THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Case No. 2020/AT/06

Appellants

vs.

European Bank for Reconstruction
And Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Spyridon Flogaitis, Chair
Maria Vicien-Milburn
Michael Wolf

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3 December 2020

I. Factual and procedural background

1. On 5 March 2019, each of the Appellants separately sent to the President a Request for Review. On 26 March 2019, the President replied to each individual Request for Review indicating that he did not have the competence to review it under the ARP [Administrative Review Process] Directive. On 11 June 2019, the Appellants individually submitted appeals against the President's Communication to the Tribunal. On 8 July 2019, the Bank challenged the jurisdiction of the Tribunal to entertain the appeals.

2. On 20 February 2020, the Tribunal issued four separate decisions annulling the President's Communications and instructing the Bank to refer the Appellants' individual Requests for Review to the ARC [Administrative Review Committee].

3. On 28 February 2020, the President referred each Request for Review to the ARC for consideration under Section IV, paragraph 6.4.1 (e) of the ARP Directive and in accordance with the Tribunal's Decisions. On 3 March 2020, the ARC issued a Direction for each Request for Review, assigning each Request for Review with a matter number, ARC56/2020, ARC57/2020, ARC58/2020 and ARC59/2020 respectively.

4. On 9 April 2020, the Bank submitted its separate response for each matter, i.e. ARC56/2020, ARC57/2020, ARC58/2020 and ARC59/2020, to the ARC. By Direction No. 3 dated 16 April 2020, the ARC invited the Appellants to submit their individual replication to the Bank's ARC Submission for their specific matter, and on 30 April 2020 the Appellants collectively submitted one replication.

5. On 20 May 2020, the Chair of the Committee requested to provide documents referred to and relied upon by the Appellants in their Replication, namely copies of the former Grievance Committee Reports in GC/10/2012 and GC/11/2012 and the report and recommendation for ARC 40/2018. On the same day, the Bank submitted its observations to the request for documents.

6. On the basis of the submissions by the parties, the ARC issued its individual Reports for each matter. In each Report, the ARC established, by a majority vote, that the Appellants did not have a relationship of employment with the Bank. On 14 July 2020, the President issued the impugned Administrative Decision in each matter. The President accepted the findings of the ARC that the Appellants did not have a relationship of employment with the Bank and were not *de facto* staff members. As such, the Appellants were not entitled to any benefits stemming from the Staff Handbook.

II. Appellants' position

7. The Appellants submit that the Administrative Decisions were erroneous because the ARC erred in its findings of the Appellants' Requests for Review. According to them, the ARC "*failed to do what the Tribunal asked of it and the President's decision accepting the [ARC's] recommendation should not, therefore, stand*". The Appellants assert that because their cases are similar to the cases of the former Grievance Committee reports in GC/10/2012 and GC/11/2012, that their Requests for Review should have been considered against the principles set forth in those reports by the Grievance Committee.

8. The Appellants request the Tribunal to recognize that the services they provided to the Bank were "*as de facto employees; not contractors*". Accordingly, they request the Tribunal to set aside the President's Decisions in which the President confirmed the ARC's findings that they did not have a *de facto* staff member status with the Bank and thus are not entitled to any of the payments that they seek.

9. The Appellants seek new findings of fact and are asking the Tribunal to undertake a fact finding (i.e. GC10/2012 and GC11/2012 Reports).

III. Bank's position

10. According to the Bank, an administrative review decision by the President pursuant to Section IV, paragraph 6.4.1 (e) of the ARP Directive is an administrative decision of a discretionary nature. The President's Decisions in the present matters were lawful and there was nothing erroneous in accepting the Committee's findings of fact, as these related to the main question set out in the Appellants' Requests for Review, namely, whether or not the Appellants had a relationship of employment with the Bank and were *de facto* staff members.

11. The President is not bound by all the observations and findings of the ARC. In taking his Decisions, the President followed the guidance of the Tribunal's Decisions insofar as such guidance related to whether the Appellants had a *de facto* staff member status with the Bank and if so, whether they were entitled to any benefits as a result of such status. Contrary to the Appellants' assertions, the Committee carried out fact finding in line with the requirements of the ARP Directive. In doing so, the Committee made findings using the principles governing simulated employment contracts and the criteria set out by the Tribunal in the AG Decision as directed by the Tribunal. The ARC's established findings of fact conclusively established that the Appellants did not have a relationship of employment with the Bank and were only providing services to the Bank as service providers, and as independent contractors.

12. The Appellants' request that the Tribunal undertakes another fact finding to establish that the Appellants were providing services as *de facto* staff members of the Bank, is not consistent with the procedures of the Appeals Directive pursuant to paragraph 7.01 (a) whereby the Tribunal shall take into account the findings of fact by the Committee unless there is a manifest error, which is not the case here.

IV. Considerations by the Tribunal

13. The Tribunal turns now its attention to its own considerations on the matter.

Opinion of Spyridon Flogaitis

14. In four landmark decisions, the Tribunal, after a thorough and deep consideration of the facts of the present four cases and for each one of them, concluded that it would be in the interest of justice to ask the President to remand them to ARC for consideration, because, the procedure which was followed by the EBRD had not guaranteed the full examination of the facts offered by the established grievance system of the Bank.

15. Moreover, Spyridon Flogaitis agrees with Michael Wolf and Maria Vicien Milburn stating that "If the ARC meant that the Tribunal had "remitted the question" of admissibility to that Committee, such statement is incorrect and does not accurately reflect the Tribunal's decision".

16. The ARP Directive sets out the procedure of the administrative review process. Specifically, the following provisions are relevant to the present matter:

    Section IV, paragraph 6.4.2 (c):

    > "*subject to paragraph 10.4 below, the Administrative Review Committee may also: (i) ask the Staff Member and/or the Bank to provide additional documentation and other relevant information and material, which it considers critical to the matter under consideration, as well as to identify the applicable rules of the Bank bearing on the Administrative Decision under review; and (ii) meet separately with the Staff Member and/or any other Staff Member of the Bank who may have relevant information, ….*"

    Section IV, paragraph 6.4.3 (i):

    > "*based on its review, the Administrative Review Committee shall formulate a view as to whether the Administrative Decision which is subject to review in accordance with the Administrative Review Process set out in this Directive should be reversed, confirmed or modified and, if so, in what manner, and shall prepare and submit a reasoned Report and Recommendation to the President for their consideration. The Report and Recommendation shall also include a recommendation in respect of award, if any, of reasonable legal costs incurred by the Staff Member for the preparation of the request for review of an Administrative Decision which is subject to review in accordance with the Administrative Review Process set out in this Directive submitted to the President and other submissions requested by the Administrative Review Committee*."

    Section IV, paragraph 6.4.3 (a):

    > "*within 21 days of the receipt of the Report and Recommendation of the Administrative Review Committee, the President shall take a reasoned Administrative Review Decision, which shall be notified in writing to the Staff Member*."

17. Pursuant to Section IV, paragraph 7.01 (a) and (b) of the ARP Directive, the scope of review of the Tribunal is set out as follows:

    i. "*In the ordinary course, the Tribunal shall decide the Appeal on the basis of the Appeal Documents which shall include the Statement of Appeal, Response, Findings of Fact of the Administrative Review Committee and a transcript of the proceedings before the Administrative Review Committee and any other documents and evidence submitted to the Tribunal*."

    ii. "*The Tribunal shall take full account of the Findings of Fact made by the Administrative Review Committee in the Administrative Review Committee's*

Report and Recommendation unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error on the face of the written materials before it (including the Findings of Fact and the transcript) or are perverse or are reached in breach of applicable law or the Tribunal grants a request of either party to present new evidence not available to that party before the Administrative Review Committee."

Section IV, paragraph 3.03 of the Appeals Directive:

"*when the Administrative Decision complained of is a Decision of a Discretionary Nature, the Tribunal shall uphold the Appeal only if it finds that the decision was arbitrary, or discriminated in an improper manner against the Staff Member or the class of staff members to which the Staff Member belongs, or was carried out in violation of the applicable procedure*."

18. Principles of importance in relation to *de facto* employment claims made by independent contractors are set forth in a number of various decisions across international administrative tribunals, and especially by this Tribunal in relation to *de facto* employment claims. Where an independent contractor makes a claim of de facto employment the threshold is very high. This Tribunal has already established in the decisions already taken on the matter as follows:

"*the Tribunal reiterates that this jurisdictional decision does not reach any conclusions regarding the merits of this dispute. It does not make any finding as to whether Appellant has or does not have employee status or any rights of a staff member. Those determinations can only be made after completion of the fact-finding process before the ARC and a decision by the Bank President. The Tribunal recognizes that there is considerable precedent that argues against de facto employment status*."

19. The Bank followed and applied the decisions of the Tribunal and the internal system of considering the appeals by staff members was put in motion.

20. In this place, the Tribunal reaffirms what the Decision of this Tribunal in Case No. 2019/AT/06 has recognized as a high degree of discretion entrusted to international organizations in the management of their functions:

"*...international organizations enjoy a high degree of discretion in organizing 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.*"

21. The same Decision noted that the threshold to override formal written arrangements is very high:

"*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 organization and a worker is high.*"

22. The ARC concluded by majority vote that the four Appellants, under the factual circumstances of the four cases, could not be considered as staff members or *de facto* staff members of the Bank. The President of the Bank followed the recommendation of the ARC and decided accordingly to reject the Appeals of the four Appellants.

23. The Tribunal is satisfied by the procedure followed and now needs to pronounce itself if it is, under the Law, satisfied with the conclusions reached by the ARC and the President.

24. Pursuant to Section IV, paragraph 7.01 (a) and (b) of the ARP Directive, the scope of review of the Tribunal is set out as follows:

"*In the ordinary course, the Tribunal shall decide the Appeal on the basis of the Appeal Documents which shall include the Statement of Appeal, Response, Findings of Fact of the Administrative Review Committee and a transcript of the proceedings before the Administrative Review Committee and any other documents and evidence submitted to the Tribunal*."

"*The Tribunal shall take full account of the Findings of Fact made by the Administrative Review Committee in the Administrative Review Committee's Report and Recommendation unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error on the face of the written materials before it (including the Findings of Fact and the transcript) or are perverse or are reached in breach of applicable law or the Tribunal grants a request of either party to present new evidence not available to that party before the Administrative Review Committee* ."

25. Pursuant to Section IV, paragraph 3.03 of the Appeals Directive, in reviewing an appeal, the Tribunal,

"*when the Administrative Decision complained of is a Decision of a Discretionary Nature, the Tribunal shall uphold the Appeal only if it finds that the decision was arbitrary, or discriminated in an improper manner against the Staff Member or the class of staff members to which the Staff Member belongs, or was carried out in violation of the applicable procedure*."

26. The scope of review, therefore, is limited to a finding by the Tribunal that the ARC erred in Law or in the consideration of the facts leading to an error of Law, or the President exercised his authority arbitrarily, in a discriminatory manner or in violation of an applicable procedure.

27. The Tribunal notes that in the majority decision under consideration, the ARC made a thorough legal analysis of the legal framework of its competence and negated the hypothesis of the Applicants being de facto staff members. To do so, it refers *expressis verbis* to the

jurisprudence of this Tribunal and the criteria developed by the Tribunal itself in Case No. 2019/AT/06.

28. The Tribunal is satisfied that the case was treated by the ARC with the same standards of procedure which have been applied to all other cases which have up to now come to its attention. The Tribunal finds nevertheless that, despite the fact that in principle it is bound to follow the fact findings of the ARC nothing prevents or could prevent the Tribunal to proceed to its own examination of the facts of the case, should it suspect that an error of fact leading to an error of Law occurred. This is the case in all modern administrative adjudication systems of the world, but also according to the Law of the Bank and the practice of this Tribunal.

29. The President's Decisions were clear and were based solely on the findings of fact established by the ARC. The President referred to the legal principles set out in the Decision in Case No. 2019/AT/06. In doing so, the President concurred with the ARC's findings of fact and this is evident in the President's Decisions that concluded the following:

> "*the Report's findings, which are based on the principles governing employment contracts and the criteria set out in EBRD Administrative Tribunal Decision of 2019/AT/06 is that the relationship you had with the Bank was not one of employment and as such, you were not a de facto employee of the Bank*".

30. In his decision, the President was specific and the conclusions made related to the core claim set out by the Appellants alleging that they were de facto staff members of the Bank.

31. This being clarified, the Tribunal does not feel the need to reopen the case before it for fact finding by offering oral hearings, especially taking also into account that the Appellants had the opportunity to present their cases in the first jurisdictional phase of the present procedures.

Concurrence by Michael Wolf and Maria Vicien Milburn

32. We agree that Appellants in this case have failed to demonstrate they are entitled to staff member benefits or to be treated as de facto employees. However, we disagree with the ARC's analysis of these issues and therefore write this concurrence to set forth what we believe to be the proper standards for deciding these issues should similar cases arise in the future.

33. The statement of conclusions by the ARC majority includes the following:

> Having concluded that there was no reviewable administrative decision taken by the EBRD in this case, and in effect that the President's decision on admissibility in his email of 26 March 2019 was correct, the ARC is not able to make any recommendation to the President to reverse, confirm or modify any administrative decision. There is no decision that can be reversed, confirmed or modified. [¶74.]
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> The ARC has no power to determine or declare a request for review to be inadmissible. The dilemma of the ARC is compounded by the fact that the Tribunal has annulled and set aside the President's decision on admissibility and remitted that question for reconsideration by the ARP. [¶75.]

34. The Bank President thereupon accepted the ARC report and the conclusion that Appellant was not entitled to "any benefits stemming from the Staff Handbook, including but not limited to the severance payment that you seek."

35. The ARC majority correctly stated that this Tribunal had previously annulled the Bank President's admissibility decision in his email of 26 March 2019.[1] However, it is unclear what the ARC meant when it referred to "reconsideration by the ARP [Administrative Review Process]." If the ARC meant that the Tribunal had "remitted the question" of admissibility to that Committee, such statement is incorrect and does not accurately reflect the Tribunal's decision. The Tribunal decided in Case No. 2019/AT/02 as follows:

> Based on the decisions in EBRDAT Cases 2018/02 and 2019/06, the Tribunal concludes: (a) the Bank President's 26 March 2019 email is an administrative decision under the Directive on Administrative Review Process and (b) the Tribunal and the ARC have jurisdiction to consider Appellant's claims. [¶67.]
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> The email of 26 March 2019 constitutes an individual decision by the Bank President under Section IV, Paragraph 3(c) of the Directive. As such, the Tribunal may decide the jurisdictional question without resorting to preliminary proceedings by the ARC. The Tribunal's conclusion that it has jurisdiction over this appeal and that Appellant is entitled to utilize the administrative review process is therefore final. [¶69, emphasis added.]
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> The Tribunal reiterates that this jurisdictional decision does not reach any conclusions regarding the merits of this dispute. It does not make any finding as to whether Appellant has or does not have employee status or any rights of a staff member. Those determinations can only be made after completion of the fact-finding process before the ARC and a decision by the Bank President. [¶70.]
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> The Tribunal adopts the following standard when this type of jurisdictional issue is raised: Whenever someone working for the Bank makes a plausible, non-frivolous claim that he/she is entitled to the rights of a staff member because of a de facto employment relationship with the Bank, that person is entitled to invoke the jurisdiction of the Bank's dispute resolution processes to consider that claim. There may well be future cases in which such a claim is deemed frivolous and incapable of succeeding under the criteria specified in EBRDAT Case 2019/06. However, in the instant case, we cannot reach such a conclusion at this preliminary stage of the proceeding. The Tribunal therefore rejects the Bank President's arguments in his 26 March 2019 email and in the Bank's challenge to this Tribunal's jurisdiction. [¶71.]

36. In other words, the Tribunal had decided the admissibility question posed by the Bank President's email of 26 March 2019, and it did not ask the ARC to revisit the admissibility question. Instead, the ARC was asked to make factual findings so that the following

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[1] Throughout this concurrence, "admissibility" and "jurisdiction" will be used interchangeably. An appeal or request for an administrative review decision may be inadmissible for several reasons, e.g., (1) it is untimely, (2) it has been filed by a person who does not have standing or (3) it raises a claim outside the scope of the Bank's dispute resolution system. Any one of these three situations will result in a conclusion that there is a lack of jurisdiction.

questions could be answered: Were Appellants de facto employees or independent contractors? If they were de facto employees, were they entitled to the benefits claimed in the request for an administrative review decision?

37. The ARC majority's analysis of the jurisdictional question was misconceived. It pointed out that: (1) jurisdictional issues often involve mixed questions of law and fact and (2) that a factual finding that Appellant was an independent contractor would necessarily lead to the conclusion that she had no right to present an appeal under rules reserved for staff members. The Tribunal recognized then and recognizes now that the status of this case is anomalous. The fact-finding and the legal conclusions are so intertwined that one cannot be decided without the other. This circularity or chicken-and-egg conundrum should not be an excuse for the ARC to avoid its responsibility to conduct the fact-finding necessary for the Tribunal to reach a definitive view on the jurisdictional question.

38. At the time of the remand, the Tribunal understood that factual findings reached by the ARC could lead to the conclusion that Appellants did not have the rights of staff members and therefore would not have a right of access to the administrative review process. That does not mean the Tribunal was asking the ARC to decide the admissibility question. The Tribunal requested only that the ARC engage in fact-finding, using the criteria governing employee-contractor disputes set forth in Case No. 2019/AT/06. If the logical consequence of the ARC's fact-finding leads to the conclusion that the appeal should be dismissed on jurisdictional grounds, then that is a decision the Tribunal will ultimately take – as it does now.

39. The ARC presumably understands that it is not an appellate body and does not determine whether the Tribunal has properly exercised its jurisdiction. Notwithstanding the ARC's criticisms, it was not improper for the Tribunal to take jurisdiction over this case and direct fact-finding that would assist in resolving the jurisdictional question raised by the Bank. In fact, the Bank's own rules provide for fact-finding in cases which initially might appear to be inadmissible. Section IV, Paragraph 4.03(a) of the Appeals Process Directive directs appeals to be filed "within sixty days of the date of the Administrative Review Decision" for which an appeal is being sought. However, Paragraph 4.03(b) states:

> 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.

40. The questions whether the delay was "justifiable" or whether there would be a "substantial injustice" if the deadline were not waived may involve contested facts. For example, an Appellant may assert that she did not receive the appealed decision when it was issued because she was on holiday or in hospital. If the Bank contests the staff member's assertion, fact-finding may be the only means of deciding whether the appeal is time-barred. That the ultimate decision might be to dismiss the appeal because it was indeed untimely does not mean that the preliminary assertion of jurisdiction and fact-finding were improper. The process of fact-finding may the only means by which the Tribunal could be "satisfied" that the criteria in Paragraph 4.03(b) have been met.

41. The Tribunal adopted this same approach to the question of de facto employee status for practical reasons that are worth reiterating. This case does not arise in isolation. There has

been a growing recognition around the world that a written agreement in and of itself may not be the sole determinant whether a person providing services is an employee or independent contractor. There have been cases in many countries, as pointed out in our decision in Case 2019/AT/06, in which employee versus contractor status has been litigated, and the results have varied. Legislation and/or regulations have also been enacted in an effort to clarify the distinction between employees and contractors. Most importantly for present purposes, there have been several decisions issued by Administrative Tribunals for international organizations stating that they have jurisdiction to decide such questions and, in a very few instances, concluding that a contract purporting to create an independent contractor status for a worker was a fiction that concealed an underlying employment relationship. See, e.g., *Amora v. Asian Development Bank*, ADBAT Dec. No. 24 (1997). Appellants in the instant case relied on this international precedent when filing their appeals.

42. Another factor in the Tribunal's jurisdictional decision arises out of the Bank's immunity from suit in the national courts in which it operates, including the United Kingdom. That immunity is especially important when, as in this case, the Bank constructs a series of contracts that insulate it from any legal or administrative action that Appellants might wish to bring against the Bank. As the ARC found: "The applicant [i.e., Appellant] had no formal or express contractual relationship with the EBRD." Rec. at 21.

43. Using the contract between the Appellant in Case No. 2019/AT/02 (Appellant "1") and Westek as an example, it gave her the right, through her own company (KWLC Ltd.), to assert claims against Westek in the courts of the United Kingdom.[2] There was no contractual relationship, however, that permitted her to assert a litigable claim directly against the EBRD arising out of her work for the Bank. Neither her contract with Westek nor public law offered British courts as a venue in which Appellant could lodge a claim against the Bank for any alleged mistreatment of her.

44. One hypothetical example explains the conundrum facing the Tribunal. Suppose Appellant had found herself to be a victim of sexual harassment by a Bank staff member/manager, had complained to Human Resources about the harassment and was told that a formal investigation would not be conducted. Under Section IV, Paragraph 1.6, of the "Harassment-Free and Respectful Workplace Procedures," a Bank staff member in this position would have a right to initiate the Administrative Review Process. Appellant, on the other hand, would be denied recourse to the ARP or to the Tribunal because, as the Bank argues, she is not a staff member. She would have no internal mechanism for obtaining relief for any alleged harm caused by the harassment. Nor is it likely that Appellant would be able to obtain relief in British courts against Westek. Westek would undoubtedly argue that it has no responsibility or liability for wrongful acts by Bank staff. Appellant could perhaps sue the Bank in British courts to pierce its cloak of immunity, but the outcome would be uncertain. Under this hypothetical, there is a realistic possibility that the victim would have no venue in which to litigate her claim of sexual harassment by a Bank staff member – unless she were treated as a de facto staff member.

45. The same difficulty is found in the instant case. Where does Appellant go to vindicate what she claims are rights similar to those recognized in *Amora*? The Bank's position, expressed

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[2] For the remainder of this discussion, we will use Appellant "1" as an example. To the extent there are references to a singular "Appellant" in this decision, they mean Appellant "1". However, the same material facts and legal principles apply to the other three Appellants.

in the President's email of 26 March 2019, is that Appellant is barred altogether from accessing the internal dispute resolution processes of the EBRD. As a result, the Bank would foreclose Appellant from having any forum in which to present her allegations and claims against the Bank, even on the threshold question whether she has standing to initiate the Administrative Review Process. Such a position is antithetical to the norms of the international civil service. We recognize the legitimacy of and the need for judicial immunity for international organizations, but can the law governing the international civil service truly tolerate the absence of any adjudicatory recourse for a person who has worked 19 continuous years exclusively at the Bank and who alleges the Bank violated its own internal laws in its treatment of her? We believe the answer must be no. All claims arising in the workplace deserve to have some forum in which they can be asserted and considered by a neutral. That is why the Tribunal originally took jurisdiction in these cases and that is why we write this concurrence.

46. The Bank no doubt fears that the jurisdictional rulings in this case create a slippery slope leading to consideration of other non-staff claims by the internal dispute resolution system. That is not the case. This assertion of jurisdiction is for a narrow class of cases: where a contractual worker asserts a non-frivolous claim that he/she is a de facto employee. The Tribunal's jurisdiction (and the ARC's jurisdiction) are exercised in the first instance solely for the purpose of determining whether the Appellant can assert the status of a de facto employee under the analytical rules set out in Case No. 2019/AT/06. The underlying claims (for example, the claim for severance pay in these cases) are not reached unless and until the employment status is resolved in the Appellant's favor. The assertion of limited jurisdiction did not foreclose ultimate findings and conclusions that Appellant "1" and the other Appellants never attained the status or rights of employees.

47. To turn to another of the ARC's concerns, once the Tribunal decided initially that the Bank President had erroneously rejected admissibility, the secondary question was who should make the fact-findings upon which the ultimate jurisdictional conclusion would rest. The ARC seems concerned that, because a finding of non-staff status leads to a lack of admissibility, the fact-finding should be undertaken by the Tribunal, because it is the only body capable of determining which claims are cognizable in the dispute resolution system. The Tribunal disagreed before and disagrees now that it should be the initial fact-finder in such cases.

48. The rules governing the appeals process permit the Tribunal to engage in fact-finding, but it is clear from those same rules that the ARC has primary responsibility for determining which documents and witnesses are relevant and for issuing findings based on that evidence. See Directive on Administrative Review Process, Section IV, ¶6.4.2. The rules go so far as to instruct the Tribunal that it must decide cases "on the basis of the … Findings of Fact of the Administrative Review Committee" and that it must also "take full account of the Findings of Fact … unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error … or are perverse or are reached in breach of applicable law…."Appeals Procedures, Art. 7, ¶7.01. This division between fact-finding and legal interpretations makes it clear that the Tribunal should engage in its own fact-finding only in unusual circumstances. We do not perceive any reason why the normal order of fact-finding by the ARC should be altered in this case. Nothing in the rules prevents the ARC from finding facts that eventually implicate or even determine the outcome of jurisdictional questions.

49. Appellants assert that "the ARC did not even meet with us" and "failed to do what the Tribunal asked of it." Statement of Appeal at 19, 15. We agree that the ARC could have and should have done more to ascertain the facts by interviewing witnesses, such as officials from Westek and the Bank. However, the Appellants themselves, when asked to submit a "replication," put their positions in writing and did not request oral testimony in that submission. In addition, it is not quite accurate to say that the ARC failed to make findings; it did so based on the written record before it. For example, the ARC majority credited the Bank's explanation that the oversight of Appellant's work and the instructions given to her by supervisors is not inconsistent with independent contractor status:

> The provision of IT support services by an independent service provider naturally requires oversight by operational staff and integration within the EBRD and given the nature of the services the provision of IT tools and materials on-site was obviously convenient. Likewise, the requirement that absence during the contract period be authorised is to be expected. Furthermore, not much should be inferred from the applicant's use of a staff pass, email access and attendance at social events. These are matters of practical convenience and social courtesy which ought not to be elevated to terms and conditions of employment overriding the clear contractual arrangement to which the applicant consciously agreed and abided for years. [¶67.]
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> The contractual arrangements were legitimately and legally intended to relieve the EBRD from utilising its administrative and recruitment resources to insource a specialist service that is non-core in its business. The arrangement had commercial sense and was not a sham aimed at disguising the parties' real intention. [¶69.]

50. The ARC majority also made findings regarding Appellant's understanding of her work status: "With every signature of each of the many contracts she signed, the applicant was aware of the EBRD's intention not to regard her as an employee." ¶67. Essentially, the ARC majority discredited the contention that Appellant "1" thought she was an employee: "the contractual arrangements were genuinely intended by all parties to establish and benefit from the perceived advantages of an independent contract of services." ¶70. None of these findings was manifestly erroneous and must be given due deference by this Tribunal.

51. The Bank initially contended in its opposition to jurisdiction that it not only had no employment relationship with Appellant but that it did not even have a contractual relationship with her. It stated in its opposition to the Tribunal's assertion of jurisdiction in Case No. 2019/AT/02 that the Bank "did not have a contractual relationship, express or implied with the Appellant for the provision of services." ¶II.A. The Bank argued that it entered into a contract with Westek and solely with Westek. However, the Bank then modified its position by stating in its Response in ARC 57/2020 that: "The Applicant's Relationship with the Bank is as an independent contractor." Response at p. 16. The Bank identified Appellant's company (KWLC Ltd.) as a sub-contractor to Westek, but it was now conceding there was a contractual relationship between Appellant and the Bank. Id.; Response in ARC 57/2020 at ¶34. In fact, there is considerable evidence in this record to suggest that there was a contractual relationship between Appellant and the Bank, even if the nature of the relationship is in dispute.[3]

[3] The ARC majority found that Appellant "was employed by KWLC, a company that was an independent contractor of the EBRD." ¶71. In fact there is no direct contract between KWLC

52. Appellant worked for the Bank on Bank premises and under the supervision of Bank staff members for 19 years; her terms and conditions of employment (hours, pay, etc.) were regulated by the Bank. The question to be answered is whether the facts prove Appellant and the Bank had created a de facto employment relationship that entitled her to some of the benefits available to staff members. We would apply the principle adopted in Amora and rule that a functional and realistic approach must govern the decision before us. The Framework and Consultancy Agreements were clearly intended to provide a legal shield for the Bank. They permitted Appellant to perform work for the Bank without any formal contract between her and the Bank. Applying *Amora*, we take account of the contracts but would not limit ourselves to that evidence. We believe the Tribunal must determine if the contracts created a legal fiction that concealed the reality of the working relationship.

53. This Tribunal concluded in Case 2019/AT/06 that there are four criteria to be given primacy in deciding whether an employment relationship exists:

    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. [Dec. at p. 21.]

54. The Tribunal went on to state that additional criteria could be considered "[s]hould it not be possible to reach a conclusion on the basis of the above criteria." Id. We conclude that the issue in the instant case can be decided based on these four criteria – particularly the first and fourth criteria.[4]

55. The first and most important factor to consider is the "contract" itself. But the Bank has created interlocking contracts (the Framework and Consultancy Agreements) in such a way that there is no piece of paper containing signatures of both Appellant (or KWLC) and the Bank. There is no direct, written contract between Appellant and the Bank to look to as a source of conditions or intentions. This Tribunal must therefore decide whether there was an implied contract of employment between the Bank and Appellant. An essential requirement of any contract, including a contract of employment, is that there was a "meeting of the minds" between the parties. What did each party intend? Is there evidence of mutuality of understanding?

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and the Bank. It is only through its contract with Westek that KWLC could be characterized as having an implied contractual relationship with the Bank.

[4] Had we not reached this conclusion, we believe it would have been necessary to remand to the ARC for a proper and more thorough fact-finding.

56. Appellant came to work at the Bank pursuant to her Consultancy Contract between KWLC and Westek. The Framework and Consultancy Agreements clearly stated that Appellant would not be an employee of the Bank. Appellant then continued to perform work for the Bank under the same or similar contracts for 19 years; she signed each of the renewal Consultancy Agreements. There is no evidence in this record that Appellant believed at the outset of her contractual relationship with Westek she was providing service to the Bank as an employee.

57. By permitting a remand to the ARC, the Tribunal gave Appellant the opportunity to present additional evidence with regard to her understanding and intentions at the outset of the working relationship and during the terms of her multiple contracts with Westek. Yet, there is no evidence that Appellant did or said anything for 19 years showing a belief that she had been transformed from a contractor to an employee at any point during her work for the Bank. The absence of such evidence tends to show that Appellant never intended to be an employee of the EBRD.

58. In addition, Appellants have claimed an entitlement to only limited benefits available to staff; they have sought only termination benefits. Appellants have not claimed they were staff members for all purposes during their tenures. For example, they have not claimed they should have been participants in the Bank's retirement scheme. This course of conduct also supports a finding that the never intended to be employees. Appellants' assertion of this status after their relationships had been severed is not a tenable basis for favorable findings and conclusions by this Tribunal. See Case No. 2019/AT/06. Conversely, as the ARC found, "[w]ith every signature of each of the many contracts she signed, the applicant was aware of the EBRD's intention not to regard her as an employee."

59. At the outset of her career at the Bank, Appellant would not necessarily have envisioned her lengthy tenure or thought to assert immediately the rights and benefits of staff. However, at some reasonable point in her tenure, if she genuinely thought she was a de facto staff member, she could have and should have asserted her rights and entitlements as such. Yet, she did nothing until her contract was not renewed after 2019. We find from this evidence that Appellant never held herself out to be or thought of herself as an employee.

60. Because Appellant never asserted the status of employee until after her relationship with the Bank had ended, one can assume that the Bank would have relied on Appellant's acceptance of her contractor status throughout the 19 years. There certainly is no evidence that the Bank ever considered converting her to employee status. In other words, neither the Bank nor Appellant gave any indication for 19 years that she was an employee. This evidence applies directly to the fourth of the above criteria: "Whether there is evidence of the worker's acceptance of the terms of the contract by long and repeated practice." It is a factor that leads to the same outcome for all four Appellants.

61. In sum, we concur that an employer-employee relationship was never created by either express or implied contract. There is no evidence that the putative parties mutually understood during the terms of Appellants' work at the Bank that there was an employment relationship. In this respect, we find that the ARC did not commit error in finding that the various indicia of employment status cited by Appellants were not in fact proof that either party thought they were engaged in an employer-employee relationship. Per our rules, we must defer to this finding. Applying the criteria from Case No. 2019/AT/06, Appellants did not prove a right to claim staff benefits as de facto employees.

62. Without evidence of an employment relationship, Appellants' argument to the Tribunal effectively asserts that they should be treated as quasi-employees – they would retain the benefits of contractor status while also receiving some of the benefits of a staff member. Such status does not exist within Bank law, and Appellants have not presented any other legal authority pointing to the existence of such status in the international civil service. This too is a reason to reject Appellants' claims. They should not be permitted to accept independent contractor status for so long and then retroactively claim the right to pick and choose which employee benefits should be made available to them.

63. One can look at this decision and question why this proceeding was necessary at all. The ARC certainly seems to raise such question. Why should the Tribunal have asserted jurisdiction in these cases only to decide that Appellants are not employees? The result of this decision is that Appellants did not, after all, have any rights of staff members, including the right of access to the dispute resolution process. Nevertheless, we think it imperative that the principles expressed in Case Nos. 2019/AT/06 and 2020/AT/02-05 be maintained for a practical reason.

64. In the future, there may well be Appellants who present facts considerably different from the facts offered by the Appellants herein, such as the hypothetical described in para. 44 above. Future Appellants may have much more compelling evidence proving an employment relationship and may not be saddled with the charge that they slept on their rights for 19 years. It is, in our view, important that persons claiming de facto employee status have a forum in which to assert their arguments.

65. In this respect, we point out that the concept of de facto employers and employees is not a novel one invented by this Tribunal or the Tribunal in Amora. National courts and legislation have increasingly found de facto employer status and, in some cases, joint employer status for de facto employers. Employee rights are increasingly determined by functional analyses of working relationships rather than by a simplistic reading of a contract.

66. For example, the United Kingdom's Employment Rights Act (ERA) of 1996, as amended, states at Section 230(2): "'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing." [Emphasis added.] Section 230(3) similarly states that a "worker" is someone who performs work or services pursuant to a contract that is either "express or implied." The whistleblower protection provisions of the ERA, adopted by the Public Interest Disclosure Act 1998, define a "worker" as follows:

> 43K. For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—
> (a) works or worked for a person in circumstances in which—
> (i) <u>he is or was introduced or supplied to do that work by a third person</u>, and
> (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person <u>or by both of them</u>,
> (b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b)…. [Emphasis added.]

67. The latter provision effectively recognizes for purposes of whistleblower protection that there may be more than one employer, including a de facto employer. Cf. *International Workers' Union of Great Britain and University of London*, Case No. TUR1/1027 (2017)(CAC, 2018) (the Central Arbitration Committee noted that the concept of joint employers has been recognized in the whistleblower protection laws, but it concluded that this concept has not yet been recognized in the United Kingdom's collective bargaining laws).

68. In *Point-Claire (City) v. Quebec* (Labour Court), Case No. 24845, Report No. [1997] 1 SCR 1015, the Canada Supreme Court affirmed a Labour Court decision recognizing a joint employer relationship in the following circumstance:

> The appellant city hired a temporary employee through a personnel agency to work for 6 weeks as a receptionist and then for 18 weeks as a clerk. During the two work assignments, the employee's wages were determined and paid by the agency, which submitted an invoice to the city. The employee performed her work under the direction and supervision of a manager working for the city. The general working conditions, such as hours of work, breaks and statutory holidays, were dictated by the city. If the employee had not been qualified or had experienced problems in adapting, the city would have informed the agency, which would have taken the appropriate action. The respondent union, which holds the certification certificate for most of the city's employees, submitted a request to the office of the labour commissioner general under s. 39 of the *Labour Code* seeking, *inter alia*, to have the temporary employee included in the union's bargaining unit. The labour commissioner found that the city was the employee's real employer during the two assignments and granted the union's request. On appeal, the Labour Court affirmed the decision. It acknowledged that the agency recruited, assigned positions to, evaluated, disciplined and paid the temporary employees, but concluded that the city was the real employer by focusing on the question of which party had control over the temporary employee's working conditions and the performance of her work. The Labour Court also noted that there was a relationship of legal subordination between the city and the employee because the city's managers directed and supervised how she did her day-to-day work. [Quoting from the headnote.]

See also *Procom Consultants Group Ltd. v. Kirti Shringi*, 2019 CanLII 45488 (ON LRB) Case No. 2450-18-ES at ¶32 ("The Board is not bound by … how the parties themselves have described their relationship. The Board is interested in the substance of the relationship between the parties, not whether they use the term "independent contractor" in their contracts or arrange the terms of compensation in such a way as to give the appearance of an arm's length commercial association.")

69. The United States has also long recognized that the absence of a direct contract of employment does not prevent a de facto employer from being recognized as a joint employer with a contracting agency when employees' conditions of work are almost entirely within the control of the de facto employer. See, e.g., *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018); *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3rd Cir. 1982).

70. There is a recent trend by employers to resort to the use of "independent contractors" to perform work as a means of avoiding the liabilities and added costs attached to creating an

employment relationship. Increasingly, these relationships are being challenged when they appear abusive or, as in Amora, based on fictional contractual arrangements. The foregoing judicial decisions and legislative enactments show that contracts designed to avoid employment liability may not always succeed. The courts in such cases look at the reality of the relationship and not merely the title attached to a worker.

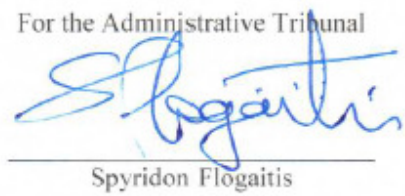
71. This is not to say that certain types of contractual relationships for services are necessarily illegitimate or unfair. In fact, they make economic sense for everyone involved when used properly. The classic example is a company's decision to contract out its janitorial/cleaning services to another company that, in turn, hires and supervises all of the workers cleaning the company's premises. If cleaning is not a core function of the company, there is no reason for it to devote resources to oversight of janitorial work when it can out-source the work to another company having that expertise. The cleaning workers can then look to the contractor for their employment protections. Similar arrangements are routinely made for IT services by a company that needs such service, but when IT services are not part of the core business. Many companies and institutions contract with IT service entities who hire, supervise, pay and fire employees pursuant to contractual specifications. These too are legitimate arrangements so long as they are structured to provide workers with basic adjudicative protections.

72. The fact that Appellants in the instant case failed to prove their claims does not mean that future similar cases should be rejected automatically. The material facts in a future case may well differ from those in the instant case. To this end, the ARC should consider all of the questions identified in the decision in Case No. 2019/AT/06 and decide, depending on relevancy, whether they should be answered by documentation or by witness testimony. The ARC is urged to ensure that a thorough factual record is made – a better record than was made in the instant case. Such questions should be designed to illuminate the larger question: Is the Bank a de facto employer, either alone or in conjunction with an intermediary contractor? The results of this case show that the Appellant carries a heavy burden of proof when the contract is clearly worded to create independent contractor status and when the conduct of the parties over an extended period of time gives no indication of a contrary intent or practice. Nevertheless, the ARC should ensure that an Appellant is given the opportunity to meet that burden in any future case that might arise.

V. Decision of the Tribunal

73. All four Appeals are unanimously rejected in their entirety.

For the Administrative Tribunal



Spyridon Flogaitis