THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Case No. 2020/AT/03

Appellant

vs

European Bank for Reconstruction and Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Chris de Cooker (Chair)

Giuditta Cordero-Moss

Maria Vicien-Milburn

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30 April 2020

I. Introduction

1. In the present appeal Appellant claims to hold an implied contract of employment after having worked at the European Bank for Reconstruction and Development ("EBRD" or "Bank") for more than fifteen consecutive years following the decision communicated to her that the Bank would not renew the service contract with her company beyond its expiry date on 6 October 2018.

2. On 1 October 2018, Appellant filed a Request for Review of an Administrative Decision (RARD) with the Bank's President, arguing that she was a *de facto* employee of the Respondent and that she should have, therefore, been treated as such and been granted the Respondent's statutory severance pay.

3. On 22 October 2018, the Bank's President rejected her request for review because she had no standing under the Bank's Directive on the Administrative Review Process and redirected her to the arbitration mechanism as foreseen in the consultancy contract between Glencairn Communications Limited and the Bank dated 13 August 2008, and which had been regularly extended. He added that this admissibility decision could be challenged under the Bank's internal justice system. Appellant initiated arbitration proceedings on 17 December 2018. On 10 December 2019 the arbitral tribunal held that it had no jurisdiction to determine Appellant's claims.

4. Appellant lodged an appeal with the Tribunal on 14 February 2020. She requests the Tribunal to:

- accept this appeal as receivable *ratione temporis*;
- set aside the President's decision of 22 October 2018;
- order the Bank to transmit her RARD to the Administrative Review Committee;
- order the Bank to reimburse all actual and possible future expenses incurred by the Appellant because of the Bank's deliberate misleading information, the Bank having requested that the Appellant pays a six-figure sum for its legal costs incurred before the arbitral tribunal;
- order the Bank to pay moral damages in the amount of GBP10,000 on account of the Bank's gross violation of its duty of care and obligation to act in good faith which has caused the Appellant not only an unbearable level of stress but also unreasonable delays in resolving the dispute; and
- order the Bank to pay reasonable legal fees in relation to this appeal.

5. In the case before the Tribunal Appellant thus, first of all, requested the Tribunal to waive the statutory time limits under the Appeals Process Directive and to declare the appeal admissible in view of the misleading attitude of the Bank.

6. The Tribunal requested the Bank's response on the point of admissibility.

7. The Tribunal's Decision therefore only deals with the issue of admissibility.

II. Procedural History

8. The present appeal was lodged on 14 February 2020.

9. On 4 March 2020, the appeal was forwarded to the Bank with the request to provide their comments on the admissibility of the appeal within 15 working days, i.e. by 25 March 2020 at the latest.

10. The Bank replied on 24 March 2020.

11. On 30 March 2020 the Tribunal wrote to both parties. It noted that both parties referred to an arbitral award rendered in the dispute between them. The Tribunal deemed it opportune to be acquainted with this award and requested a copy without delay, this request being without prejudice to the Tribunal's position in law.

12. Copy of the award was communicated to the Tribunal on 3 April 2020.

III. The Facts

13. Appellant worked from September 2003 until November 2007 for the Bank through an agency (JMMS Contract Ltd) under seven consecutive service contracts. As from November 2008, and after maternity leave, she engaged through her own company Glencairn Communications Ltd. in twelve continuous direct service contracts with the Bank as Technical Services Server Engineer - with one four-month interruption for a second maternity leave.

14. In a meeting on 4 September 2018 her Operation Leader, a staff member of the Bank, informed Appellant that the contract would not be extended beyond its expiry date of 6 October 2018.

15. On 11 September 2018, Appellant wrote an e-mail to her Operation Leader referring to the 4 September 2018 conversation and asking for the reasons of the termination of her employment. The Operation Leader replied on 20 September 2018 that her contract was a consultancy contract regulating a commercial transaction between the Bank and Glencairn Communications. As expressly stated in the contract, it did not create an employment relationship between her, or any other personnel of Glencairn Communications, with the

Bank. He added that he had informed her that the Bank would not extend the contract beyond the end of its term as a mere courtesy and that she should direct any questions she might have regarding her situation to Glencairn Communications. He copied his answer to a colleague in the Procurement Department who, on the same day, confirmed that Appellant had been providing services to the Bank as an independent consultant via Glencairn Communications. On the expiry of the Term of Engagement, there was no obligation to extend it for a further period, even if it had been extended on previous occasions. There was no requirement for formal written notice as the contract would expire naturally and was not being suspended or terminated prior to the Contract End Date.

16. On 1 October 2018, Appellant's lawyer submitted a Request for Review of an Administrative Decision (RARD) with the Bank's President, seeking remedies for procedural irregularities and breach of contract arising from the termination of her appointment and contending that she had been employed by the Bank for over fifteen years and was entitled to a severance package in accordance with the Staff Handbook.

17. She was seeking the following remedies:
- 49 days' payment in lieu of notice;
- payment of a severance pay equivalent to 18 months' gross base salary plus a lump sum of three months' salary;
- one month salary as compensation for breach of contract; and
- payment of reasonable legal costs.

18. On 22 October 2018, the President replied as follows:

> **Decision by the President on the Admissibility of your Request for Review**
>
> Dear Ms Sang,
>
> I refer to your request for review of an administrative decision (your "Request for Review") submitted to me on 1 October 2018 pursuant to the Bank's Directive on the Administrative Review Process (the "Directive") in relation to a decision not to extend a contract for the provision of consultancy services between Glencairn Communications Ltd ("Glencairn") and the EBRD (the "Consultancy Contract") beyond the expiration date of such contract.
>
> As required pursuant to Section IV, paragraph 6.4.1(d) of the Directive, I have ascertained the admissibility of your Request for Review.
>
> I note that you do not fall within one of the categories of persons specified under Section IV, paragraph 2 of the Directive who may initiate the Administrative Review Process. I also note that the decision you are referring to does not fall within the types of administrative decisions listed in Section IV, paragraph 3 of the Directive as being subject to the Administrative Review Process set out in the Directive.
>
> Consequently, I have determined that your Request for Review is not admissible for review under the Directive.

You provided services to the Bank pursuant to the Consultancy Contract as Glencairn's designated expert/consultant. Your relationship with the Bank is therefore governed solely by the terms and conditions of that Consultancy Contract.

Specifically, Section 14 of the General Conditions enclosed to the Consultancy Contract provides that the Consultancy Contract should not *"be construed as establishing or creating any relationship other than that of independent contractor between the Bank and [you]."* This is reaffirmed by Section 4 of the General Conditions, which identifies your privileges and immunities as being those accorded to an expert performing a mission for the Bank under Articles 51 and 52 of the Agreement Establishing the Bank, and not those accorded to a staff member.

Section 16 of the General Conditions sets out a mechanism for settlement of any dispute, controversy or claim arising out of, or relating to the Consultancy Contract which cannot be amicably settled, namely arbitration in accordance with UNCITRAL Arbitration Rules. Accordingly and as recently held by the EBRD Administrative Tribunal, where a consultancy contract is validly executed between the parties, then the agreement to arbitrate claims resulting from such consultancy contract is binding on the parties. I note that your signature and date validly concluded the Consultancy Contract between your private limited company, Glencairn, and the Bank thus accepting arbitration as the mechanism for settlement of disputes arising in connection with the Consultancy Contract. Therefore, should you have any claims for compensation or otherwise arising as a result of, or in connection with the Bank's decision not to extend the Consultancy Contract beyond the date of its contractually agreed expiration, or any other claims in relation to the Consultancy Contract such claims should be resolved through the mechanism for settlement of disputes as provided in the terms of that Consultancy Contract.

This response constitutes my Administrative Decision under Section IV, paragraph 6.4.1(e) of the Directive and is subject to Appeal under the Bank's Appeals Procedures, attached for your convenience.

Yours Sincerely,

19. On 30 October 2018, Appellant sent an e-mail to the Bank's President informing him of her intent to initiate the arbitration process in accordance with clause 16 of the General Conditions of the contract between Glencairn Communications and the Bank. She mentioned that she could not have her dispute with the Bank settled through the EBRD's internal justice system, nor could it be settled in the UK's domestic employment system, which would both be free of charge. She would find it therefore unfair if the Bank did not cover the costs of the arbitration process, regardless of the eventual outcome. She emphasized that she was not referring to the parties' legal fees, but simply to the cost of the administration of the arbitration process itself. She asked for confirmation that the Bank would cover the arbitration fees.

20. The President replied on 8 November 2018. He recalled that under the UNCITRAL Rules referred to in Clause 16 of the Contract, the party to initiate arbitration must provide formal written notice of arbitration to the other party. It is, therefore, when the Bank receives such notice of arbitration from Glencairn Communications, in line with the process prescribed

by the Rules, that arbitration proceedings commence. He further explained that the costs of arbitration are determined by the Rules, are fixed by the arbitral tribunal and borne by the unsuccessful party. The arbitral tribunal, however, has the discretion to apportion costs between the parties if it considers it reasonable. Accordingly, the Bank would only cover any costs of arbitration if so instructed by the arbitral tribunal in line with the Rules.

21. On 14 November 2018, Appellant asked the President by e-mail to reconsider his decision, which would make it extremely difficult for her to access justice.

22. On 26 November 2018, the Bank's Chief Counsel answered by e-mail as follows:

> Dear Sang,
>
> The President has asked me to respond to your message below.
>
> You signed the contract and its subsequent extension(s) between Glencairn Communications Ltd. and the EBRD, which came to its contractual end on 7 October 2018. The contract expressly provides that any dispute, controversy or claim, arising out of or in connection with the Contract shall be resolved through arbitration in accordance with UNCITRAL Rules. You were well aware of and have expressly accepted the dispute resolution mechanism provided for in the Contract for the resolution of disputes arising out of or in connection with such contract. As noted by the President, in accordance with the UNICTRAL Rules, the costs are covered by the losing party, or in some cases the arbitral tribunal can apportion the costs between the parties.
>
> Best regards,

23. On 17 December 2018, Appellant submitted the Notice of Arbitration.

24. On 10 December 2019 the arbitral tribunal accepted the Bank's objection to jurisdiction and held that it had no jurisdiction to determine Appellant's claims.

25. On 14 February 2020, Appellant lodged the present appeal.

IV. Appellant's position

26. Regarding the admissibility of the case, Appellant observes to be fully aware of the procedural time limit to file an appeal and understands that – in normal circumstances – her appeal would be dismissed as time barred. However, Appellant submits that the Bank has misled her in, first, advising her to address her claims to her personal limited company and, then, in redirecting her to the arbitration mechanism. She also submits that the Bank has further shown an unprecedented level of bad faith by arguing before the Arbitral Tribunal that she should have availed herself of the internal justice system, which was open to her. She

considers that the way she has been set up by the Bank constitutes a gross breach of the duty of care and obligation to act in good faith. It was in her view entirely reasonable to trust the Bank's 22 October 2018 decision, where she was explicitly redirected to the arbitration mechanism on the basis of an *a contrario* interpretation of the 14th September 2018 EBRDAT Judgment in Case 2019/06. She could not predict that the Bank – once arbitration had started – would argue that arbitration was not the correct venue for her case. Had the Bank considered that the internal justice system was open to Appellant – as it claimed later during the arbitration process – then it should have clearly said so, in accordance with its duty of care and obligation to act in good faith. She recalls that she sent an email to the President advising him that she was planning to initiate the arbitration process and asked the Bank to cover the arbitration costs. Had the Bank considered that the internal justice was open to the Appellant as it later claimed before the arbitral tribunal, it had a further opportunity, and the obligation, to correct the mistake the Appellant was about to make.

27. Appellant draws the attention to Article 4.03 (b) of the Appeals procedures and rules of procedures which provides:

> A Statement of Appeal may be submitted after the sixty-day period has elapsed, but only if the Tribunal is satisfied that there were justifiable grounds for the delay and that a refusal to consider the Appeal would cause substantial injustice to the Staff Member.

28. Appellant contends that she has been deliberately misled by the Bank as to the right forum in which to have her claim heard and that there are therefore justifiable grounds for the delay in filing her appeal. She also considers that a refusal to consider the Appeal would cause an obvious substantial injustice to her as her claim would eventually never be heard. Consistent with the above Appeals procedures and rules of procedures, the longstanding and well-settled case law provides that while procedural time limits should be strictly adhered to, there are exceptions to this general principle, one of them being where the Organization misleads the claimant.

V. Respondent's position

29. The Bank puts forward three arguments in support of its view that the case is inadmissible.

30. In a first argument it submits that the appeal is inadmissible *ratione temporis* and that only in very limited and exceptional circumstances the strict time limits may be waived, which is not the case here. It dismisses in this respect the argument that Appellant avers that the time limits should not be strictly applied because she has a right to have her *de facto* employee claim heard on the merits and that she was not afforded this opportunity when she pursued her claim through arbitration. It contends in this respect that the Bank never denied Appellant

access to the Bank's internal justice system and that Appellant was not deliberately misled by the Bank. It adds that there is no principle whereby time limits are waived because an appellant was unsuccessful in external proceedings and that at any point during the arbitration proceedings, Appellant could have requested the Tribunal to extend the time limits for appealing the President's Decision had she any concern that she was misled into the arbitration proceedings by the Bank.

31. It adds in this respect that the President took an admissibility decision based on his assessment of Appellant's Request for Review and the requirements of the Appeals Process Directive. He considered that Appellant's legal relationship with the Bank was not governed by an employment contract (i.e. she was in possession of commercial consultancy contracts and not a letter of appointment as required by the Bank's Staff Handbook) and that the decision she was requesting a review of was not a decision that was reviewable *ratione materiae.* He did, however, offer the option to Appellant, in case she disagreed with the President's assessment, to appeal the President's Decision to the Tribunal. This was therefore not a final decision for the purposes of the Bank's internal justice system.

32. In a second argument Respondent contends that the Appeal should be dismissed as the arguments and claims raised by Appellant have been resolved through the arbitration proceedings and have the force of *res judicata.* The same matter between the same persons involving the same cause of action may not be adjudicated twice and an appellant cannot continue to bring the same complaint.

32. Thirdly, Respondent denies the accusation that it acted in bad faith when, during the arbitration proceedings, it argued that Appellant should have availed herself of its internal justice system, which was open to her. The 22 October 2018 Decision was not an act of bad faith, but a legitimate and reasonable assessment based on his interpretation of the Directive. In addition, the Bank's right to address and respond to the legal issues set out in the arbitration claim, as the respondent in the proceedings, cannot amount to an act of bad faith.

33. The Bank notes that it was Appellant who made the claim to the arbitral tribunal that arbitration was the correct and only forum to have her claims heard because she was denied access to the Bank's internal justice system. The arbitration proceedings were carried out fairly and in adherence with due process. The Bank never gave her legal advice or purported to about whether arbitration was the correct forum to hear her alleged claims against the Bank.

34. Respondent concludes that any prejudice or injury Appellant has possibly suffered, which the Bank rejects, was not as a result of actions or bad faith by the Bank but by her own actions and decisions.

VI. The Tribunal's evaluation

35. The Tribunal notes that the parties did not request an oral hearing or additional documents.

36. The Tribunal underlines that the present decision only deals with the question of admissibility. Appellant argues that, if the Tribunal rejects jurisdiction in this case, she will have been denied access to justice. The Tribunal emphasizes that any judicial proceeding is subject to conditions on admissibility and jurisdiction. There is no denial of justice if an appeal does not meet these preliminary conditions and the matter is not heard on the merits.

37. The Tribunal had access to the arbitral award, which was of assistance for better understanding the parties' arguments.

38. The Tribunal further observes sometimes important imprecisions, contradictions and lack of clarity in several documents and arguments presented in the present case. One essential element is whether Appellant was, and is, acting as an individual or as Director of her company and how the Bank has considered her throughout the dispute.

39. For example, the contract between the Bank and Glencairn Communications Ltd. does not indicate who was representing the respective parties and was signing the contract. The contract was signed by Appellant, most likely in her capacity as the Director of the company, but this is not clear. The extension letters were all addressed to Appellant, likely, again, as the Director of her company.

40. Appellant submitted the RARD as an individual, which is logical since a company cannot be or pretend to be a Bank employee. The 22 October 2018 Decision ("Decision") specifies, first, that Appellant did not fall within one of the categories of persons specified under Section IV, paragraph 2 of the Bank's Administrative Review Process Directive on who may initiate the Administrative Review Process, and that the decision she was referring to did not fall within the types of administrative decisions listed in Section IV, paragraph 3 of the Directive.

41. Secondly, the letter stipulates that if Appellant *("you")* should have any claims for compensation or otherwise arising as a result of, or in connection with the Bank's decision not to extend the Consultancy Contract beyond the date of its contractually agreed expiration, or any other claims in relation to the Consultancy Contract, such claims should be resolved through the mechanism for settlement of disputes as provided in the terms of that Consultancy Contract, *i.e.* arbitration. Here the Bank thus clearly suggests to the individual, and not to the company, that her claims should be resolved through arbitration.

42. It is true that the Bank had, on 11 September 2018, advised Appellant that "she should direct any questions she might have regarding her situation to Glencairn Communications." The Tribunal observes that this argument, although formally correct, is not reasonable in fact, as the Bank suggested that the Appellant direct a claim against the Appellant's own company, which was a different legal entity only formally, but not in practice. This argument has not been repeated in the present proceedings nor was it used in similar cases before the Tribunal.

43. On 30 October 2018 Appellant informed the Bank's President of her intention to resort to arbitration and requested the Bank to cover the arbitration costs. The President in his 8 November 2018 reply declined this but made it clear regarding the process that "[i]t is, therefore, only once the Bank receives such notice of arbitration from Glencairn Communications, in line with the process prescribed by the Rules, may the arbitration proceedings commence." He therefore made it clear that it was Glencairn Communications that should initiate the proceedings and not Appellant as an individual.

44. Matters were, however, not made any clearer when the Chief Counsel, in her 26 November 2018 reply to Appellant's request to reconsider the decision not to *a priori* cover the arbitration costs, wrote: "You signed the contract and its subsequent extension(s) between Glencairn Communications Ltd. and the EBRD…. You were well aware of and have expressly accepted the dispute resolution mechanism provided for in the Contract…" This reply appears to be addressed to the individual and not to the Director of the company. It would have been more appropriate to use the same language as in the 8 November 2018 communication. The lack of clarity due to this inaccurate language may have contributed to the Appellant's course of action that eventually led to her not filing an Appeal within the term.

45. On the other hand, the Decision itself clearly referred to the arbitration clause in the contract. Without entering into the merits of the case, one may, however, raise the question whether the arbitration clause in the commercial contract between Glencairn Communications Ltd., and not the Appellant as an individual, on the one hand, and the EBRD, on the other hand, is the appropriate vehicle to treat the question whether Appellant was a *de facto* Bank staff member. The Bank may have erred on that point in law but it is not established that it intentionally misled Appellant in this respect.

46. The last paragraph of the 22 October 2018 Decision reads as follows:

> This response constitutes my Administrative Decision under Section IV, paragraph 6.4.1(e) of the Directive and is subject to Appeal under the Bank's Appeals Procedures, attached for your convenience.

46. This paragraph was not used in similar cases that were before the Tribunal. It also at first sight appears to be at variance with the rest of the Decision. Respondent contends that the Decision was a decision on admissibility (only) and that that decision can be challenged under the Directive. Respondent does not explain, however, how such an appeal would be

admissible *ratione personae*, when, in its view, the original request was not. The Tribunal finds it difficult to justify this inconsistency in the Bank's communication with the Appellant. But that is not the question before the Tribunal now. One may conclude, however, that again, the legal picture was not clear. Moreover, the Bank regrettably did not reiterate that the internal appeals process was open to challenge the 22 October 2018 Decision when it had the occasion to do so in the further communications with Appellant regarding the costs of the arbitration.

47. Contracts are to be implemented in good faith, including clauses for the resolution of disputes. The Tribunal finds, that the Bank's communication was equivocal and inconsistent. It is highly unfortunate that this lack of clarity and of consistency may have misled Appellant to initiate an arbitration for which the Bank later successfully challenged the jurisdiction. It is also highly regrettable that the Bank did not use the communication on the prospective arbitration proceedings to clarify the situation. The Tribunal finds that, although not in bad faith, the Bank's position was misleading and it could have been presented more clearly – as clearly as the Bank did when it later objected to the arbitral tribunal's jurisdiction. The Tribunal does, however, not share Appellant's view that the Bank's position was intentionally misleading or in bad faith.

48. Appellant does not mention this last paragraph of the Decision in her Appeal before the Tribunal. It was, however, her responsibility to seek explanations if things were not clear in order to better understand her situation and legal position, and to take appropriate measures to safeguard her rights before the Tribunal, if necessary. It is recalled that Appellant was represented by Counsel.

49. It is not for the Tribunal to make an appraisal of the arbitral award or of the arguments presented in the arbitral proceedings. Suffice it to say that the proceedings did take place, that both parties presented their arguments and that an award was rendered. In particular, the Bank successfully argued that the arbitration agreement giving jurisdiction to the arbitral tribunal was not signed between the Appellant as an individual and the Bank, but between Glencairn Communications Ltd. and the Bank. This argument clarifies the position that had been unclearly communicated to the Appellant in the abovementioned communications and upon which the Appellant had decided to initiate arbitration proceedings. The behaviour of the Bank is regrettable.

50. Appellant has admitted that the case is in principle time-barred, but invokes Article 4.03 (b) of the Appeals procedures and rules of procedures which provides that an Appeal may be submitted after the sixty-day period has elapsed, but only if the Tribunal is satisfied that there were justifiable grounds for the delay and that a refusal to consider the Appeal would cause substantial injustice to the Staff Member.

51. The Tribunal observes that "justifiable grounds for the delay" must be genuinely

extraordinary. They must be serious and beyond Applicant's control, in other words they should have prevented Applicant from acting (*cf.* UNDT/2010/202).

52. As was observed *supra*, Appellant, who was represented, did not follow up on the possibility given in the 22 October 2018 Decision to appeal that Decision. She did not seek clarifications if matters were not clear to her. And there were probably good reasons to do so, since the Decision and related correspondence were not clear, or not clear enough. She did, however, not take any steps to preserve her rights, if any, before the Tribunal. Even assuming that the Bank's communication should have been clearer, and that Appellant should not be negatively affected by her decision to initiate arbitration proceedings because that decision might have been induced by unclear communication by the Bank, Appellant should, when she saw the Bank's objection to the arbitral tribunal's jurisdiction, have understood that she needed to preserve her rights in respect of the Bank's internal justice system. Instead, Appellant awaited the outcome of the arbitration proceedings before requesting to be reinstated in the term to file the Appeal. Any prejudice that Appellant may have suffered is therefore ultimately the consequence of her own decisions and/or inactions. As a consequence, the request for an exception under Article 4.03 (b) cannot be granted.

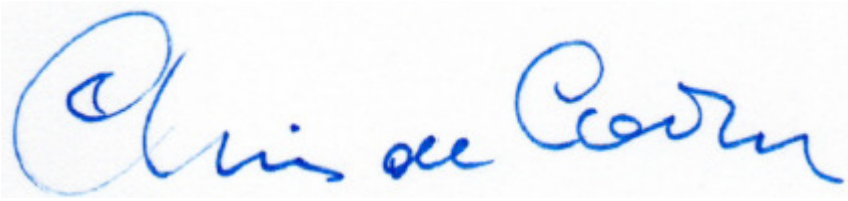
53. The Tribunal cannot but conclude that the Appeal is time-barred and thus inadmissible.

VII. Decision

54. The Tribunal decides that the Appeal is inadmissible.

30 April 2020

For the Administrative Tribunal



Chris de Cooker

Chair of the Panel