THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Case No. 2019/AT/06

Appellant

vs

European Bank for Reconstruction and Development,

DECISION

by a Panel of the Administrative Tribunal comprised of
Professor Giuditta Cordero-Moss (Chair)
Mr Chris de Cooker
Professor Spyridon Flogaitis

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4 October 2019

1. Introduction

In the present appeal dated 8 July 2019 (the "Appeal"), the Appellant requests the Administrative Tribunal to annul a President Administrative Review Decision dated 11 April 2019 (the "PARD"), and to grant other remedies.

The challenged PARD rejected the Report and Recommendations of the Administrative Review Committee (the "ARC") ARC 40/2018 dated 14 March 2019 (the "ARC Report").

The ARC Report was rendered in the frame of an administrative review process that was initiated as a consequence of a previous decision on jurisdiction rendered by the Administrative Tribunal between the Parties on 14 September 2018, AT/02/2018 (the "Decision on Jurisdiction").

The Decision on Jurisdiction annulled a President Administrative Review Decision dated 1 May 2018 (the "1 May 2018 PARD"). The 1 May 2018 PARD was a reply to the Appellant's request to start an administrative review process relating to a decision taken on 9 April 2018 not to renew the contract under which the Appellant was carrying out work for the European Bank for Reconstruction and Development (the "Bank"). The request to start an administrative review process of this decision was based on the Appellant's allegation that the Bank had infringed Appellant's rights as a *de facto* Staff Member of the Bank. The 1 May 2018 PARD denied the Appellant access to the internal justice system of the Bank on the grounds that the Appellant could not be considered a Staff Member of the Bank and therefore could not avail himself of the process and rights set out for staff members under the Bank's rules.

When the Appellant appealed the 1 May 2018 PARD before the Administrative Tribunal, the Bank challenged the jurisdiction of the Administrative Tribunal on the same ground, *i.e.* that the Appellant could not be considered a Staff Member of the Bank and therefore could not avail himself of the process and rights set out for staff members under the Bank's rules. The Bank also invoked an arbitration agreement and argued that the dispute should be brought to arbitration. On this latter point, the Decision on Jurisdiction found that the arbitration agreement had not been signed by the Appellant and therefore could not be invoked to bar jurisdiction of the Administrative Tribunal.

The Decision on Jurisdiction assumed that employment disputes between the Bank and its Staff Members are not subject to the jurisdiction of state courts, but fall within the scope of the internal justice system of the Bank.[1] Allegations that Staff Member rights have been infringed fall thus within the jurisdiction of the Administrative Tribunal.

[1] It can be appropriate to refer to the source of the immunity: The Bank's immunity from judicial proceedings is founded on Article 4 of the Headquarters Agreement between the Government of the United Kingdom and

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.

Where the determination of the Staff Member status cannot be made on the basis of the submitted documents, there is the necessity to ascertain the factual situation. However, the Administrative Tribunal is not a fact finding-body. Assessment of facts is, within the internal justice system of the Bank, carried out by the ARC. Therefore, the Decision on Jurisdiction annulled the 1 May 2018 PARD and directed to permit the administrative review process relating to the decision not to renew the Appellant's contract. This was intended to permit the assessment of facts by the ARC. The ARC assessment of facts would permit the Administrative Tribunal to determine whether the Appellant was a Staff Member of the Bank, should the case be brought again to the Administrative Tribunal (as it was, with the present Appeal). This in turn is a precondition to determine whether the Appellant's Staff Member rights (if any) have been infringed by the Bank.

Following the Decision on Jurisdiction, the Administrative Review Process was carried out, and the ARC Report was rendered. The ARC Report concluded that the Appellant was a Staff Member of the Bank and that his Staff Member rights had been infringed, and recommended that the Bank pay an amount corresponding to the severance package to which Staff Members are entitled, in addition to legal costs.

The PARD did not accept the ARC Report arguing, *i.a.*, that the decision to engage the Appellant as an independent contractor constituted a legitimate exercise of the Bank's discretionary authority on how to organise and resource most effectively its IT function, that the decision was motivated by valid business reasons, and that it was not detrimental to the Appellant. The Appeal challenges the PARD and requests the Administrative Tribunal to order the remedies that were recommended by the ARC.

Pursuant to paragraph 7.01 of the Directive on the Appeals Process, the Administrative Tribunal will take into consideration the findings of fact made by the ARC. The legal evaluation of the facts and the application of the law to the facts will be carried out independently by the Administrative Tribunal in accordance with the applicable law.

The Appeal refers to a letter that a law firm sent on behalf of the Bank on 27 September 2018, and defines it as a clear threat of retaliation by the Bank and an admission that the Bank views the decisions taken in its own legal system as having no legal force of value. The letter put the Appellant on notice that the Bank would request to be indemnified, under the terms of the intermediary contract that was entered into between the Appellant's

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the Bank dated 15 April 1991, which constitutes integral part of the Bank's Basic Documents. Immunity from state jurisdiction covers the scope of the Bank's official activity, and is subject to some exceptions that are not relevant here.

company and the Bank, in case the Bank be found to be liable to pay a severance package to the Appellant. The Appeal does not pursue this matter further.

2. Procedural History

This Appeal was filed on 8 July 2019.

The Bank submitted its Response on 9 August 2019.

On 27 August 2019, the Administrative Tribunal, without expressing an opinion on its legal value, requested some documentation that was referred to in the Appeal, but had not been submitted. Part of the documentation was received on 9 September 2019.

On 10 September 2019, the Administrative Tribunal asked the Parties whether they had any objections to the Tribunal assuming that a still missing document had in substance the same content as the corresponding document that was issued in a parallel proceeding, and was submitted by the Appellant. The Parties responded on 10 and 16 September 2019 that they had no objections to that assumption. The Bank objected to the Appellant's arguments on the legal value of the document. The Bank also pointed out that the Appellant's disclosure of the documents infringed the Appellant's legal representative's confidentiality obligations.

3. The Findings of Fact in the ARC Report

This section summarises the facts of the case, as they have been assessed in the ARC Report. The ARC Report is based on the written submissions of the Appellant and of the Bank, as well as on the oral evidence that the ARC took from the Appellant on 5 February 2019 and from Mr C. and Mr S. (the Appellant's supervisors) on 26 February 2019. The Bank and the Appellant were offered the opportunity to comment on that evidence. None of the Parties has objected to the ARC findings of fact.

The ARC Report has evaluated the facts in light of an extensive analysis of relevant case law by other international administrative tribunals. The ARC's evaluation of the facts in light of the applicable law was disputed by the Respondent.

The facts of the case can be summarised as follows:

About five years prior to entering into a contract relationship with the Bank, the Appellant established a limited company, IntelligenceNet Limited, for the purpose of carrying out IT consultancy activities. The decision to organise his activity in the form of a limited company was taken to benefit from a favourable tax treatment, as well as to limit the Appellant's liability. The Appellant's limited company established a business relationship with an agent, Sentinel IT LPP (the "Agent"). Through the intermediation of the Agent, the Appellant's limited company obtained consultancy contracts with third party principals.

In December 2009, the Agent on behalf of the Appellant's limited company entered into a contract with the Bank for the provision of consultancy services rendered by the Appellant's limited company. The contract between the Appellant's limited company and the Agent, as well as the contract between the Agent on behalf of the Appellant's limited company and the Bank, unequivocally regulated the relationship as a provision of services based on an independent contract.

The Appellant did not enjoy Staff Member benefits. Among other things, he did not enjoy paid annual leave, his remuneration was based on submitted time sheets and was not guaranteed in case of reduced volume of work, he was not covered by the Bank's insurance or retirement system, he was not exempted from domestic income tax, and the renewal of his contract was not guaranteed.

The rate of remuneration provided for in the Appellant's contract was higher than the rate of remuneration the Appellant would have received, had he been a Staff Member.

Numerous IT experts were, and are, working for the Bank. Some of them were working under employment contracts, others under independent contracts for the provision of services. The distinction was not necessarily based on the characteristics of the work, but was linked in part to budgetary constraints ("headcount") and in part to the Bank's strategic and organisational management of its activity. Depending on budgetary availability, sometimes independent contractors were offered to transform their legal relationship into employment contracts (they were "internalised"). The performance of the work and its integration into the Bank's organisation did not necessarily change after the contractors had become Staff Members.

At the time during which the Appellant was performing his work for the Bank, the organisation of the Bank's IT activity was the object of internal discussions. There was a general awareness about the distinction between independent contractors and Staff Members, as well as discussions about possible outsourcing of some IT activity. The Bank exercised efforts to clarify the distinction between independent contractors and Staff Members. In 2016 these discussions were formalised in an extensive restructuring project.

Initially, the Appellant's provision of services was related to project work as a reporting and analysis consultant with particular focus on supporting reports for equity reporting. In November 2014, the Appellant's work was moved from the equity department to the banking department. This implied that the work was less project based and more based on a steady flow. The Appellant became more integrated into the Bank's organisation, and subject to the Bank's instructions and control. Particularly after Mr S., to whom the Appellant reported, transformed his own contract for the supply of services into an employment contract, the Appellant's performance became increasingly subject to the Bank's control, although the Appellant was never subject to appraisal as the Bank's Staff Members were. However, the Appellant's contract was not amended to reflect the modified functions.

Prior to 2014, the Appellant's contract was renewed in function of the duration of the project-related tasks that the Appellant was to carry out. After November 2014 the Appellant started receiving a steady flow of work, and the contract was renewed for standardised one year-periods.

In 2014 or in 2016,[2] the Appellant was informally offered the possibility to transform his contract for the supply of services into an employment contract. The Appellant hesitated because he considered it not to be financially advisable for him to change his status. The status as an independent contractor ensured a higher retribution than he would have received as a Staff Member, in compensation of the lack of Staff Member benefits. After 2016, the possibility to convert independent contracts into employment contracts was drastically reduced.

The involvement of the Agent in the relationship between the Appellant and the Bank was substantial at the beginning, when the contract was obtained through the Agent's involvement. After the contract was signed, the Agent continued receiving a provision from the Bank. The Bank paid the remuneration for the Appellant's work to the Agent, who then transferred it to the Appellant's limited company. However, the Agent had no role in the performance of the contract. Also, the Agent was not engaged in the negotiations of the renewed contracts, that were carried out directly between the Bank and the Appellant. The renewal would then be formalised by the Bank sending a standard renewal letter to the Agent.

When the Bank decided not to renew the Appellant's contract, the Appellant's engagement with the Bank expired by effluxion of time on 28 February 2018 (subsequently extended to 9 March 2018 in order to give the Appellant 30 days notice).

The ARC Report found that the Appellant was a sophisticated commercial actor who understood *"the distinction between an independent contractor and an employee*". He accepted his commercial arrangement notwithstanding that he was aware it had a fixed end date and generally entailed less job security than a staff position. He took active steps to take full advantage of his situation, establishing and maintaining a private service company to minimise his liabilities, in respect of both income tax and potential negligence. The ARC found that the Appellant's contract was an independent contract to begin with.

However, the ARC found that after 2014 the Appellant developed a feeling of security in his work for the Bank, as well as expectations that his relationship with the Bank would continue past its contractual end dates.

[2] There is a discrepancy between the ARC Report and the testimony of the Appellant: the former places this conversation in 2014, the latter in 2016.

On this basis, the ARC found that the Appellant had become a fixed term staff member of the Bank by March 2014. The ARC found that the Appellant's contract had been unlawfully terminated by the Bank due to the continuing need for the role in early 2018.

The ARC Report pointed out a series of circumstances showing divergence between the formal status as an independent contractor and the reality of how the Appellant performed his work. These include that the Appellant worked full time day in day out exclusively for the Bank, that he provided personal service, that he received a level of managerial input from the Appellant's supervisors, that the Appellant moved from project work to more central routine functions consistent with "business as usual", that the Appellant enjoyed a high degree of social inclusion in the Bank, that the terms of the contract were never amended to reflect the functions the Appellant took over after November 2014, that from 2014 the Appellant's contract was extended for standardised one year-periods, and that the Appellant negotiated directly with the Bank both the extensions of his contract and the rate of pay. The Agent was purely a vehicle through whom payment was made.

The ARC Report found that the functional justification of needing up to date short term IT contractors applied less and less to the Appellant, over time. The ARC Report found that the persistence of a functional justification for using independent contracts after 2014 was not supported by the evidence given by the Appellant or his supervisors, although according to the ARC Report Mr S. testified that the use of independent contracts was due both to headcount restrictions and to the intention of the Bank to look to outsource staff in the IT Department at some point in the future. Furthermore, from the Minutes of the hearing of Mr C., one of the Appellant's supervisors, it appears that the Bank had legitimate reasons for using short term contracts for its IT work and to change them after a while: to ensure that new contracts are offered to state-of-the-art contractors, to permit accessing the market depending on the needs, to permit acquiring from the market skills that were lacking.

4. The Appellant's position

The Appellant argues that the PARD is unlawful on two grounds: (i) it is arbitrary because it does not state any logical reasons for deviating from the ARC Report, and (ii) it is in breach of international administrative law because the applicable law and its application to the facts, as made in the ARC Report, support the Appellant's case.

Regarding the ground under (i), the Appeal affirms that the Decision on Jurisdiction requested the ARC to determine whether the Appellant was a Staff Member of the Bank. Having the ARC thoroughly made the factual and legal evaluation and having it concluded that the Appellant was a Staff Member, the PARD is expected to provide an equally thorough legal and factual justification to deviate from the ARC Report. Instead, the PARD re-argues factual issues that were already presented to the ARC, and does not provide new or sufficient justification for not agreeing with the evaluation contained in the ARC Report.

Regarding the ground under (ii), the Appeal relies on the reasoning made in the ARC Report, and in addition it specifically refers to the administrative tribunals' decisions ILOAT 701, ILOAT 1385, and ADBAT 24. In particular, Appellant refers to the test contained in the latter, according to which work that is not independent and cannot be subcontracted, but is ancillary to the Bank's business, is to be considered to be carried out in an employment relationship – notwithstanding the wording of the contract.

The Appeal further refers to two recommendations and reports by the Grievance Committee (now ARC): Case GC/10/11/2012, GC Report and Recommendation on Jurisdiction of 15 October 2014; case GC/10/11/2012, GC Report and Recommendation on Liability and Remedy of 23 July 2015 (the "2012 Grievance Committee Recommendations"). The 2012 Grievance Committee Recommendations have been accepted by the Bank, see, for case GC/11/2012, the Decision by the President in relation the Report and Recommendation by the Grievance Committee of 12 August 2015. For case GC/10/2012, the corresponding Decision by the President was not submitted. However, the Administrative Tribunal has reason to assume that there is a corresponding decision, as the two cases were dealt with simultaneously throughout the proceedings. The Parties did not object to this assumption. The Appellant argues that the underlying principles now constitute part of the internal law of the Bank. The Appellant argues that the 2012 Grievance Committee Recommendations were rendered in two situations comparable to the Appellant's situation: a contract was entered into between the Bank and an intermediary, and the work was carried out under a contract that, according to its terms, was for the provision of services as independent contractor, and did not create an employment relationship. The 2012 Grievance Committee Recommendations found that the terms of the contracts disregarded the reality of the facts. In view of the organisational integration and management control that was exercised on the work, the 2012 Grievance Committee Recommendations found that the principles set out in the decision ADBAT 24 were applicable, and that there was reason to disregard the wording of the contract and consider the work to be carried out in an employment relationship.

The Appellant seeks: (i) the annulment of the PARD; and, consistent with the remedy recommended by the ARC Report, (ii) the award of £43,672.52 directly to the Appellant; and (iii) the award of reasonable legal costs.

5. The Respondent's position

Regarding Appellant's ground under (i) in section 4 above, the Bank argues that the PARD provided an extensive and well-reasoned explanation for why the Bank disagreed with the legal evaluation made in the ARC Report, and that there is no basis in international administrative law to require that Bank provides new argumentation to disagree with the ARC Report.

Regarding Appellant's ground under (ii) in section 4 above, the Bank refers to administrative tribunals case law that accepted the wording of the contracts as sufficient

basis to determine that the relationship at issue was as an independent contractor and not as a Staff Member. The Bank refers to the following decisions: ILOAT 4045; ILOAT 3459; ILOAT 3551; ILOAT 67; ILOAT 4045; ILOAT 3459; UNAT 233; UNAT 233; UNAT 233; IMFAT 1999-1.

In the few cases where administrative tribunals intervened to re-qualify the formal contract for services into an employment contract, they did so when the international organisation was deemed to clearly be abusing its power and depriving the appellant of Staff Member protection: WBAT 215; ILOAT 701; ADBAT 24. The threshold for disregarding the wording of the contract is very high, and can be met only under exceptional circumstances.

The Bank further refers to the case law invoked by the Appellant and points out that ILOAT 701 establishes a very high threshold to disregard the wording of contracts entered into by international organisations. The Bank argues that this high threshold is not met in the present case.

Regarding the 2012 Grievance Committee Recommendations that were accepted by the President, the Bank observes that one solitary President decision does not evidence an administrative practice, and that the facts in any case were different from the facts in the case at hand. In the 2012 cases, exceptional circumstances existed to warrant disregarding the written arrangements.

The Bank argues that the choice to hire independent contractors is a legitimate exercise of discretionary authority and is particularly justified for IT-related work, which has a need of continuing updated competence. The Bank pointed out that the decision WBAT 215 declined to override the wording of the contract where the choice of using independent contracts was founded on justified management decisions, such as in the IT field, which is subject to rapid technological change and depends on constantly updated skills

Moreover, the arrangement was not established to deprive the Appellant of any benefits of employment, and provided remuneration to such a level that the Appellant considered an employment relationship as financially unattractive. In particular, the remuneration under the contract compensated the lack of paid annual leave, insurance, pension benefits, etc., the necessity for the Appellant to pay income taxes, and the lack of security connected with the status of being a Staff Member. The Appellant found it more advantageous to offer his services on a commercial basis, and did not seek to change this into an employment relationship.

The Bank recognises that the regular flow of work to the Appellant and its integration into the Bank’s organisation indicate that work comparable to the work carried out by the Appellant could have been (and, indeed, was) carried out by a Staff Member. However, this is not sufficient to meet the high threshold for overriding the wording of the contract. The need for continuously updated skills justifies the use of independent contracts for provision of services even when the work could have been carried out by Staff Members.

Furthermore, the Bank considered modernising and restructuring its IT-activity, and eventually initiated a modernisation project in 2016. Pending reorganisation, it was justified to utilise independent contracts, which ensured flexibility.

The standardised length of the renewals of the contract after 2014 was due to the constant flow of work. However, this is not a sufficient basis for overriding the wording of the contract, as the choice to utilise an independent contract was not abusive, as the higher rate compensated the Appellant for the detriment of not being a Staff Member, and was based on a functional justification.

6. The Tribunal's evaluation

6.1 Request for Oral Hearing

The Appeal suggests in para 1.8 that the Administrative Tribunal may decide to hold an oral hearing: "[i]n light of the refusal of the EBRD to follow the ruling of the ARC Report on a significant point of law, and considering that there are pending cases before the Tribunal that also concern the question of *de facto* Staff Member status, the Tribunal may be of the view that a consolidated hearing would be of use in order to settle these issues once and for all. The Appellant would support holding an oral hearing in this case."

Presumably, the reference to other pending cases is to four appeals that are presently pending before the Administrative Tribunal on the jurisdiction of the administrative review system on matters similar to the question at issue here.

The Bank objects to the usefulness of an oral hearing, and to a consolidation with other proceedings.

Pursuant to paragraph 7.02 of the Directive on the Appeals Process, oral hearings may be held in exceptional cases: "In exceptional cases, the Tribunal may hold oral hearings to hear arguments of the parties or to re-hear the evidence (or part of the evidence) or to allow new evidence to be heard."

The Appeal does not explain what exceptional circumstances warrant an oral hearing, but refers to the circumstance that the Appeal regards a significant point of law.

The Administrative Tribunal does not consider it necessary to hold an oral hearing to discuss a point of law. Legal arguments have sufficiently been developed by the Parties in writing, and the Administrative Tribunal does not see the usefulness of discussing these arguments orally. Pursuant to paragraph 7.02 of the Directive on the Appeals Process, oral hearings may be held only under exceptional circumstances.

Regarding consolidation with other proceedings, it does not seem to be helpful to consolidate the present case, which deals with the applicability of the law to the facts of the specific case, with proceedings that are at present dealing with the question of jurisdiction only.

On the basis of the foregoing, the Administrative Tribunal does not deem it appropriate to hold an oral hearing or to consolidate this proceeding with other proceedings.

6.2 First ground for appeal: Arbitrary PARD

Regarding the first ground for appeal, the Administrative Tribunal observes that the Appeal recognises, in para 1.6.1, that ARC recommendations and reports are not binding on the Bank. Thus, the President may decide to deviate from them. This, however, presupposes that the President's decision is not arbitrary or in breach of the applicable law. The Appellant argues that the PARD disagrees with ARC's legal and factual conclusions, re-argues the facts and that, for this reason, it is arbitrary and should be set aside.

The Administrative Tribunal fails to see that the PARD objects to the fact findings made by the ARC. However, the PARD does not agree with the ARC's legal qualification of the facts. The PARD explained the reasons for its disagreement with the ARC Report's legal evaluation. The PARD's reasons coincide with the legal arguments the Bank had put forward before the ARC.

The Administrative Tribunal observes that the recommendations and reports made by the ARC are not binding on the President. While the Head of an Organization must give adequate reasons when deviating from recommendations given by a body set up to advise the organisation, there is no requirement that the reasons for disagreeing with the evaluation made in the recommendations present new arguments in addition to those that the organisation has already put forward. If the President renders an Administrative Decision that is not in compliance with an ARC recommendation and report, and if a Staff Member disagrees with that President Administrative Decision, the available remedy is to appeal the Administrative Decision before the Administrative Tribunal. Pursuant to paragraph 7.01 of the Directive on the Appeals Process, the Administrative Tribunal is to rely on the finding of facts made by the ARC. However, the legal qualification of the facts and the consequences of the application of the law to those facts are the competence of the Administrative Tribunal.

On this basis, the Administrative Tribunal does not consider the PARD to be arbitrary for having deviated from the ARC Report as regards the legal qualification of the facts and the application of the law to the facts.

6.3 Second ground for appeal: Breach of the applicable law

The issue in dispute is whether the legal qualification of the work as employment relationship or independent contract is to be made primarily on the basis of the terms of the contract, or whether factual considerations are to be given weight as well.

In determining whether the wording of the contract may be overridden by considerations relating to the factual situation, the Administrative Tribunal has to apply the applicable law. Pursuant to paragraph 3.02 of the Directive on the Appeals Process, the applicable law consists of: (i) the Staff Member's contract of employment, (ii) the internal law of the Bank (consisting of decisions of the Board of Governors and of the Board of Directors, the Staff Regulations of the Bank, written bodies of rules and procedures, and Bank administrative practice), and (iii) generally recognised principles of international administrative law. These will be analysed below.

6.3.1 "The Staff Member's contract of employment"

The Appellant's work is regulated by a number of contracts entered into between the Appellant's limited company and the Agent, as well as between the Agent and the Bank. According to their wording, the contracts are for the independent provision of services, and do not create an employment relationship.

6.3.2 "The Staff Regulations and the internal law of the Bank"

Section 5(c) of the Staff Regulations provides that the Bank shall *"appoint staff members by letter of appointment, which shall specify the type and duration of the appointment,*"

Section 1.2 of the Staff Handbook provides that an "employee" or "staff member" is a person appointed to the staff of the Respondent and serving under a letter of appointment and that the terms "employee(s)" and "staff member(s)" refer to the same group of persons, and are used interchangeably in the Staff Handbook.

Section 1.1.3(2) of the Staff Handbook specifically excludes the application of the Staff Handbook, unless otherwise stated therein, to *"consultants, personnel supplied by contractors and/or employment agencies, and other individuals providing services to the Bank who do not hold an appointment as a staff member".*

6.3.3 "Bank Administrative Practice"

The Appellant refers to the 2012 Grievance Committee Recommendations that have been fully accepted by the Bank. The Appellant argues that these now represent part of the law to be applied by the Administrative Tribunal, and that these sources confirm the Appellant's arguments.

The Bank recognises that the President accepted the 2012 Grievance Committee Recommendations in one isolated case, but denied that this constitutes Bank practice.

The Administrative Tribunal observes that the principles invoked by the Appellant as having become Bank administrative practice coincide with the principles invoked by the Appellant as part of international administrative law. International administrative law is part of the law applicable to the Administrative Tribunal. However, the application of the law to specific cases depends on the circumstances of the case.

6.3.4 "Generally recognised principles of international administrative law"

The law applicable by the Administrative Tribunal consists also of generally recognised principles of international administrative law. How to determine the existence and content of generally recognised principles is a matter of methodology. When sources are not extensive within a special field, it may be appropriate to look at the general field of law of which the former is part. To the extent it is compatible with the principles informing the special area, the methodological approach adopted in the general area may be applicable to complement the sources available in the former. While international administrative law is a separate field of law, it is part of the larger field of public international law. It may, therefore, be useful to look at the general field of public international law to find guidance as to the method according to which the existence of generally recognised principles may be determined. Of relevance in this context is the doctrinal debate around the rule on the applicability of generally recognised principles that can be found in Article 38, paragraph 1 (c) of the Statute of the International Court of Justice (the "ICJ").

Most recently, the issue is being dealt with by the International Law Commission (the "ILC") in its ongoing work on general principles of law. For the moment, this work resulted in the First Report on General Principles of Law, adopted at the Commission's Seventy-first session of 2019. While the work is still in a preliminary phase, and it has not addressed specifically the field of international administrative law, it makes a comprehensive analysis of the doctrinal debate on the determination of generally recognised principles in the general field of public international law. As pointed out above, the methodological approach of the general field of public international law may be applied, to the extent compatible, in the special field of international administrative law.

As the ILC Report points out,[3] there are at least two categories of general principles: those formed within the international legal system, and those derived from national legal systems. These will be briefly discussed below.

6.3.4.1 Sources formed within the international legal system

Lacking any treaties or custom on a certain issue, an indicator of the existence of a general principle is the jurisprudence by other, comparable international courts. These decisions have at least the subsidiary function, in the identification of general principles of law, that Article 38, paragraph 1 (d) of the ICJ Statute gives to decisions by national courts. While case law by other international administrative tribunals is not formally binding on this Administrative Tribunal, the desirability of a consistent development of international administrative law strongly suggests that they should be taken into consideration.

This Administrative Tribunal has not rendered any decision that could be deemed to be directly relevant to the issue of whether a worker who is under a contract for the independent provision of services can be deemed to be a *de facto* Staff Member.

Other international administrative tribunals have rendered some decisions that are relevant. These have been presented above, in connection with the presentation of the Parties' respective arguments. From these decisions it appears that, while it is not impossible to look beyond the wording of a contract and consider the factual circumstances, the threshold to override formal written agreements entered into between an international organisation and a worker is high.[4]

Indeed, in some cases the international administrative tribunals have considered the label given in the contract to be the final indicator that the relationship between the appellant and the organisation was an independent contract.[5]

When administrative tribunals have overridden the written form of the contract, they have applied different tests. The discerning criteria seem to have been whether the contract completely disregarded reality without any functional justification for the discrepancy between the contract and the factual situation,[6] whether the worker was carrying out tasks foreseeably required for an indefinite period without any valid reason for doing so as a contractor (as opposed to being employed),[7] whether the organisation was abusing its power

[3] International Law Commission, First Report on General Principles of Law, adopted at the Commission's Seventy-first session of 29 April-7 June and 8 July-9 August 2019, para 22.
[4] ILOAT 701.
[5] ILOAT 4045, ILOAT 3459, ILOAT 3551, ILOAT 67, UNAT 233, IMFAT 1999-1.
[6] ILOAT 701, ADBAT 24.
[7] WBAT 215.

to avoid the application of its internal law[8] or to deny certain benefits,[9] whether the work was carried out in the frame of an independent business with possibility to sub-contract the performance of the tasks (as opposed to the work being ancillary to the organisation's business).[10]

That Staff Regulations may be applicable also to others who do not fall with the formal scope of application of the regulations, is confirmed in ILOAT 122. This decision states that: "While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognised so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts."[11]

6.3.4.2 Principles derived from national legal systems

Another source of general principles of law are national legal systems.[12] It is generally accepted that, when a principle exists within a sufficiently large number of national legal systems, it can be considered to be a generally recognised principle in the sense of Article 38 paragraph 1 (c) of the ICJ Statute.[13] This methodology may be applied also to the specific field of international administrative law, as was explained above.

It is necessary, however, to proceed cautiously, as the mere presence of a certain principle in numerous national systems does not necessarily mean that the principle is capable of being applied at the international level.[14]

Transposing national principles to international law does not imply that the specific regulation contained in certain municipal laws is elevated to the level of international law. Instead, transposing national principles to international law means that the values that underlie a regulation that is common to numerous systems is elevated to the level of international law.[15]

When a thorough comparison shows that a certain principle is recognised in numerous municipal laws, and provided that the principle is transposable in international law, that

[8] ILOAT 701.
[9] ADBAT 24, WBAT 215.
[10] ADBAT 24
[11] ILOAT 122, consideration on the Administrative Tribunal's competence.
[12] For an extensive analysis of the sources supporting that principles of national law constitute principles of international law, see ILC First Report, paras 191-230.
[13] ILC First Report, paras 167-168, 190.
[14] ILC First Report, para 169.
[15] ILC First Report, paras 225-228.

principle may be considered to be a generally recognised principle in the sense of Article 38 of the ICJ Statutes. Applying the same method, a comparative approach may constitute a basis to identify recognised principles of international administrative law applicable by the Administrative Tribunal pursuant to paragraph 3.02 of the Directive on the Appeals Process.

The areas of municipal law that are mostly relevant to international administrative law are administrative law and civil service law. In addition, more general principles of labour law may also be relevant, to the extent they do not contradict any specific principles of administrative or civil service law. In particular, civil service law may have specific rules regarding, *i.a.*, criteria to qualify as civil servants, modalities for their appointment, constraints on their actions or constraints on their dismissal. A feature of civil service is that civil servants are appointed by the competent authority, rather than being engaged on the basis of an employment contract. However, public employers must also fulfil the traditional responsibilities of an employer. Among the principles of labour law that may be considered applicable also in civil service law is the principle that the employer shall not abuse its position and deprive the employee of employee protection. In respect of the specific issue of *de facto* employment, in particular, the specificities of civil service do not seem to be exclusive of the more general principles regarding the protection of the employee.

In respect of the matter at issue, taking into due consideration that principles of labour law may not necessarily be applied to civil service law without qualification, a comparison will be made below covering labour law in 36 legal systems including not only the European Union and the EEA member states, but the geographical scope of Europe, including Russia and Turkey, as well as the United States.

Regarding the mentioned 36 legal systems, a recent and thorough comparison was made in the *Restatement of Labour Law in Europe*.[16] Based on the comparison of all these legal systems, the book restates principles common to them in respect of the definition of the concept of "employee". The following restated definitions and principles may be highlighted:[17]

- Section I.-1. (1) defines a contract of employment as a contract "that obliges one person (the employee) to *perform work or services for another* (the employer) while being *subordinated* to that party" (emphasis in the original);
- Section I.-1. (4) defines an employment relationship as a "legal relationship that covers the performance of work or services for another party which, without necessarily requiring the conclusion of a contract of employment, is in principle legally equated with a contract of employment under national law";
- Section I.-2. (1) defines an employee as "a person who *either under a contract of employment or as a party to an employment relationship* is obliged to perform work

[16] Bernd Waas, Guus Heerma van Voss, *Restatement of Labour Law in Europe* Volume I, "The Concept of Employee", Hart Publishing, 2017.
[17] Waas, *Restatement of Labour Law,* pp. xxiv-xxvi.

or services for another party, and is *subordinated* to that other party" (emphasis in the original);

- Section I.-4. (1) defines criteria and indicators to be applied, either jointly or independently, to establish whether there is subordination. These are: work instructions, work control and integration;
- Section I.-4. (2) explains that often supplementary criteria are required to establish an employment relationship;
- Section I.-4. (3) points out that mere economic dependence is insufficient to establish an employment relationship;
- Section I.-5. contains the principle of primacy of facts: "Typically, the determination of the existence of a contract of employment or employment relationship is guided by the *facts* (ie, what has been actually agreed and executed between the parties) and not by how the parties describe their relationship" (emphasis in the original);
- Section I.-7. (1) contains the principle of limits to freedom of contract: "Typically, it is provided that in the event that a contract qualifies as a contract of employment or as an employment relationship, the parties concerned *may not alter the legal nature of the contract or legal relationship*, even if they reach an agreement to this effect" (emphasis in the original).

Thus, the principle of primacy of facts, restated in section I.-5. of the Restatement of Labour Law in Europe, and the principle of limits to freedom of contract, restated in section I.-7. of the Restatement of Labour Law in Europe, imply that the definition that the parties have given in a contract may not prevail over the mandatory provisions protecting employees, if the factual circumstances indicate that the legal relationship between the parties is an employment relationship.

As the chapter titled "Comparative Overview",[18] as well as the 36 national reports contained in the Restatement of Labour Law in Europe, show, the specificities of each national law vary from system to system. However, the principles abstracted and restated into the abovementioned sections are common to all examined legal systems.

Regarding the legal regime in the United States, it can be observed that also in the US formal circumstances relating to the contractual relationship cannot shield from employer liability. There is precedent exploring the concept of joint employer and joint liability. [19] Particularly when a contract is entered into through an intermediary, the National Labor Relations Board (NLRD) has been concerned with ensuring that under certain circumstances the worker does not lose the benefits of being deemed an employee of the entity for which the work is performed, notwithstanding that there is no formal employment contract between the two parties. The NLRD has therefore adopted the concept of joint employment. The

[18] Waas, *Restatement of Labour Law,* pp. xxvii-lxvii.

[19] See for example Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery *and* FPR-II, LLC, d/b/a Leadpoint Business Services *and* Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, 362 NLRB 1599 (2015).

essence of the standard for determining whether there is a joint employment relationship is whether the putative employer exercises control over the essential terms and conditions of work. Indicators of the control have been deemed to be:

- The selection and engagement/hiring of workers.
- The rejection of applicants.
- The termination of workers for performance and financial reasons.
- Annual or periodic performance evaluations.
- The site of the work.
- The setting of work hours and overtime.
- The specification of the number of workers.
- The assignment of day-to-day tasks and oversight of those tasks.
- The creation of work rules governing the workers.
- Setting wage rates and other benefits

The foregoing comparative analysis shows that numerous municipal systems contain equivalent principles according to which a worker may not be deprived of employee protection by invoking formal arrangements concerning the working relationship. This applies both to the situation where the contract is entered into directly between the parties and purports not to be a contract for employment, and to the situation where the contract is entered into through an intermediary.

Regarding the transposability of these principles in international administrative law, the following may be observed.

The principles described above stem from the balancing of sometimes conflicting interests. On the one hand, there is the interest in permitting the free exercise of entrepreneurial autonomy as well as of freedom of contract. On the other hand, there is the interest in protecting the party that is deemed to be weaker (the worker) and avoiding that the stronger party exploits its dominant position by structuring the relationship in a way that permit circumventing the protections given by the law.

There do not seem to be compelling reasons to consider the values underlying the abovementioned principles as not transposable to the international level, *mutatis mutandis*.

In particular, international organisations enjoy a high degree of discretion in organising and managing their functions. This is confirmed by the restricted power of this Administrative Tribunal. Pursuant to paragraph 3.03 of the Directive on the Appeals Process, the Administrative Tribunal's power is limited, *i.a.*, to verifying that the appealed administrative decisions are not arbitrary, discriminating or carried out in violation of the applicable procedure. The Administrative Tribunal, therefore, may not interfere with the Bank's management of its activity, as long as this is exercised within the mentioned limits.

The Bank's high degree of autonomy is, thus, restricted by the requirement to avoid the abuse of its discretionary power. In a relationship with an independent contractor, the imbalance between the parties resembles the situation that was addressed above in connection with national labour law. Therefore, considerations similar to those existing in municipal labour law may be relevant also in respect of the relationship between international organisations and independent contractors.

On the basis of the foregoing, there is sufficient basis to consider the abovementioned principles as generally recognised and transposable in international administrative law, *mutatis mutandis,* and thus part of the law applicable by the Administrative Tribunal.

It must be emphasised that the general principles applicable by the Administrative Tribunal consist of the underlying values common to numerous national legal systems, and not of the detailed regulation contained in any specific national law.

6.3.4.3 Summary

On the basis of the foregoing, the principles applicable by the Administrative Tribunal may be summarised as follows:

Generally, there is a strong presumption that the wording of the contract reflects the parties' intentions. Therefore, if a contract says that the legal relationship is not a relationship of employment but a contract of services, the terms of the contract are presumed to reflect the proper nature of the relationship.

Exceptionally, the wording of the contract may be disregarded as not reflecting the reality of the relationship between the parties. This can be the case if there is no functional justification for the format that has been chosen for the legal relationship between the parties. In other words, if the formal label was chosen for the purpose of, or has the effect of, circumventing the protection that the applicable law grants to employees, the formal qualification of the legal relationship may result in an abuse of discretionary power. In this case, there may be a basis to override the wording of the contract and to look at the factual circumstances.

Furthermore, there must be a clear divergence between the formal qualification of the legal relationship and the reality. The test is whether the contractors were carrying out their work in a position of subordination, *i.e.* as an integral part of the organisation and subject to the Bank's instructions and control for the purpose of ensuring the proper functioning of the organisational structure for the Bank's interest and at the Bank's risk.

Case law and national sources have developed a series of indicators that can be used to qualify the legal relationship. Certain indicators (*e.g.* required availability during working hours, required presence in the office premises, use of the organisation's tools and

infrastructure, participation in meetings and events, repeated renewals of the contract) are not necessarily evidence of subordination. They may be evidence of this, but they may also be due to the necessity of permitting the carrying out of the project's tasks. Therefore, the discriminant is whether integrating the contractor into the organisation serves the proper functioning of the organisation's activity, or is meant to permit the proper performance of the contractor's tasks. If the purpose is the latter, there is no basis to disregard the formal structure as it results from the wording of the contract. If the purpose is the former, there may be, depending on the evaluation of the circumstances as a whole, a basis to look beyond the wording of the contract and establish that there was a *de facto* employment relationship.

In applying these criteria, the Administrative Tribunal is guided by the principle that it has the power to determine whether the formal regulation of a legal relationship amounts to an abuse of discretionary power, but it may not review the organisational or managerial discretion of the Bank.

6.4 Applicable criteria

Based on the foregoing, the Administrative Tribunal is entitled to evaluate whether the Appellant's legal status was indeed that of an independent contractor, or whether factual circumstances and the lack of a functional justification for choosing to organise the work through an independent contract, justify overriding the wording of the contract and considering the Appellant as a Staff Member of the Bank.

The above overview of the applicable sources shows that it is not possible to determine on an abstract level whether a work relationship constitutes an employment relationship or an independent contract relationship. While the formal definition that is made in the contract between the parties has great significance in determining whether the relationship is an employment relationship or an independent contract, there are also other elements that, under exceptional circumstances, may be taken into consideration.

Based on the examination of the relevant sources, the Administrative Tribunal is of the opinion that several elements in a factual relationship can be used as indicators of the type of legal relationship. The ARC Report listed some such indicators. The Administrative Tribunal considers them all to be relevant, to a varying extent. In addition, other indicators may be relevant.

The Administrative Tribunal points out that, in order to determine whether the legal relationship is an employment relationship or an independent contract, the circumstances as a whole must be considered. While the presence of the indicators may be useful to the determination, there is no automatic effect between the presence or absence of one or more indicators, and the result of the determination. Some indicators, furthermore, are not necessarily crucial because they can be present in both categories of legal relationship.

The Administrative Tribunal considers the following elements to be among those that can have particular relevance to its determination of the issue:

Criteria that have a direct bearing on the qualification as contractor or Staff Member:

1. Whether, under the terms of the contract, the worker is an independent contractor or a Staff Member;
2. Whether there is a functional and economic justification for choosing an independent service contract as opposed to an employment contract;
3. Whether the independent service contract compensates for the lack of Staff Member benefits by calculating a higher rate of remuneration than if the contract had been for employment; or
4. Whether there is evidence of the worker's acceptance of the terms of the contract by long and repeated practice.

Criteria that have significance for the qualification as contractor or Staff Member:

Should it not be possible to reach a conclusion on the basis of the above criteria, further criteria can be employed, such as:

1. Whether the remuneration is based on the performed work, or is guaranteed;
2. Whether the tax treatment of the remuneration is consistent with an employment relationship or an independent contract;
3. Whether the worker is required to enter into its own professional and social insurance arrangements, or is included in the arrangements provided by the organisation;
4. Whether the worker is entitled to paid annual leave;
5. Whether the worker is personally obliged to perform the work, or can sub-contract it; or
6. Whether the original term and further renewals of the contract are based on the performance of specific tasks or on managerial decisions taken by the organisation in the exercise of its organisational or strategic discretion.

Features that may be present both in independent contracts and employment contracts:

Some features that were considered by the ARC Report can be useful to obtain a complete picture of the work relationship. However, they do not give a significant contribution to the qualification as contractor or as Staff Member, because they may be present both in independent contracts and in employment contracts. Among these features are:

1. Whether the work is carried out under the instructions and supervision of the organisation;
2. Whether the work is integrated in the organisation (*e.g.* as regards the timing and modalities of work performance, as well as coordination with the organisation's work process);
3. Whether the work is part of the organisation's core functions;
4. Whether the same work is being carried out also by Staff Members of the organisation under similar conditions as regards instructions, supervision and integration into the organisation;
5. Whether the worker is at the continuous disposal of the organisation, or can carry out secondary activities;
6. Whether the work is carried out using material and tools provided by the organisation, or whether the worker has to carry out the relevant investment;
7. The overall length of the work;
8. The duration of each individual contract and the number of such consecutive contracts; or
9. Whether there are breaks between the contracts.

Where the contract is entered into through an independent intermediary:

Where the work contract is not entered into directly between the worker and the organization, the question arises whether the presence of an intermediary is sufficient to shield the organization from any potential employer liability. Among the criteria that permit to verify whether the presence of the intermediary is such as to exclude the possibility of any employer liability on the part of the organization, are the following:

1. The role played by the intermediary in the selection of the worker;
2. The role played by the intermediary in determining the conditions to perform the work (site, work hours, remuneration, evaluation of the performance, etc.);
3. The role played by the intermediary in respect of payment of the remuneration; or
4. The role played by the intermediary in terminating the contract.

6.5 Application of the criteria to the facts of the case

Determining whether the reality of the facts entails overriding the terms of a contract must be made as a result of the evaluation of the circumstances of each specific case. The indicators are of significance, although they may have different weight. Furthermore, they do not give an automatic answer to the question. In particular, some indicators may be compatible both with an independent contract for the provision of services and with a *de facto* employment relationship. Their presence alone will therefore not give a clear answer, and other elements will need to be evaluated in addition.

Applying the criteria listed in section 6.4 to the facts as described in section 3 above, the Administrative Tribunal observes that there are elements suggesting that the formal labelling of the contract as an independent provision of services is correct, and there are elements suggesting that the reality of the facts diverged from the formal label of the contract. While the determination of the issue cannot be based on a mechanical counting of the elements supporting that the terms of the contract should be confirmed or overridden, for the sake of clarity it can be useful to refer to such elements, as will be done below.

The Administrative Tribunal finds it particularly significant that the Appellant had informally been offered the possibility, in 2014 or in 2016, to convert his contract into an employment contract. The Appellant eventually preferred to continue as an independent contractor, finding it more satisfactory from a financial point of view. The remuneration regulated in the independent contract was designed so as to compensate for the disadvantages that followed from not being a Staff Member. Therefore, the remuneration received by the Appellant under the independent contract was at a rate higher than the remuneration that would have been paid under a comparable employment contract. The higher rate of the independent contract was meant to compensate for the circumstance that the contractor had to pay taxes, for the lack of Staff Member benefits, for the lack of security that the contract would be renewed indefinitely, *etc*. This circumstance suggests that the label given to the contract deprived the Appellant of the protection granted to a Staff Member, but this detriment was compensated with a higher rate of pay.

The Administrative Tribunal also considers the Bank's explanation of the reasons for choosing independent contracts rather than employment contracts. On the one hand, this decision was dictated by the need not to exceed a certain number of Staff Members, so-called headcount reasons. This seems to suggest that the choice of independent contracts was intended to avoid that the Appellant appeared as a Staff Member, and that therefore there was no reality in the label. On the other hand, the decision was also due to the need to ensure that the work at all times is carried out by someone who has the necessary skills. This is particularly important in a sector like information technology, in which know-how is soon outdated and new skills may be required. In the testimony of Mr C., it appears that the Appellant was up-to-date in respect of parts of his area of competence, but not of all. The flexibility flowing from using independent contracts permits to terminate contracts with contractors who do not have up-to-date skills, and to enter into new contracts with contractors who have state-of-the-art know-how. This flexibility comes at a cost, because contractors are more expensive than Staff Members, as was seen above. The decision to invest in contractors rather than investing in continuing education of its Staff Members, is a managerial and organisational decision. The Administrative Tribunal notices that a comparable situation was deemed not to represent an abuse in WBAT 215, and was accepted as a functional justification for using independent contracts.

Furthermore, the Bank considered modernising and restructuring its IT activity, and eventually launched a restructuring project in 2016. Pending the restructuring, the Bank desired maintaining flexibility as to the number and qualification of its IT work force. The

need for flexibility required using independent contractors, and represents a functional justification.

Furthermore, the Administrative Tribunal finds it significant that, while the tasks carried out by the Appellant could initially be defined as project-related and the Appellant could independently organise its work as he deemed fit, from November 2014 his work acquired a more regular nature. From the same time, the contract was renewed for standardised one year-periods and no longer linked to the necessity to perform certain tasks, as was the case at the beginning of the contract relationship between the Parties. That the work regards tasks that are foreseeably required for an indefinite period was deemed in WBAT 215 to be an indicator of *de facto* employment. That the work is ancillary to the Organisation's business, was accepted as a basis to override the wording of the contract in ADBAT 24.

Regarding the intermediary, the Administrative Tribunal observes that its role was substantial at the beginning of the relationship between the Appellant and the Bank, particularly regarding the selection process. Later, however, the role of the intermediary lost in significance, as the determination of the work conditions, the negotiation of the remuneration and the renewal of the contracts were made directly by and between the Bank and the Appellant. There is, therefore, no basis to consider the presence of the intermediary as a shield against potential employer liability on the part of the Bank.

6.5.1 Evaluation

The above analysis shows that the initial choice to formalise the relationship between the Parties in an independent contract for the provision of services was not abusive, because the Appellant received a higher remuneration than if he had been a Staff Member, and therefore was compensated for being deprived of the protection that is accorded to Staff Members. The Appellant was aware of the advantages of this arrangement and declined to become a Staff Member when he was informally offered to consider this possibility in 2014 or 2016. By refusing to become a Staff Member, the Appellant continued enjoying a more advantageous treatment than the one he would have received if he had accepted to become a Staff Member. The Appellant's awareness is confirmed by the circumstance that the Appellant is a highly skilled professional who had independently, prior to initiating his relationship with the Bank, organised his activity in a sophisticated legal structure for the purpose of enjoying favourable tax treatment and limiting his liability.

It flows from the above that the Appellant's decision to formalise his relationship with the Bank in an independent contract for the provision of services was a considered decision based on the Appellant's own assessment of benefits and risks.

Furthermore, the Bank's decision to formalise its relationship with the Appellant in an independent contract for the provision of services was based on the Bank's exercise of its

organisational and managerial discretion. The need to ensure access to state-of-the art competence, as well as the need of flexibility pending the restructuring of the Bank's IT activity, constitute a functional justification for the choice of utilising independent contractors.

There is, therefore, no basis to consider the labelling of the contract as abusive or unjustified until 2014.

According to the ARC Report, starting from November 2014 and following a reorganisation, Appellant's work flow became less project-related; furthermore, the Appellant was increasingly subject to the Bank's instructions and supervision; also, the contract was renewed for one year-periods without reference to the completion of specific tasks, with negotiations being carried out directly between the Parties and without real involvement of the intermediary.

The question then is whether the increased subordination, as well as the standardised renewal of the contract from early 2014 until non-renewal of the contract in early 2018, are a sufficient basis to consider that the divergence between the label of the contract and the reality of the facts became abusive and without functional justification (as the tests were developed in ILOAT 701, ADBAT 24 and WBAT 215).

The Administrative Tribunal notices that in the course of these four years the Appellant has each year renewed the contract that he intentionally had entered into as an independent contractor. In addition, the Appellant chose in 2014 or 2016 to maintain his status as an independent contractor, for the purpose of continuing enjoying what he considered a more advantageous treatment reserved to independent contractors. In the period between 2014 and 2018 the Appellant continued enjoying the advantageous treatment as an independent contractor, and did not seek transforming the contract into an employment contract. There is, therefore, no basis to consider the contract abusive as from 2014.

Also, there is no indication that the Bank lost in 2014 the functional justification for using an independent contract. The internal reorganisation that moved the Appellant to a function where he was receiving a steady flow of work, rather than working on a project basis, did not affect the basis for the functional justification of using an independent contract. The functional justification was, on the one hand, the Bank's managerial decision to invest in more expensive independent contractors to ensure access to state-of-the-art competence, rather than investing in continuing education of its Staff Members; and, on the other hand, the Bank's managerial decision to maintain flexibility pending its restructuring plans, preserving the possibility to outsource its IT function.

The Administrative Tribunal further observes that the Appellant's considerations, made in 2014 or 2016, about the financial preferability of remaining an independent contractor rather than enjoying Staff Member benefits, is not compatible with the assumption that the

Appellant, starting 2014, developed a legitimate expectation to be entitled to Staff Member benefits.

The Administrative Tribunal finally observes that the Appellant's request for severance pay is not consistent with the Appellant's behaviour throughout the duration of the contract. It is not until the contract was not renewed in 2018, that the Appellant decided to seek recognition of the status as a *de facto* Staff Member. The Appellant requests to receive the severance pay that he would have been entitled to, had he formally been a Staff Member. The higher rate of remuneration that the Appellant received as an independent contractor, however, was also meant to compensate for the lack of security and benefits that followed from not being a Staff Member. This higher rate of remuneration was at the origin of the Appellant's evaluation in 2014 or 2016 that it would be more advantageous to continue working as an independent contractor. Two or four years later occurred the eventuality for which the Appellant received higher remuneration throughout his contractual relationship with the Bank: the contract was not renewed. Requesting severance pay as a Staff Member, after having enjoyed the higher remuneration that was meant to compensate for the lack of Staff Member benefits, is self-contradictory.

The Administrative Tribunal also finds it peculiar that the remedies sought by the Appellant are selective. The Appellant only seeks one of the possible remedies that flow from asserting his Staff Member status, namely severance pay. This is probably in part due to the circumstance that the Appellant waited until the termination of the contract to claim that he has the status of a *de facto* Staff Member. Had the Appellant sought recognition of his status while the work relationship was still ongoing, the recognition (if any) could have had prospective effect for all purposes.

The Administrative Tribunal recognises that significant difficulties would arise if all the effects of having been a Staff Member for a number of years should be recognised with retroactive effect. Apart from the question of a possible time bar of some claims, the question would arise of retroactive payment by the Bank of annual leave, professional and social insurance, pension, etc. However, also the question of restitution would arise: the Bank has been paying a higher rate of remuneration to the Appellant to compensate for the lack of Staff Member benefits. If the recognition of Staff Member status means being treated as a Staff Member for all purposes and thus being retroactively entitled to all Staff Member benefits, for the sake of reinstating the contractual balance between the Parties it would be necessary to reimburse the excess payments made by the Bank. This would apply also to the income taxes paid by the Appellant on the remuneration. Were the Appellant to be recognised as a Staff Member, he would have received a net remuneration from the Bank instead of the gross amount that he received, and that covered the taxes payable by the Appellant as an independent contractor.

The Administrative Tribunal recognises that these issues are problematic. The Appellant decided to take a pragmatic approach and sought only one of the possible remedies to which he would be entitled, if his allegation were to be accepted. However, considering only one of the Staff Member benefits does not seem to be consistent with the assumption for according the remedy, *i.e.* the recognition of Staff Member status.

Finally, the Administrative Tribunal has reviewed the 2012 Grievance Committee Recommendations, that concluded that the 2012 appellants were to be deemed *de facto* Staff Members of the Bank. The President accepted these Recommendations. The Administrative Tribunal examined the 2012 cases to verify whether they may be used as guidelines in this present case. While the underlying law, to the extent it corresponds to the assessment of the law that was made in section 6 above, is of relevance, the application of the law to the specific case has to be made on the basis of the circumstances of each specific case.

The Administrative Tribunal observes that there are significant similarities between the cases in which the 2012 Recommendations were rendered and this present case, but also considerable differences.

In particular, all appellants were recruited as independent contractors through a third party-agency, and most of the characteristics that have been described in this present case applied equally to the 2012 cases. The main differences seem to be that, in the 2012 cases: (i) the remuneration was not calculated so as to compensate for the lack of Staff Member benefits (while the Bank argued that the pay rate included a compensation, the Grievance Committee found this unpersuasive. In the present Appeal, however, the Appellant recognised that he received remuneration at a higher rate than as if he were a Staff Member); (ii) the appellants were not offered to consider whether they desired to transform their legal relationship into an employment relationship and did not decline to pursue the transformation because the independent contracts were financially more attractive than becoming a Staff Member; and (iii) the evidence showed that termination of the independent contracts was purely due to budgetary reasons and could be deemed to fall within the scope of reduction for redundancy, and did not answer to a functional justification.

The Administrative Tribunal observes that these factual differences have great significance in the application of the law to the specific cases, and that therefore no guidance may be found in the 2012 Recommendations.

On the basis of the foregoing and on balance, the Administrative Tribunal finds that there is no basis to consider the Appellant a *de facto* Staff Member of the Bank.

The proceedings leading to the decision of this case have been time consuming. The Appellant was successful in the jurisdictional phase of the proceedings, and this was recognised by the PARD, which decided to cover the legal costs incurred by the Appellant in that phase of the proceedings. The Appellant was not successful in the merits, as explained above. The Administrative Tribunal does not find it appropriate to order the Bank to cover the Appellant's legal costs for this phase of the proceedings.

Concurring opinion: Professor Spyridon Flogaitis, member of the Panel, is of the opinion that following the facts exposed above, under any possible legal interpretation of them the Applicant has not proved that he was a staff member and therefore he does not come under the scope of this Administrative Tribunal, he lacks locus standi and the Administrative Tribunal must dismiss his appeal.

Concurring opinion: Mr de Cooker, member of the Panel, concurs with the overall conclusion of this Panel that Appellant cannot be considered a Staff Member of the Bank.

He notes that this Administrative Tribunal accepted jurisdiction in this case and referred the matter to the ARC for fact-finding. This Panel was therefore only concerned with the analysis of the facts and the application of the law thereto.

7. Decision

The Administrative Tribunal dismisses the Appeal.

4 October 2019
For the Administrative Tribunal

Giuditta Cordero-Moss
Chair of the Panel