usually, a contract signed by the parties is binding upon them. There are, however, some circumstances in which a contract may be set aside or varied by a competent tribunal. This happens, for example, when the contract fundamentally disregards reality. [¶22.]

44. Cases GC/10/2012 and GC/11/2012 also involved contracts between Westek and the Bank, pursuant to which Westek provided personnel ("consultants" or "service personnel") to the Bank to perform services for the Bank. As in the instant case, Westek then entered into temporary contracts with service companies controlled by an individual consultant who, in turn, was referred to the Bank. Both the Westek-Bank and Westek-Service Personnel contracts disavowed any employment relationships. Explicit language in the contracts stated that the consultants provided to the Bank by Westek were not considered employees of either entity. Disputes between Westek and its consultants were agreed by contract to be governed by the laws and courts of England and Wales.

45. The appellants in Cases GC/10/2012 and GC/11/2012 were individual consultants who had worked for the Bank under the above contractual arrangements for 13 years and 9 years, respectively. The terminations of their contracts were implemented pursuant to a reorganization by the Bank that the Grievance Committee found to have been a cost-cutting measure. The Grievance Committee found that, soon after their terminations, appellants were replaced by two younger and lower-paid consultants who were also referred to the Bank by Westek.

46. Upon their terminations, the appellants in Cases GC/10/2012 and GC/11/2012 asserted they were *de facto* employees of the Bank and requested, as a consequence of their terminations, the payment of severance packages consistent with those provided to staff under the Bank's Staff Handbook. Appellants did not claim an entitlement to any other benefits accorded to staff members (e.g., pension benefits).

47. At the outset of the proceedings in Cases GC/10/2012 and GC/11/2012, the Grievance Committee conducted a preliminary hearing to address the initial question whether the Committee had jurisdiction over the appeals.

48. On 15 October 2014, the Grievance Committee, by a majority of its members, issued a decision confirming that it had jurisdiction over the two cases. The Bank accepted this decision.

49. The Grievance Committee subsequently issued a decision on liability and remedies on 23 July 2015. It concluded that appellants were working pursuant to "de facto employment contracts with the Bank" and that they were "regular contracts of indefinite duration." ¶19. The Committee further concluded that the Bank's refusal to make severance payments to appellants "was in breach of their de facto employment contracts" or in breach of the Staff Handbook. ¶28. On 12 August 2015, the Bank President took "the decision to accept the Grievance Committee's recommendation" (the "PARD").[2] The cases were not appealed to the Administrative Tribunal.

[2] The Tribunal was provided only with the Bank President's decision in GC/11/2012. However, the parties herein agree that the decision in GC/10/2012 was comparable.

50. The Bank argues that the PARDs in Cases GC/10/2012 and GC/11/2012 are not binding precedent and that they merely represent discretionary decisions by the Bank to enter into settlements with those particular grievants. The Tribunal agrees that those two PARDs did not bind the Bank in future cases and did not necessarily represent an endorsement of the Grievance Committee's reasoning. The Bank may have had operative, strategic or managerial reasons not to contest the Grievance Committee's recommended outcome. Nevertheless, to the extent Appellant believed her situation was factually comparable to the situation of the two earlier grievants, the two PARDs created a reasonable expectation that he too could claim the status of a *de facto* employee. When Appellant in the instant case filed her RARD in March 2019, he was effectively stating: In light of the PARDs in Cases GC/10/2012 and GC/11/2012 and in light of the precedent in *Amora*, *Burt* and *Bustos*, I am a *de facto* staff member who is entitled to certain staff benefits that had wrongfully been denied to me.

51. The Bank initially contends that it has not issued an "administrative decision" that can be challenged through the administrative review process. It asserts that the Bank President's email of 26 March 2019 does not qualify as an administrative decision. The Bank presents this argument through its "challenge" to jurisdiction. The Tribunal interprets this challenge as a motion to dismiss the appeal on the ground that it is not legally cognizable under the rules governing administrative review.

52. The recently-adopted Directive on Administrative Review Process (the "Directive") limits that process to "current or former staff members." Sec. IV, ¶2. An "administrative decision" is defined as 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…." Sec. II.

53. The first question before the Tribunal is whether the Bank President's email of 26 March 2019 (quoted above at ¶17), which refused Appellant access to the administrative review process, constituted an "administrative decision."

54. Appellant has presented allegations and documents that he claims support his position. The Bank has not, at this juncture, disputed the authenticity of the documentation accompanying the appeal and, in fact, has relied on that same documentation.

55. For purposes of a motion to dismiss, the Tribunal must assume the Appellant's non-frivolous allegations are true. This assumption is made as a preliminary matter for procedural purposes only. Whether the allegations are actually true will be a question to be decided when the merits of the Appeal are decided. A motion to dismiss is not the procedural context for litigating factual disputes between the parties. The Bank's burden in a motion to dismiss is to establish that it has the right as a matter of law to avoid participation in the internal appeal process. It must show that Appellant, regardless of the ultimate findings of facts, has no legal basis for prevailing.

56. The Bank President's 26 March 2019 email asserts that Appellant is not "a staff member of the Bank." By so stating, the Bank President implicitly rejected the holdings in

Amora, *Burt* and *Bustos* or, at least, rejected the argument that Appellant was entitled to the same status as the claimants in those three cases.

57. It is normally the province of this Tribunal to issue final decisions on whether the Bank has complied with international law. If the Bank's jurisdictional argument were accepted, it would preclude this Tribunal from reaching such a decision. It also would preclude Appellant from introducing evidence intended to prove that his factual circumstances are indistinguishable from those in *Amora*, *Burt* and *Bustos*.

58. The Bank has referred to case law from other Administrative Tribunals in which the absence of a formal designation of employee status was a barrier to accepting jurisdiction. On the other hand, Tribunals such as the ones that issued *Amora*, *Burt* and *Bustos*, have held that jurisdiction may be asserted when there are exceptional circumstances creating a *de facto* employment status. At this preliminary stage of the instant appeal, the Tribunal concludes that Appellant should be given the opportunity to prove his case before the ARC and this Tribunal. The Bank has not established as a matter of law that Appellant is incapable of proving facts that would bring him under the umbrella of *Amora*, *Burt* and *Bustos* or that this precedent is inapposite to the instant case.

59. The Tribunal believes that it must use a functional, as opposed to a formalistic, approach to the jurisdictional issue before us. The 26 March 2019 email must be accepted for what it does and not merely for what it says. In this respect, it is a decision telling Appellant that he has none of the entitlements or benefits afforded to staff, notwithstanding international legal precedent indicating that he might, under exceptional circumstances, be deemed a *de facto* employee of the Bank. The Tribunal therefore concludes that the Bank President's email was an administrative decision under the Directive.

60. In reaching this decision, the Tribunal is not prejudging the merits of Appellant's claim. The Tribunal is not deciding whether Appellant is a *de facto* employee of the Bank. The Tribunal is not even deciding whether *Amora*, *Burt* and *Bustos* should be followed as part of EBRD jurisprudence. Rather, the sole question is whether Appellant has a right to assert his claim through the Bank's internal dispute resolution processes. The decisions in *Amora*, etc. support the view that this Tribunal may take jurisdiction over an Appellant's non-frivolous claim that he was a *de facto* employee. The difference in facts between those three cases and the instant case, as pointed out in the dissent in EBRDAT Case 2019/05 and EBRDAT Case 2019/04, is not relevant to the jurisdictional issue before the Tribunal. The principle enunciated in this decision is quite limited: The absence of a formal employment contract with the Bank or even a contract that excludes an employment relationship with the Bank does not alone prevent the Tribunal from asserting jurisdiction over an Appellant's non-frivolous claim to certain staff member benefits as a *de facto* employee.

61. As reflected in the dissenting opinion in this case (and in the three related cases), the Tribunal is divided on the issue of jurisdiction. This division reflects the differing approaches taken by other international Administrative Tribunals on the same subject.

The majority in this case and some Administrative Tribunals are of the view that jurisdiction may be asserted in cases wherein the Appellant seeks staff member benefits notwithstanding the lack of a formal appointment to the staff and notwithstanding contractual language precluding an employment status. The dissent, with the support of other Administrative Tribunals, insists that an Appellant's formal status as a staff member is a necessary precondition to this Tribunal's assertion of jurisdiction and that additional fact-finding cannot overcome this jurisdictional defect.

62. This Tribunal's decision in EBRDAT Case 2018/02 concluded that, in exceptional circumstances, a person performing work for the Bank may argue he/she is a *de facto* employee notwithstanding the absence of a formal letter of appointment and notwithstanding contractual language that precludes an employment status; the Tribunal asserted jurisdiction over that Appellant's claim so that a factual record could be developed for purposes of assessing Appellant's status as employee (if any). However, this Tribunal is not a fact-finding body. The creation of a factual record necessarily had to be undertaken through the administrative review process before the ARC. In EBRDAT Case 2019/06, the same Appellant returned to the Tribunal after the ARC recommendations and an adverse PARD. The Tribunal concluded in the latter case that the threshold for considering a worker to be a Staff Member without a letter of appointment is very high and that reaching such a conclusion requires analysis of multiple factors. The appeal in Case 2019/06 was ultimately dismissed because Appellant failed to establish the exceptional circumstances justifying being treated as a *de facto* Staff Member. The decision on the merits in Case 2019/06, however, did not undermine the conclusion in Case 2018/02 that the Appellant should be given the opportunity to prove his case through administrative review. The Tribunal's decision in the instant case is consistent with the approach taken in EBRDAT Case 2018/02 and EBRDAT Case 2019/06.

63. The Bank also opposes Appellant's right of appeal, in part, by pointing to the Consultancy Agreement's provision allowing Appellant to argue English and Welsh law to English and Welsh courts. However, the Bank is not party to that Agreement, and that Agreement only permits Appellant to file claims against Westek. It provides Appellant with no opportunity to lodge claims directly against the Bank.

64. In this respect, Appellant is in a position analogous to the Appellant in EBRDAT Case 2018/02 and Case 2019/06. In both the earlier cases and the instant case, there was no contract directly between the Bank and Appellant. The Tribunal rejected the Bank's argument that the Grievance Committee did not have jurisdiction to address the claim, observing that Appellant would otherwise have no recourse to an adjudicatory mechanism for deciding the claims against the Bank in his Statement of Appeal. Significantly, in EBRDAT Case 2019/06, this Tribunal wrote: "Allegations that Staff Member rights have been infringed fall thus within the jurisdiction of the Administrative Tribunal. When the evaluation of whether Staff Member rights have been infringed assumes that a decision is made on whether the appellant was a Staff Member, it falls within the jurisdiction of the Administrative Tribunal to determine whether the appellant

was a Staff Member or not." Dec. at pp. 2-3 (emphasis added, summarizing the prior decision in Case 2018/AT/02).

65. The agreements entered into by the Bank, Westek and Appellant give him no means of presenting a claim to English or Welsh courts that he is entitled to Bank benefits as a *de facto* employee of the Bank. At this juncture, only the Bank's internal administrative review process can provide a forum for addressing such claims.

66. The Bank suggested that, if an appellant had no recourse through the internal administrative process or through other channels, a possible outcome might be that courts decline to recognize the Bank's immunity and accept jurisdiction on the Appellant's claim. The Bank argued that, in any case, its immunity is not a basis for the Tribunal to assert jurisdiction in cases on which it has no jurisdiction. The Tribunal recognizes that immunity alone is not a basis to assert jurisdiction. However, the majority of the Tribunal is of the view that the prospect that the Bank may be deprived of its immunity is not a basis to decline jurisdiction either. As explained above, the Tribunal considers that it has jurisdiction to determine whether the factual and legal conditions for its jurisdiction are met, and that, in a case in which the absence of jurisdiction is not manifest on the face of an appeal, fact-finding is necessary to determine whether these conditions are satisfied.

67. Based on the decisions in EBRDAT Cases 2018/02 and 2019/06, the Tribunal concludes: (a) the Bank President's 26 March 2019 email is an administrative decision under the Directive on Administrative Review Process and (b) the Tribunal and the ARC have jurisdiction to consider Appellant's claims. This decision is also consistent with the PARDs in Cases GC/10/2012 and GC/11/2012.[3]

68. The Directive on Administrative Review Process provides at Section IV, Paragraph 3(c) and (d):

> (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.

[3] The Tribunal is not suggesting that these two PARDs are binding precedent. They are, however, instructive.

69. The email of 26 March 2019 constitutes an individual decision by the Bank President under Section IV, Paragraph 3(c) of the Directive. As such, the Tribunal may decide the jurisdictional question without resorting to preliminary proceedings by the ARC. The Tribunal's conclusion that it has jurisdiction over this appeal and that Appellant is entitled to utilize the administrative review process is therefore final.

70. The Tribunal reiterates that this jurisdictional decision does not reach any conclusions regarding the merits of this dispute. It does not make any finding as to whether Appellant has or does not have employee status or any rights of a staff member. Those determinations can only be made after completion of the fact-finding process before the ARC and a decision by the Bank President. The Tribunal recognizes that there is considerable precedent that argues against *de facto* employment status. The discussion of that case law must await a final decision on the merits. The fact that the ultimate conclusion in this case, after the consideration of evidence, may be contrary to Appellant does not detract from the Tribunal's decision that jurisdiction lies in this case. Because of the procedural nature of motions to dismiss, the Tribunal cannot pre-judge Appellant's central allegations and claims and must allow those allegations and claims to be considered in the dispute resolution processes of the Bank.

71. The Tribunal adopts the following standard when this type of jurisdictional issue is raised: Whenever someone working for the Bank makes a plausible, non-frivolous claim that he/she is entitled to the rights of a staff member because of a *de facto* employment relationship with the Bank, that person is entitled to invoke the jurisdiction of the Bank's dispute resolution processes to consider that claim. There may well be future cases in which such a claim is deemed frivolous and incapable of succeeding under the criteria specified in EBRDAT Case 2019/06. However, in the instant case, we cannot reach such a conclusion at this preliminary stage of the proceeding. The Tribunal therefore rejects the Bank President's arguments in his 26 March 2019 email and in the Bank's challenge to this Tribunal's jurisdiction.

VI. Remedy

72. The Bank President's 26 March 2019 email to Appellant is annulled. The Bank is instructed to permit Appellant's RARD to proceed through the administrative review process, if Appellant so wishes.

73. If there are further proceedings before the ARC, it is instructed to gather and assess evidence in a manner consistent with the Administrative Tribunal's decision in EBRDAT Case 2019/06.

74. Although this case has not reached a conclusion on the merits, Appellant has successfully opposed the Bank's objection to jurisdiction. In light of Appellant's success, the Tribunal is awarding reimbursement of Appellant's counsel fees expended solely in

opposition to the Bank's jurisdictional challenge, including attendance at the oral hearing on 14 January 2020. Appellant's counsel should submit an accounting of those hours and fees to the Tribunal and the Bank within 30 days of this decision. The accounting should not include time spent in preparation of the Statement of Appeal. The Bank will have 30 days thereafter to submit an opposition to the fee request, if it so wishes. The Tribunal will issue a supplemental decision after consideration of those submissions.

* * *

VII. Dissenting opinion of Mr. Chris de Cooker

1. With all due respect to my colleagues on the Panel I regret that I cannot join them in the conclusions in this case. I do so for a number of, in my view, very pertinent reasons that warrant me to write this dissenting opinion.

2. As the considerations in the judgment show, there is disagreement within the Tribunal regarding its jurisdiction in this case and three other cases. I attach the same dissenting opinion in Case No. 2019/AT/05 and I also refer to the dissenting opinion of my colleague Spyridon Flogaitis in Cases Nos. 2019/AT/02 and 2019/AT/03.

3. The Tribunal is deciding in this case and the three other cases only on the question of whether it has jurisdiction. I recall, first of all, that international administrative tribunals have limited jurisdiction and generally do not have any powers beyond those given to them. The EBRD Administrative Tribunal is no exception.

4. The Bank's Directive on the Appeals Process (DIR/2019/14) specifies in Section I (Purpose) that it:

> … sets out the processes to be followed in the appeal against an Administrative Decision which allegedly is in breach of a Staff Member's terms and Conditions of Employment.

5. Under paragraph 3.01 (a) the Tribunal is competent to consider an Appeal that is initiated in accordance with paragraph 2.01, which provides:

> A Staff Member may submit an Appeal against an Administrative Decision to the Tribunal after having exhausted all appropriate channels for Administrative Review under the Directive on the Administrative Review Process.

6. The Directive on the Administrative Review Process (DIR/2019/16) stipulates that this process may be initiated by current or former staff members of the Bank, a current or former participant in the Retirement Plan, or the legal representative of a deceased staff member of the Bank or of a deceased participant in the Retirement Plan.

7. The Process consists of two steps. In the first step the staff member must submit a written request to MDHR, who will either uphold or modify the administrative decision.

8. A staff member who does not agree with the response of MDHR may then submit a written request to the President for review of the administrative decision.

9. On 5 March 2019 Appellant's counsel sent an e-mail directly to the Bank's President submitting that the request was in accordance with Articles 6.1 (c) and 6.4.1 (b) of the Directive on the Administrative Review Process a Request for Review of an Administrative Decision terminating appellant's employment.

10. Requests for review of Administrative Decisions terminating employment may indeed under paragraph 6.1(c) be directly submitted to the President. The issue at stake here is, however, not the termination or interruption of an existing contract; the issue is the non-renewal of a contract which then ceases at its expiry date. These are quite different notions and international civil service law clearly distinguishes between them. The wrong steps were thus followed in the present case and the appeal must therefore, and irrespective of what follows, already on this ground be summarily dismissed.

11. In light of the above and in order to have jurisdiction in the present case the Tribunal must thus be satisfied that : 1. there is an "administrative decision," and 2. the appeal is lodged by a "staff member."

12. The notion of "Administrative Decision" is defined in the Directive of General Provisions and Glossary of Terms for the Staff Handbook (DIR/2019/1), which is applicable in this case. This definition, which is commonly used in international civil service law, reads as follows:

> 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 the Directive on the Administrative Review Process (DIR/2019/16).

13. In his 26 March 2019 reply the President correctly pointed out that the Directive on the Administrative Review Process is an internal Bank document setting out a process for administrative review of decisions of the Bank taken in the administration of its staff. He could therefore not consider the document that was submitted as a request for review pursuant to this Directive as he had no authority to review a decision made by Westek.

14. This reply cannot be clearer. It emphasizes that the Directive is not applicable and makes it obvious that no administrative decision was being taken as defined in the Staff Handbook. This reply may in itself well be considered as constituting a decision, but it is not an Administrative Decision under the rules in force. This is only logical. Otherwise, anyone can write to the President and claim that the latter's reply constitutes an administrative decision entailing access to the Tribunal.

15. As said, the wording of the reply is clear. It is settled that when a text is clear no further interpretation is necessary, functional or otherwise. I cannot but conclude therefore that the President's reply is not an administrative decision under the rules in force. There is no *prima facie* evidence to the contrary.

16. The second requirement is that in order for the Tribunal to have jurisdiction over an appeal, the appeal must be lodged by a "staff member." The Directive of General Provisions and Glossary of Terms for the Staff Handbook gives the following definition:

> a staff member of the Bank holding a Regular, Fixed-Term or Short-Term appointment.

17. Both the Framework Agreement between the Bank and Westek and the Consultancy Agreement between Westek and Appellant's company (which was regularly renewed thereby contributing to the situation), make it abundantly clear that Appellant was not a staff member of the EBRD. Appellant admits this, but now claims to be a *de facto* staff member, a notion that cannot be found in the Staff Handbook.

18. To make matters worse, Appellant does not even wish to be considered and treated as a staff member and be accorded all the rights and obligations of the Bank's staff. The Appeal makes it clear, and this was confirmed at the hearing, that he only seeks a higher severance pay, with the argument that there was no further need of a staff member status since the hourly rate he was receiving already catered for salary, taxation and social security contributions, which, by the way, in principle entail entitlement to unemployment benefits, something to which Bank staff are not entitled.

19. In my view, Appellant is therefore not a staff member under the rules in force. There is no *prima facie* evidence to the contrary.

20. The logical conclusion thus is that the Tribunal lacks jurisdiction in this case.

21. The question that arises then is whether the allegation on the merits, i.e. that Appellant was a *de facto* staff member, requires the Tribunal to exercise jurisdiction over this claim even though its jurisdiction is *expressis verbis* limited to claims brought by members of the staff and is limited to challenges to the legality of administrative decisions. I don't think so and I find support for this conclusion in the following pertinent jurisprudence.

22. Other international administrative tribunals indeed had to deal with this dilemma and had admittedly different approaches in the matter.

23. The Panel's majority relies heavily in this respect on three judgments referred to by Appellant. I am not convinced of their usefulness for the cases(s) before us, as I will seek to show.

24. The first judgment is a 1997 judgment of the Asian Development Bank Administrative Tribunal (ADBAT): *Amora v. ADB*, ADBAT Decision No. 24. Appellant was a (retired) staff member and ADBAT thus did have jurisdiction. One of the issues at stake was the qualification of Appellant's employment status during the period before he became a staff member. But that issue then was a question of merits, not of jurisdiction. In other words, this case does not help this Tribunal in deciding on whether it has jurisdiction in the present case.

25. The second judgment referred to is a 1995 judgment of the Administrative Tribunal of the International Labour Organization (ILOAT): *In re Burt*, ILOAT Judgment 1385. This Appellant held a number of consecutive fixed-term contracts, but was then, for a very short period, offered an external collaborator contract, followed by a number of short-term contracts, while performing the same tasks. He was thus a staff member when he lodged the appeal and the only issue was whether he was entitled to a fixed-term contract and associated status. Jurisdiction was not an issue also in this case.

26. The third judgment dates back even further. It is a 1985 judgment of ILOAT: *In re Bustos*, ILOAT Judgment 701. ILOAT rejected respondent's objection to jurisdiction holding that the facts of the case show that the complainant's link with the Organisation was more than just a purely casual one. It considered that the very short consultancy contracts did not reflect the more permanent character of the work for PAHO. It emphasized, however, the exceptional, if not unique, character of this case and that it is very rare that it looks behind the documents to ascertain the intention of the parties.

27. To sum up: in two of the three cases there was no issue of jurisdiction and in the third one ILOAT underlined the exceptional character of the case. I cannot consider these authoritative precedents, as the Panel majority seems to imply, in particular in the light of abundant precedent to the contrary.

28. I appreciate that the majority acknowledges that the Bank has produced case law in which the absence of a formal status as employee was deemed by those Tribunals to be a sufficient barrier to accepting jurisdiction. The Tribunal also had additional case law before it. I regret that the

majority is not more specific about that case law and does not explain why this was not convincing or relevant. I will give a summary of it below.

29. I am a strong believer of convergence in international civil service law, including in jurisprudence. Differences, and sometimes strong differences, do remain, however. Jurisprudence of other international administrative tribunals can indeed be referred to; it is, however, not binding on this Tribunal. Moreover, if one refers to the jurisprudence of a particular tribunal, as was done in this judgment, for example, with the case law of ILOAT, it is then only logical to consider the *ensemble* of ILOAT's jurisprudence in the matter and in particular its most recent.

30. It is appropriate to recall that jurisprudence evolves and that it evolves with changes in society. We are at present living in societies where "Services" represent a large, sometimes the largest, sector in our national economies. Businesses concentrate on their core activity and outsource most of what comes in support of it. Framework agreements and service level agreements have become the standard approach and are common phenomena. The core function of EBRD is banking, not IT.

31. The Administrative Tribunal of the International Monetary Fund (IMFAT) made an analysis of the jurisprudence of other tribunals in its Judgment No. 1999-1, *Mr. "A" v. IMF*. It noted that a number of tribunals on occasion had determined that it was necessary to consider the merits of a claim in order to determine whether to exercise jurisdiction.

32. Examples that were given are the World Bank Administrative Tribunal in Decision No. 15 (1984), *Joel B. Justin v. The World Bank*, which dealt with an Applicant who was ultimately not retained for a position he had applied for.

33. The (former) United Nations Administrative Tribunal (UNAT), in Judgement No. 96 (1965), *Camargo v. The Secretary-General of the United Nations*, held that the question whether or not the Applicant must be regarded as the holder of a contract of employment with the United Nations could be decided only after a substantive consideration of the case, which the Tribunal had to carry out. It ultimately decided that the Applicant had not made a valid acceptance of a valid offer of employment and therefore was not the holder of a contract of employment.

34. In another case before the UNAT (Judgement No. 230 (1977), *Teixeira v. The Secretary-General of the United Nations*), Respondent had not contested the Tribunal's jurisdiction. It, in fact, had found that UNAT was an appropriate forum to be seized by the application claiming staff member status, i.e. there was consent by Respondent to UNAT's jurisdiction. This is obviously not the case before us, since Respondent contests the jurisdiction.

35. IMFAT then also analyzed a number of judgments of the ILOAT, which I will deal with below together with more recent jurisprudence.

36. IMFAT concluded that it found the interplay of the cases of other administrative tribunals of interest, but that the case before it fell to be decided on the basis of the particular provisions of IMFAT's Statute and its *travaux préparatoires*, and of the specifications of the Applicant's contract.

37. It then concluded that it did not have jurisdiction *ratione personæ* over Applicant's complaint since his letter of appointment stated that he *"will not be a staff member of the Fund"* and the Administrative Tribunal's jurisdiction was restricted by its Statute to applications brought by a *"member of the staff"* (Art. II, para. 1.a.), defined as *"any person whose current or former letter of appointment, whether regular or fixed-term, provides that he shall be a member of the staff"* (Art. II, para. 2.c.(i)). It further held that it did not have jurisdiction *ratione materiæ* over Applicant's claim; the Fund's decision to enter into a contract or series of contracts with an individual to serve as a contractual employee, rather than as a member of the staff, is not a "decision taken in the administration of the staff."

38. As mentioned, the ILOAT had to rule on similar matters in a number of cases and its jurisprudence is not limited to *In re Burt* and *In re Bustos*. In an early case (Judgment No. 67 (1962), *In re Darricades*) ILOAT looked at the plain language of the contract and upheld Respondent's claim that the Tribunal did not have jurisdiction.

39. More recently, in Judgment No. 2649 (2007) ILOAT confirmed that in order for a complaint to be receivable, it must allege a breach of guarantees which the Organization is legally bound to provide to staff who are connected with it by an employment contract or who have permanent employee status, this being a *sine qua non* for the Tribunal's jurisdiction.

40. At the same session, in Judgment No. 2657 (2007), ILOAT also rejected a complaint of an unsuccessful external candidate for a position. It held with reference to Judgment No. 67 that the Tribunal had no option but to confirm the well-established case law according to which it is a court of limited jurisdiction and bound to apply the mandatory provisions governing its competence. I come back to this judgment below.

41. In a short Judgment No. 3049 (2011) ILOAT ruled that it clearly had no jurisdiction to hear the complaint since complainant could not be considered as an official of the Organization and was not covered by its Staff Regulations and Staff Rules, in particular the provisions governing the internal appeal process. Complainant therefore had no access to the Tribunal.

42. In another short judgment (Judgment No. 3551 (2015)) the ILOAT observed that the complainant was challenging before the Tribunal the non-renewal of his last special service agreement. It held that the special service agreements expressly provided that the person with whom the Organization concluded the contract would have the status of a contractor and would not be considered in any respect as a staff member. The agreements also provided that any dispute which could not be resolved amicably or through conciliation would be settled by arbitration, unless the parties agreed on another mode of settlement. The Tribunal recalled that pursuant to its Statute it is only competent to hear complaints of officials. It held that it clearly had no jurisdiction to hear the complaint. The complainant did not have the status of official and thus had no access to the Tribunal. It considered the complaint to be clearly irreceivable and summarily dismissed it. It noted that an arbitration clause was in place.

43. In an equally short Judgment No. 4045 (2018) ILOAT held that the facts showed that the complainant was an independent contractor employed by a private company to provide services to the Organization. He had no employment connection with the Organization deriving from a contract of employment or from the status of a permanent employee. He was not an employee or an auxiliary staff member of the Organization. His employment relationship was with a private company. He never belonged to the category of employees to whom the Service Regulations for permanent employees applied.

44. Similarly, the NATO Administrative Tribunal held in 2016, in joined cases 1056-1064, that Appellants freely acknowledged throughout the proceedings that they were not staff members within the literal scope of the Staff Regulations (CPR). The essence of their claim was that they ought to be staff members, because their current status as International Civilian Consultants was not created in accordance with the CPR. Accordingly, they should in their view be entitled to have recourse to the Tribunal on the same basis as staff members, because that is what they would be had their status been properly created. The Tribunal then concluded:

> Notwithstanding appellants' request that the Tribunal now hold that it has jurisdiction, the essence of their position seems to be that the Tribunal should assume that they are right on the merits of their claims, and that further merits proceedings will confirm that they are indeed entitled to recognition as NATO international civilian staff members authorized to appeal to the Tribunal. This argument, while ingenious, is too much to ask of the Tribunal. As noted, this is a Tribunal of clearly defined and limited jurisdiction. The appellants are not NATO staff members as that status is clearly defined under the CPR. They therefore do not satisfy the CPR's clear and mandatory requirements for bringing an appeal to the Administrative Tribunal.

45. International administrative tribunals also entertained the question whether they should assume jurisdiction because otherwise a claim would escape judicial review.

46. ILOAT, in its Judgment No. 67 referred to in paragraph 38 *supra*, recognized that as a result of holding that it lacks jurisdiction, complainant was regrettably deprived of having any means of judicial redress. It added that it, being a Court of limited jurisdiction, was bound to apply the mandatory provisions governing its competence.

47. UNAT, in Judgement No. 628 (1993), observed that the bodies to which the Applicant had recourse were both internal bodies. It held that it was competent to entertain cases, where the primary concern is the absence of any judicial procedure.

48. IMFAT, in the same Judgment No. 1999-1 mentioned in paragraph 31 *supra*, expressed its disquiet and concern at a practice that may leave employees of the Fund without judicial recourse. It concluded, however, that it was not entitled to exercise jurisdiction in this case because otherwise Applicant's complaint may escape examination by an impartial adjudicatory body. The principle

of *audi alteram partem* did not authorize or require IMFAT to exercise jurisdiction in this case. The IMF adopted new (arbitration) provisions shortly after that.

49. ILOAT more recently refined its position on this point. In Judgment No. 2657 (2007) mentioned in paragraph 40 *supra*, it held however regrettable a decision declining jurisdiction may be, in that the complainant is liable to feel that he is the victim of a denial of justice, the Tribunal had no option but to confirm that it is a court of limited jurisdiction. It recalled, with reference to its Judgment No. 933 that it had no authority to order the Organization to waive its immunity. It noted, however, that the present judgment created a legal vacuum and considered it highly desirable that the Organization should seek a solution affording the complainant access to a court, either by waiving its immunity or by submitting the dispute to arbitration. The Organization concerned proposed arbitration.

50. The NATO Administrative Tribunal, in the cases referred to in paragraph 44 *supra*, noted that appellants invited the Tribunal, should it find that it lacks jurisdiction, to state that its judgment created a legal vacuum, and in effect to urge the competent NATO authorities to seek a solution affording the appellants access to a court or to arbitration. The Tribunal was not prepared to do so. It held that the adequacy of the remedies available under the existing arrangements, or the possibility of creating an administrative board of inquiry to consider appellants' grievances, were matters going more to the merits of appellants' claims than to the Tribunal's jurisdiction.

51. The EBRD Administrative Tribunal itself, in EBRDAT Case 2018/02, assumed jurisdiction, essentially on two grounds. One was that it noted that the arbitration clause was not signed and thus not binding on the parties. This may well be true, but this would not prevent parties from having resort to arbitration if they wanted to. In any case, it appears that in the cases before us now all relevant documents were signed. The Tribunal, secondly, held that the Tribunal should declare to have jurisdiction, since it otherwise would amount to denial of justice for the Appellant, who could not apply to English courts (due to the Bank's status).

52. Is this latter observation correct? I don't think so. The Tribunal is obviously referring to the Bank's immunity from national jurisdiction. This calls for a number of comments. First, the Bank's immunities are not unlimited. It is now settled that national courts, in particular since the

Waite & Kennedy and *Beer & Regan* cases before the European Court of Human Rights, are currently very unwilling to grant immunities when the organization does not provide for an adequate alternative judicial remedy. I have not seen one judgment or one indication in support of the thesis that the Bank's status prevents a complainant to go to domestic courts when there is no adequate alternative dispute resolution mechanism in place. Also the Bank, at the oral hearing, as quoted in the judgment, observed that, if an appellant had no recourse through the internal administrative process or through other channels, a possible outcome might be that courts decline to recognize the Bank's immunity and accept jurisdiction on Appellant's claim. The Bank argued that, in any case, its immunity is not a basis for the Tribunal to assert jurisdiction in cases on which it has no jurisdiction. In other words, there is no *prima facie* evidence that there is, or would be, a legal vacuum.

53. It is not my role to indicate here and now which dispute resolution avenues could or should be followed by Appellant and/or her company. I cannot agree, however, to assume jurisdiction just on a number of assumptions.

54. On balance, I conclude that the Tribunal should follow the approach that it does not have jurisdiction and that it should not go beyond the limits of its jurisdiction in the present case. There may well be exceptions, but in arriving at the present conclusion in this case I have given great weight to the fact that Appellant does not even seek to be a staff member or to be treated as a staff member. Appellant just wishes an additional payment. In my opinion, the current Appeal is, also in the light of this Tribunal's Decision in EBRDAT Case 2019/06, an improper use of the Bank's internal justice system.

55. I therefor conclude that the case must be summarily dismissed on grounds of lack of jurisdiction.

For the Administrative Tribunal

Maria Vicien Milburn