

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

Case No. 2020/AT/01

Appellant

vs

European Bank for Reconstruction and Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Spyridon Flogaitis (Chair)

Giuditta Cordero-Moss

Chris de Cooker



I. Introduction and Procedural history

1. The Appellant applied on 3 January 2019 for the position of Associate Director of a Department (the "Department") of the Bank, and in doing so she competed with three other candidates. It was the service where she was working daily and often deputizing. She was not selected, but listed number four.
2. On 29 January 2019, an Administrative Decision was conveyed to the Appellant (the "Non-Selection Decision") not to select her for the vacant and advertised position of Associate Director within the Department (the "Vacancy").
3. On 8 March 2019, the Appellant submitted to the Managing Director for Human resources (MDHR) a Written Request for reviewing the Non-Selection Decision, but on 10 April 2019 it was decided to uphold the Non-Selection Decision. As the Appellant remained dissatisfied with the outcome of the review, she submitted on 9 May 2019 a Request for an Administrative Review to the President of the Bank.
4. On 30 May 2019, the President of the Bank referred the Appellant's Request to the Chair of the Administrative Review Committee (ARC) for its review.
5. The MDHR and the ARC undertook a review of the available information and both independently made findings in their assessments of the impugned Non-Selection Decision. Specifically, the MDHR and the ARC concluded that there was no grave procedural irregularity or serious failure in following the internal law of the Bank. In any case, the Selection Panel had written assessments and scoring for their decision, and the way in which they did this was not in violation of any internal law of the Bank.
6. In its Report and Recommendation of 7 October 2019, the ARC recommended that the President should uphold the Non-Selection Decision, which, on 29 October 2019, he did (the "PARD").
7. On 17 January 2020, the Appellant submitted a Statement of Appeal against the PARD upholding the Non-Selection Decision. The Appellant seeks as remedies: (i) compensation for harm and suffering caused, in the amount of £192,000; (ii) promotion within the Department for which she competed, or elsewhere within the Bank at the level or equivalent of Associate Director, or, in lieu of promotion, payment amounting to three years' annual salary (i.e. £192,000) and; (iii) recovery of legal expenses incurred.
8. On 27 February 2020, the Appellant submitted a request to submit a rejoinder to address two issues that were specified in the request. The Appellant recognised that the applicable procedural rules do not provide for a second exchange of submissions, but relied on Rule 2.05 of the Appeals Process Directive, which permits, in exceptional cases, to modify the application of the procedural rules. The Tribunal did not find that the conditions for applying this provision were met. Under Article 4 of the Directive on the Appeals Process (DIR/2019/14) the written



procedure consists only of an appeal and a response. Rule 2.05 permits, in exceptional circumstances, modifications in the application of the procedural rules but not to change them. Appellant has on 27 February 2020 thus submitted unsolicited comments on Respondent's response. The Tribunal holds that this constitutes a violation of the written proceedings and decides that these comments shall not constitute part of the case file. However, Spyridon Flogaitis is of the opinion that independently from the above expressed opinion of the majority, this request should be rejected altogether because it was presented in violation of any existing procedural rules, i.e. outside the foreseen by the Law exchange of briefs between the applicants, and anyway for not having observed any existing deadline. The Administrative Tribunal is Law bound and cannot, especially for what concerns procedures go beyond mandatory rules.

II. The Facts

9. The present case is about a staff member of the EBRD who was an unsuccessful candidate in a selection exercise.

10. The Appellant is an employee of the Bank. She joined the EBRD just over three years after the Bank commenced operations in London in April of 1991, and she has now given 25 years of undisputed service to the institution, all of which has been undertaken within the Department. For the last 10 years, the Appellant has held the position of Principal Portfolio Manager within the Department and, for a similar period of time, she has fulfilled the additional role of the Department's Acting Associate Director during the absences of her line manager.

11. For almost a decade, the Appellant consistently deputized, as and when necessary, as the Department's Associate Director if she was available. She found support for her expectation to be selected as Associate Director in her performance appraisals, in which she was deemed both suitable and qualified to lead a Department team.

12. The Appellant applied on 3 January 2019 for the position of Associate Director of the Department, and in doing so she competed with three other candidates. Her application for the position was not successful. The Appellant believes that her dignity has been undermined and she feels embarrassment at being subordinated now to younger colleagues within the Department. She adds that her health has deteriorated, as medical certificates show.

13. On 29 January 2019 the Non-Selection Decision was conveyed to the Appellant, according to which she was not to select her for the Vacancy, as confirmed on 29 October 2019 by the PARD.

14. The Non-Selection Decision was taken following a competitive selection process. The Selection Panel shortlisted the Appellant, who in turn was given the opportunity, during the recruitment process, to demonstrate to the panel how her skills and competencies matched the requirements of the position. According to the Selection Panel, the Appellant did not demonstrate that she was the most suitable candidate, despite the Committee's conclusion that



"[the Appellant] came across well in interview and they considered that she was a very experienced [Department] manager". According to the Selection Panel, the Appellant "lacked some of the leadership qualities that would make her successful in running a team in our new changing environment and would struggle with implementing changes she did not agree with". In contrast, the Selection Panel considered that, because the successful candidate had clear ideas regarding the strategic direction she would provide to the team, gave concrete and useful examples for resolving conflicts and set out the managerial action she would take to advance the team's work, she successfully demonstrated the strongest managerial and leadership skills required for the Vacancy. The MDHR and the ARC separately concluded the same, namely that "the selection panel did follow a fair process in arriving at the selection of the preferred candidate and that it was carried out in good faith"

15. On 17 January 2020, the Appellant submitted a Statement of Appeal against the PARD, which upheld the Non-Selection Decision. In deciding to uphold the Non-Selection Decision, the President took into account the Committee's findings of fact and conclusions, according to which the decision not to select the Appellant for the Vacancy was made in good faith and in a fair manner consistent with the Bank's internal law.

III. The Appellant's position

16. The Appellant asserts that the PARD was not fair and indeed tainted by procedural irregularity because the Selection Panel did not use an assessment matrix to provide its feedback and scoring of the candidates. The Appellant considers that the ARC's findings were *"manifestly erroneous and/or perverse"* when it concluded that a guidance on the Bank's intranet did not form part of the internal law of the Bank and that any failure to follow the guidance did not amount to a breach.

17. The Appellant further alleges that the Non-Selection Decision is procedurally irregular because a member of the Selection Panel left the room before the completion of the interview, and, despite the Appellant having raised this to the ARC, the ARC failed to make any findings on her claim. Thus, the Appellant considers that the PARD is undermined as a result of the failure of the ARC to make such findings, particularly since it is alleged that one member of the Selection Panel left the room when the question relating to leadership and managerial competences were asked, which the Appellant insinuates were the most relevant interview questions for the Vacancy.

18. Furthermore, the Appellant submitted a complaint for investigation to OCCO. The complaint was made against the member of the Selection Panel who left the room and the Hiring Manager. The complaint alleged that they both conspired to deliberately mislead the ARC in its review of the Non-Selection Decision during the Administrative Review Process.

19. On 31 January 2020, the Appellant was made aware of the outcome of OCCO's initial inquiry, in which OCCO found there to be an insufficient level of reliable and probative evidence to justify a formal investigation of misconduct under the Bank's Conduct and



Disciplinary Rules and Procedures. OCCO deemed that no further action would be taken on the complaint and closed the matter. The needed thorough and independent review was undertaken to investigate the Appellant's claims of misconduct against the Selection Panel, and therefore the Bank had discharged its duty to the Appellant by ensuring that her complaints of wrongdoing against other staff members of the Bank were promptly and independently investigated.

20. In the Statement of Appeal, the Appellant has expressed *"her embarrassment at being subordinated now to younger colleagues within [the Department] with far less experience and service"* and asserts that this has led to a *de facto* demotion. The Appellant further maintains that *"those within [the Department] and indeed, within other departments apparently know and accept this as a matter of established fact"*.

IV. The Respondent's position

21. The Respondent in the present case denies all the grounds for review proposed by the Appellant, especially that she was discriminated against during the selection exercise, and in the most central points of the Appeal highlights the following:

22. The Respondent notes that the Appellant was given a fair opportunity to be considered for the selection and corresponding promotion, and in fact she was shortlisted, but finally she was listed four out of four candidates.

23. As for the alleged procedural irregularities, the Respondent reminds that in the Report and Recommendations of the ARC, it is noted that *"the alleged departure of one of the panel did not materially undermine the selection process."* The MDITR also inquired into this allegation in her review of the Non-Selection Decision. Both the member of the Selection Panel who left the room and the Hiring Manager independently reported that the former arrived late to the interview, but that they did not recall her leaving. Furthermore, she provided a copy of her calendar evidencing that she did not have an immediate meeting following the interview (scheduled from 12:00-13:00), which was contrary to the Appellant's claim that she excused herself at approximately 13:05 by announcing she had another meeting.

24. Furthermore, the Bank notes that the Appellant has not submitted any evidence or statements from anyone in the Department or in any other department with respect to the perceived demotion. The Appellant's substantive role with the Bank and her job description have not changed. She continues to report to the same band and level of Associate Director, as she did previously. The relative age of the Successful Candidate (i.e. being *"younger"*), who is now the Appellant's line manager, does not in itself constitute a demotion.

V. The Tribunal's evaluation

25. The Appellant contends that the decision not to select her for the Vacancy, as confirmed by the PARD, was improperly motivated and tainted by procedural irregularity.



26. The Appellant's main legal argument is that, although a staff member does not have a right to be selected for a Vacancy, she had a reasonable expectation of succeeding the outgoing incumbent and a right to *"be treated fairly in competing for it and that the [Bank] denied her that right"* Despite that, she felt that she was discriminated against on the basis of her age, as, according to her, it becomes evident in the Selection Panel finding that she would struggle to implement changes she did not agree with. This is further demonstrated by the Selection Panel appointing *"the staff member [...] [who] was as a matter of fact, eighteen years younger and had a fraction of her service and managerial experienced with the [Bank]"*. Furthermore, the Non-Selection Decision was procedurally irregular and improperly motivated as the successful candidate did not *"comply with the respondent's published selection criteria"* particularly since the successful candidate's *"ability to lead and manage was not at all established"*.

27. On another ground, the Appellant sustains that the selection procedure was tainted by a severe procedural irregularity, because one of the Selection Panel members left the interview room early, a fact that the ARC did not establish as true or not, which *"undermines the integrity of its conclusions and recommendations to the President"*

28. According to the Appellant, as a result of the Non-Selection Decision, the Appellant *"suffered a de facto demotion"* and this has resulted in a loss of dignity.

29. The Tribunal accepts the position of the Bank on all those issues, because, in fact, the general idea of the Appellant as it comes out from the file of the case is that her age and long standing expectation to succeed to her supervisor constitute enough reasons to be successful in a selection and promotion exercise. However, it is common knowledge that, despite all respect that the Tribunal has to the career and expectations of staff members giving their best to be successful in their working environment, an Appellant, in order to be successful before the Administrative Tribunal, needs to prove that the selection procedure was obviously and without any doubt tainted by unfairness, which is very difficult, especially in view of the fact that in those procedures the Administration has broader discretionary powers. Anyway, the Tribunal is not convinced by the arguments and the material brought to its attention by the Appellant in the present case.

30. As for the procedural irregularity invoked by the Appellant, except from the doubts based on the information provided by the Bank, the Tribunal notes the following:

31. Generally speaking, any procedural irregularity must be material, and it can only be a ground for reversing a discretionary decision if it is proved that it directly affected the outcome of the decision. The Appellant claims that the early departure of a member of the Selection Panel from the interview is material, because it occurred when questions relating to managerial and leadership competencies were asked. Thus, even if the person left the interview room as alleged by the Appellant, the latter would have had opportunities throughout the entire interview to answer questions to demonstrate to the Selection Panel her leadership and managerial competencies.

32. Moreover, the Tribunal finds no reason to question the credibility of the Selection Panel and their statements as it relates to whether the person concerned left the room during the interview. Similarly, there is no basis to disregard the ARC's findings in which it determined that an



alleged early departure did not materially undermine the process. Furthermore, the Bank avers that the Appellant has not successfully demonstrated how this claim amounts to a serious defeat in the selection process, i.e. that in any way would have substantially changed the Selection Panel's overall assessment of the Appellant's candidacy where they ranked her fourth out of the four candidates.

33. However, apart from those considerations, the Tribunal wants to take this opportunity and address the issue of the importance of formalities and procedures in more general terms, following *inter alia* the Judgement no 1304/2006 of the former United Nations Administrative Tribunal (UNAT).

34. The Tribunal notes the importance of formalities and procedures in decision-making process. As a matter of principle, if the Administration is to produce legal administrative decisions, all necessary formalities and procedures must be respected. However, lack of formalities and procedures or *vice de forme*, is substantially different from other grounds for review of administrative action, as it should not necessarily lead to the annulment of the decision. The Tribunal takes judicial notice of the legal tradition which transcends administrative law systems and has become a general principle of administrative law that, in reviewing the observance of formalities and procedures, account must be taken, *inter alia*, of:

- a) the fact that there are formalities which are substantive, and other which are accessory,
- b) the objective pursued by the formality or procedure,
- c) the factual circumstances of a particular case,
- d) the behavior of the Appellant and eventually its influence on the lack of observance, and
- e) the practical effect that the annulment of the administrative decision would have on the material outcome.

35. Following the general principle of administrative law, the Tribunal concludes that there is no element in the file of the impugned decision that gives the slightest indication that the decision was taken in disregard of the *substantive* rules of administrative law; that there would be no practical effect on the substance of the decision taken, should the selection exercise be repeated; and that the factual circumstances of the decision taken support these findings. Thus, the Tribunal recognizes that, despite the fact that a formality may have not been observed, it would be not, under the circumstances of this case, crucial. If the selection exercise had to be repeated, there is sufficient evidence that the decision would be identical.

36. In the light of the above considerations it becomes obvious that the claims of the Appellant that she was demoted or that she suffered health problems because of her failing to be successful in this promotion exercise are legally unsubstantiated, although the Tribunal understands the way the Appellant felt and perceived the outcome of that procedure.

VI. Decision



37. Therefore, the appeal is rejected in its entirety.

18 March 2020

For the Administrative Tribunal

A handwritten signature in blue ink, appearing to read 'Flogaitis', with a stylized initial 'S'.

Spyridon Flogaitis
Chair of the Panel