

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

Case No. 2021/AT/04

Appellant

vs.

European Bank for Reconstruction and Development

FINAL DECISION

by the Administrative Tribunal in plenum

13 July 2023

I. Introduction

1. In the present appeal, the Appellant (“A”), a former staff member of the European Bank for Reconstruction and Development (“Bank”), raises allegations of harassment, bullying and abuse of power against her line manager (“M”) who, in the meantime, has also left the Bank. The alleged incidents date back to 2019. The Tribunal, being seized with this case for the first time in September 2021, remanded it to the Administrative Review Committee (“ARC”) of the Bank for additional fact finding. The ARC submitted a new report in September 2022 with recommendations for financial compensation that the Bank’s President declined to adopt in October 2022. A filed the continuation of her appeal in January 2023.

II. Facts and procedural background

2. On 4 February 2019, A began working for the Bank as an Analyst in one of the Bank’s Resident Offices. At that time, M was the Lead Economist in this Resident Office and her direct supervisor. Both knew each other since 2016 when A had worked for M in a different country. M had advocated A’s application and supported her during the recruitment procedure.

3. Within a few weeks of starting work, A began complaining about M’s treatment of her, including shouting at her, being overly critical of her work and interfering in her non-Bank activities. Regarding the latter, M rejected A’s request for attending university courses during working hours.

4. On 27 April 2019, A appeared in the respective country’s Television for a long interview without prior approval from the Bank, commenting on the current visit of a foreign state’s President to this country. When confronted by M, A alleged that the interview might have been recorded before her engagement with the Bank.

5. In early June 2019, A and M attended a Bank meeting at Headquarters in London. They stayed at the same hotel in two adjacent rooms. On the evening of 10 June 2019, they had dinner and returned to the hotel late at night. The next day, A asked for another room.

6. On 20 June 2019, in the course of A's mid-year performance review, M raised concerns regarding her performance, in particular with respect (but not limited) to her drafting skills.

7. Back at the Resident Office, on 1 July 2019, A submitted a requested piece of work to M. After being criticized for an error, A allegedly fainted and was admitted to a hospital. She later contended that her hospitalization stemmed from M's aggressive and improper behaviour. From 2 to 4 July 2019, A was on sick leave.

8. After A's return to work, the supervision of her work was transferred from M to the Director of the unit. From then on, she no longer worked for M. However, she stayed in the premises of the Resident Office.

9. On 10 and 11 July 2019, A had an email exchange with her London based Business partner, complaining about M's behaviour towards her. However, she did not raise any allegations of sexual harassment.

10. In early August 2019, A contacted another London based HR staff member, who advised her how to file a formal complaint. Again, A did not allege being sexually harassed during her stay in London.

11. On 9 August 2019, A submitted a detailed report of actions by M that she considered constituted harassment, bullying, and abuse of authority. She asserted that these actions had created a hostile work environment.

12. Upon review of A's 9 August 2019 allegations, the Managing Director, Human Resources ("MDHR"), referred A's complaint to the Office of the Chief Compliance Officer ("OCCO") on 23 August 2019. The referral was taken pursuant to Section IV, Paragraph 1.3(c)(ii) of the Procedure on Harassment-Free and Respectful Workplace (RWP), which instructs that, in the event it appears from a complaint that "misconduct may have occurred," the MDHR "shall refer the matter for initial inquiry under the Conduct and Disciplinary Rules and Procedures."

13. After an initial inquiry, OCCO informed the parties that it would undertake a formal investigation of A's allegations against her former line manager. In September 2019, A was interviewed. At this opportunity, A alleged for the first time to have been sexually harassed by M when they stayed in the same hotel in London.

14. In November 2019, the Director to which A reported advised her by email that her work was not satisfactory. He cited 10 different deficiencies on which he based his assessment, including poor drafting skills, failure to properly document data collection and missing deadlines. He also advised her that she had violated Bank rules by not obtaining approval before publishing an article in an online, external publication. A was advised that the Director would recommend her termination if she failed to improve her performance.

15. After completion of its formal investigation into A's complaint, the OCCO issued a final report on 26 November 2019. The OCCO concluded that there was insufficient evidence to support a factual finding that M had engaged in the alleged incidents. A was informed about this outcome accordingly. In its report, OCCO also raised concerns about A's credibility.

16. On 28 November 2019, A reported allegations of sexual harassment against her line manager to the City of London police. This complaint arose out of the June 2019 incident when both A and M were in London.

17. On 20 December 2019, the MDHR informed A of her decision that the line manager's alleged improper behavior was not tantamount to misconduct and that "the matter will be referred for managerial action." A inquired what form the managerial action might take, but her request for that information was denied for reasons of privacy.

18. A appealed the MDHR decision to the Bank's Vice President, Human Resources, who confirmed the original decision on 7 April 2020.

19. On 14 May 2020, the Director of A's unit informed her that he would not recommend confirmation of her appointment as a regular staff member. On that same date, A filed a request for administrative review with the President of the Bank under the Directive on the Administrative Review Process. The President referred the case to the ARC on 4 June 2020.

20. On 15 May 2020, A tendered her resignation from the Bank.

21. During its proceedings, the ARC did not interview any witnesses and did not request the right to review the OCCO investigative report or file. Instead, the ARC asked both the MDHR and the OCCO to provide written reasons for their decisions. Both the MDHR and the OCCO complied. On behalf of OCCO, the lead investigator assigned to the complaint provided a second extended written statement that explained the Office's conclusions with respect to each of eight different allegations presented by A. After several extensions, the ARC issued its Report and Recommendation on 6 May 2021. It concluded that the contested decision should be confirmed and that no remedies be granted to A.

22. The Bank's President issued a decision on 8 June 2021 accepting the ARC's recommendations. Lastly, the President awarded GBP 2,000 to A "in recognition of the Bank's commitment to the expeditious resolution of requests submitted through its administrative review and as a good faith gesture to acknowledge the length of time the ARC took to issue its Report in this matter."

23. A filed an appeal dated 31 August 2021 with this Tribunal, and the Bank filed its response on 5 October 2021.

24. Having requested and received the OCCO investigative report, the Tribunal issued a Preliminary Decision on 5 February 2022. It found the ARC's fact finding proceedings to be insufficient and, therefore, remanded the case to the ARC, including specific questions and requests.

25. The (newly constituted) ARC started its proceedings in April 2022. The ARC interviewed ten witnesses at the end of July 2022. In early August, three additional witnesses were interviewed.

26. On 5 September 2022, the ARC issued its (second) report, noting that there was no procedural irregularity, and that there was insufficient evidence to support a finding of sexual harassment but that M had abused his authority. The ARC recommended the President to compensate A with 10,000 GBP as moral damages, from which the 2,000 GBP already paid should be deducted.

27. On 5 October 2022, the Bank's President took the (new) decision not to adopt the ARC's recommendation.

28. On 4 January 2023, the present appeal was submitted.

III. The Appellant's position

29. In the Appellant's view, OCCO's determination was based on a vitiated and irrational process, relying on personal judgment with no reliable evidence. She thinks that applicable procedures were severely violated.

30. According to the Appellant, the Bank interfered with the ARC process of oral hearings by holding preparatory meetings with witnesses. Furthermore, the prolonged duration and the reluctance as well as the evasiveness of the Bank in providing a transparent response negatively affected the core evidence, namely the witnesses and the documentation.

31. The Appellant therefore believes that the President's decision is based on erroneous facts and irrational reasons.

32. The Appellant requests an oral hearing. On the one hand, she requests the case to be remanded to the investigation stage. On the other hand, she requests compensatory remedies and moral compensation. Finally, she requests anonymity.

IV. The Bank's position

33. The Bank submits that it has discharged its duties towards the Appellant, in particular that a full and thorough investigation into her complaint was properly conducted.

34. The Bank further submits that the ARC erred in finding an abuse of authority, as it relied on an incorrect definition of abuse of authority within the Bank's internal law. Therefore, in the Bank's view, the President was right in not adopting the respective recommendation to award compensation for moral damage to the Appellant.

35. Accordingly, the Bank invites the Tribunal to reject the Appeal in full.

V. The Tribunal's evaluation

a. Oral hearing

36. The Tribunal recalls that Section IV, paragraph 7.02, of the Directive on the Appeals Process (Appeals Directive, DIR/2021/28) provides that in exceptional cases the Tribunal may hold oral hearings to hear arguments of the parties or to re-hear the evidence (or part of the evidence) or to allow new evidence to be heard.

37. Under this standard, the present case does not warrant an oral hearing. Since the ARC heard 13 witnesses, including those who had been nominated by the Appellant, the Tribunal has a sufficient factual basis to assess the legal situation, as foreseen in Section IV, paragraph 7.01 of the Appeals Directive. Further, as correctly determined by the ARC, additional testimony by the Appellant's former HR colleague was and is not useful. The Appellant admitted during her own testimony before the ARC that she did not mention any kind of sexual harassment when she spoke to this colleague in early August 2019. The potential testimony of this HR staff member could not shed any light on the issue whether the Appellant raised the serious allegation of sexual harassment before September 2019 when she did so during her interview with OCCO. Therefore, as such testimony would be irrelevant, the Appellant's request for an oral hearing is rejected.

b. Anonymity

38. The Appellant requests anonymity, to which the Bank does not object. The Tribunal recalls its established jurisprudence that it is inherent to an appeal process that certain facts and opinions become known, both inside and outside the Bank (cf. EBRDAT Case No. 2019/AT/08, paragraph 41). This being said, it is indeed the Tribunal's established approach to limit to the maximum extent possible the exposure of names of staff members concerned or of facts that may identify them. However, an absolute guarantee cannot be given. Under these circumstances the Tribunal grants the anonymity requested by the Appellant. Further, the names of staff members of the Bank, including the line manager, will not be made public by the Tribunal.

c. Merits

39. At the outset, the Tribunal emphasizes that, pursuant to Section IV paragraph 7.01 (b) of the Appeals Directive, it "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 material before it ... 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."

40. The Tribunal sees no reason to deviate from the findings of fact made by the ARC. The findings are based on the testimony of many staff members of different levels who were in touch with the Appellant during her appointment with the Bank. The fact alone that some of the witnesses met with Bank officials before their testimony does not demonstrate that there were inappropriate efforts to influence the content of their testimonies. The records of the testimonies show that the ARC questioned the witnesses in a thorough manner, and that the witnesses gave extensive and detailed answers. In view of the numerous and comprehensive testimonies, additional and new evidence was and is not necessary (see also above paragraph 37).

41. Further, the Tribunal does not find procedural irregularities in the investigation with respect to the Appellant's complaints. The investigation appears to have been conducted in line with the Bank's internal legal framework, as laid down in the Directive on Conduct and Disciplinary Rules (DRI/2021/29). Also, it complied with the principles established by this Tribunal in its decision of 8 November 2021 (EBRDAT Case No. 2021/AT/03, paragraph 54), reading:

“Bank staff have the right, and indeed as in most organizations the duty, to report misconduct and they may expect that their reports are taken seriously and receive prompt investigation. Non-respect by the organization thereof may be challenged. Appellant can, however, only challenge the legality of the process followed and the decision of MDHR informing him about its conclusions (cf. EBRDAT Case No. 2019/AT/08, paragraph 105).”

42. In the present case, these requirements were fulfilled. Based on the Appellant's report of 9 August 2019, the matter was transferred to OCCO on 23 August 2019, which conducted interviews in September 2019 and submitted a report in November 2019. Indeed, OCCO's investigations could and should have been of higher quality (see Preliminary Decision of 18 February 2022, paragraphs 61 to 72; and ARC report Case 62/2020, page 16). However, its shortcomings do not render the report and its conclusions meaningless or irrelevant. The Tribunal is satisfied that the ARC compensated for these deficits by conducting extensive interviews, including with witnesses who had not been heard by OCCO.

43. The Appellant's concerns regarding specific mistakes in OCCO's investigation are without merit. In particular, other and further inquiry with respect to the hotel in which the Appellant and her former supervisor stayed in June 2019 was not useful. It follows from the testimonies before the ARC that no CCTV footage existed on the floor where their adjoining rooms were situated. As the ARC already noted, other CCTV footage was no longer available, and hotel staff could only report the fact that the Appellant had asked to change her room. These obstacles might have been avoided, had the Appellant not initially alleged purely technical reasons (i.e. problems of electricity) for her wish to change her room but reported her allegations of sexual harassment immediately and not many weeks after her stay in London. The OCCO, having been involved only as of September 2019, bears no responsibility for the inability to pursue these possible lines of inquiry.

44. Since no procedural irregularities can be found, the Tribunal will now address the substantive questions whether there is sufficient evidence that the Appellant was sexually harassed and/or was the victim of an abuse of authority by her former supervisor.

(i) Sexual harassment

45. Regarding the events of the night of 10 June 2019, when the Appellant and her supervisor returned from dinner to their rooms on the same floor of the hotel, no evidence other than the testimony of these two persons is available. These statements fundamentally differ and are in no way compatible. The legal assessment of the situation at stake has to take into account two procedural aspects.

46. Firstly, pursuant to established jurisprudence, the burden of proof lies with the person who claims to have been victim of such type of ill-treatment (see, e.g., Administrative Tribunal of the International Labor Organization (ILOAT), judgment 4253, consideration 6). Moreover, it is not for the alleged perpetrator to prove his or her innocence. Where the burden of proof is not met, a case of harassment cannot be established.

47. In the second place, the relevant standard of proof in harassment cases is the question whether it is more likely than not that the incident happened (cf. regarding ‘misconduct’ Directive on Conduct and Disciplinary Procedures, Section 6.01 (a) iv). Where no evidence other than witnesses’ testimony is available, such ‘preponderance of evidence’ (see, e.g., United Nations Appeals Tribunal (UNAT), 2022-UNAT-1187, paragraph 63; ILOAT judgment 4207, consideration 20) requires an assessment of the credibility of these statements. In turn, the veracity of the witnesses depends on a variety of factors, including the probability or improbability of particular aspects of the witness’s version (see UNAT judgment 2022-UNAT-1187, para. 67).

48. In the present case, most witnesses described their impression of the personalities of the persons involved. The Tribunal notes that serious criticism about the alleged perpetrator’s style of management was widespread. However, upon specific inquiry, all witnesses denied that his attitude, even when harsh or inappropriate, ever included any element with a sexual connotation.

Unlike in other cases involving alleged incidents of similar conduct towards other staff members, the alleged perpetrator has never been accused of any behaviour which involved inappropriate conduct of a sexual nature towards others. Also, the Appellant herself does not mention any other interaction with her former supervisor that could be interpreted as sexual in nature. Therefore, in the Tribunal's view, the alleged offender's overall performance and record of behaviour towards colleagues and supervisees does not support the proposition that he suddenly changed his attitude towards the Appellant by sexually harassing her one night in June 2019.

49. Other elements for assessing the situation are difficult to find. However, the Tribunal notes with concern that the Appellant hesitated to report the allegation of sexual harassment to the competent authorities at the Bank, although there were several opportunities to do so before September 2019. Also, it cannot be overlooked that the Appellant did not always tell the truth with respect to her media activities, in particular with respect to her appearance on Television in April 2019.

50. In sum, the Tribunal, in applying the standard of 'preponderance of evidence', must conclude that there is no sufficient proof for the Appellant's allegations of being sexually harassed. Therefore, as the burden of proof is not met, it finds that the Bank's decision to reject the Appellant's claim in this respect should be maintained.

(ii) Abuse of authority

51. The Tribunal recalls that, pursuant to Section IV, paragraph 3.02 of the Appeals Directive, it shall base its decision on, *inter alia*, the internal law of the Bank. In this respect, the Guidance Note on Rule 2 of the Bank's Code of Conduct (based on Rule 22 (a) of the Code of Conduct) has to be taken into account. It defines 'abuse of authority' as "the improper use by Bank Personnel of his/her Bank position of influence, power or authority by Bank Personnel against other Bank Personnel ...". It further clarifies that abuse of authority "may occur: (i) by pressuring other Bank Personnel ...to take actions for one's personal benefit or to violate Bank rules or (ii) by unreasonably impeding the ability of other Bank Personnel ... to work effectively. It may also

arise where there is an improper use of influence, power or authority to arbitrarily influence the career or employment conditions ... of another Bank Personnel...”

52. However, the Tribunal has also to take into account other provisions of the Guidance Note stating that “managers and supervisors are expected to give frank and constructive feedback to Bank Personnel they supervise and/or manage ... The mere expression of a view by a supervisor or by a manager regarding work performance, conduct or related issues within a supervisory relationship, or the giving of a firm managerial direction, shall not in itself be considered as Harassment, Sexual Harassment, Bullying or Abuse of Authority.”

53. Firstly, the Tribunal has no doubt that the Appellant’s former supervisor, in light of the Appellant’s performance and overall conduct, including her unauthorized appearance on Television, expressed his disappointment more than once in strong words. Also, considering the witnesses’ testimony, the supervisor seems to have behaved inappropriately vis a vis lower ranking personnel at some instances. However, the Tribunal sees no sufficient evidence that the supervisor ever shouted at the Appellant or lost his temper in other significant ways towards her. Considering the open office’s structure, such incidents would have been observed and/or overheard by the Appellant’s colleagues, who did not confirm such incidents during their testimonies.

54. However, and more importantly, the Tribunal notes that the criticism the Appellant was confronted with, even according to her own reports, always related to her work performance or conduct. In this respect, the former supervisor did not exceed his responsibilities to give feedback, although he might and should have been more temperate in his managerial style. However, in the Tribunal’s view, he did not exceed his authority or enter into the sphere of bullying, harassment or abuse of power.

55. Further, with respect to the Appellant’s allegation that her supervisor threatened more than once to fire her, the Tribunal notes that the Appellant had been informed at an early stage that such a decision was not within the supervisor’s powers. Also, as from beginning of July 2019, she no longer worked under the supervision of the accused perpetrator. Therefore, the former supervisor’s influence on her professional career was, as the Appellant was already aware, limited and, in any

event, lasted only for a few months. In this respect, the Tribunal takes note that the negative assessment of the Appellant's performance, as laid down in her mid-year performance review of June 2019, was confirmed by her subsequent supervisor in November 2019.

56. In summary, and contrary to the view of the ARC in its report, the Tribunal does not conclude that the Appellant's former supervisor's attitude amounted to abuse of authority within the meaning of the Bank's internal law. Therefore, the Appellant's appeal as such is unfounded in its entirety.

d) Remedies

57. The Tribunal takes note that the proceedings concerning the Appellant's harassment complaint started on 9 August 2019. In June 2021, in her first decision following the initial ARC's report, the President already awarded GBP 2,000 "in recognition of the Bank's commitment to the expeditious resolution of requests submitted through its administrative review".

58. Unfortunately, the Tribunal had reason to remand the case to the ARC in February 2022 for additional findings of fact. Thus, the length of the proceedings increased by several months. In fact, the totality of proceedings lasted for nearly four years after its beginning.

59. Given the sensitivity of its subject, and the negative effects of the unduly lengthy proceedings on the Appellant's well-being, the Tribunal finds it appropriate to award a total sum of GBP 5,000 as compensation, from which the amount of GBP 2,000 already paid to the Appellant shall be deducted.

VI. Costs

60. Paragraph 8.06 (a) of the Appeals Directive provides:

If it upholds an Appeal, in whole or in part, the Tribunal may order that the respondent reimburse the appellant for such reasonable expenses, including reasonable legal costs, the appellant has incurred in presenting the Appeal. Exceptionally, the Tribunal may order that

the respondent pay all or some part of the appellant's legal costs where the Appeal has not succeeded.

61. As the Appellant was not represented by counsel and has not requested the Tribunal to reimburse any costs, it is not necessary to consider whether the Respondent should bear the Appellant's legal costs.

VII. Decision

62. The Tribunal rejects the Appeal. With respect to the undue length of the proceedings, the Bank shall pay as remedy an additional GBP 3,000 to the Appellant.



Chris de Cooker, President



Marielle Cohen-Branche



Thomas Laker



Joan Powers



Maria Vicien-Milburn