

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

Case No. 2022/AT/02

**Appellant**

**vs**

**European Bank for Reconstruction and Development**

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**DECISION**

**by a Panel of the Administrative Tribunal comprised of**

**Chris de Cooker (Chair)**

**Spyros Flogaitis**

**Thomas Laker**

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**15 June 2022**

## **I. Introduction**

1. In the present Appeal the Appellant seeks the annulment of the decision of the President of the European Bank for Reconstruction and Development (EBRD or Bank) dated 19 January 2022 confirming the decision taken on 25 January 2021 by the Managing Director of Human Resources and Organisational Development (MDHROD) to terminate her employment at the Bank during the probationary period.

2. On 23 March 2021, the Appellant submitted a Request for Review of an Administrative Decision (RARD) regarding the decision to terminate her employment. The President referred it to the Administrative Review Committee (ARC) for consideration. The ARC submitted its report and recommendations on 15 December 2021. The ARC concluded that the Appellant was not afforded a fair evaluation and that the decision to terminate her employment was disproportionate and unreasonable. The Appellant having found alternative employment, the ARC considered that the appropriate remedy in the circumstances would be that the Bank pays the Appellant compensation in an amount equal to the remuneration she would have received for the full period of her probation and an additional payment of the equivalent of three months' remuneration as moral damages for the procedurally unfair nature of her dismissal.

3. On 19 January 2022, the President issued her Decision. She emphasized that the Bank's applicable internal law makes it clear that the purpose of the probationary period is to allow for the assessment of the suitability of a staff member to the Bank and the Bank may terminate the appointment of a staff member on probation, by giving notice in writing, at any time during the probationary period. She also underlined that an appeal against a discretionary decision will only be upheld if it is found that the decision was arbitrary, or discriminated in an improper manner against the staff member or a class of staff members, or was carried out in violation of applicable procedure. In connection with decisions to terminate a staff member's employment during the probationary period, the Bank has two main obligations: (i) to demonstrate lack of suitability for continued employment, and (ii) to provide reasons for the termination decision.

4. Having considered the record in the matter, the President found that:

(a) throughout your probationary period, you received appropriate guidance, feedback, advice and support on the performance of your duties at the Bank, commensurate with your role and your seniority and experience;

(b) throughout your probationary period, you received periodic performance evaluation and concrete feedback on areas that required improvement, including in particular in one-to-one meetings with your line manager in June, July, August, September and November 2020, as well as in writing;

(c) in the context of the mid-probation review, at the end of September 2020, you received adequate and specific warning of performance shortcomings, a reasonable opportunity to remedy them and you were fully aware of the consequences of continued failure to meet performance expectations during the probationary period;

(d) reasonable and impactful adjustments, in line with Bank guidance, were made to take into

account your personal circumstances including the fact that you are a working single mother during the Covid-19 pandemic. These included flexible working hours of your choice which, based on your contemporaneous communications, seemed to be having a positive effect, and adjustments to your workload.

5. The President also rejected the claims of racial and indirect gender discrimination:

Turning to your claims of racial discrimination and indirect gender discrimination, I do not find these compelling or supported. As also noted by the ARC, there is no evidence of racial discrimination. With respect to indirect gender discrimination, you maintain among others that the commencement of a performance improvement process after the mid-probation point in September 2020, and the steps that followed, were indirectly discriminatory towards you as a single working mother because of the challenges that you were facing during the Covid-19 pandemic. However, I note that the objective of the performance improvement process was to assist you in improving your performance and to demonstrate your suitability for the role.

In addition, I note that reasonable adjustments were made for you, or offered to you, taking into account your personal circumstances. Further, the performance improvement process was commenced at the end of September 2020, after you had already spent more than 6 months in your role at the Bank and after circumstances had changed and your home pressures had eased with the children's return to school in early September 2020.

Taking into consideration these adjustments and circumstances, I consider that you were treated fairly and the Bank acted reasonably, in accordance with Bank guidance. I therefore do not find support for your claim that the commencement of a performance improvement process following the mid-probation point, or other steps, were discriminatory, whether on the basis of gender or otherwise.

6. She concluded that the Bank had genuine and well-articulated concerns as to the Appellant's suitability for the role and that the Administrative Decision was reasoned and amply supported by the evidentiary record. Moreover, there was in her opinion no support for the claim that the Administrative Decision was arbitrary or discriminatory in any way. She further considered that a reasonable process was followed and that the Appellant was provided with adequate opportunity to improve her performance and demonstrate suitability for continued employment.

7. She agreed with the findings of the ARC Report regarding the payment in lieu of notice that was received, the acceleration of the notice period and the Bank's refusal to grant administrative leave. She decided to confirm the Administrative Decision.

## **II. Procedural history**

8. The present appeal was lodged on 11 April 2022. The Tribunal directed the Bank to provide its Response to the Statement of Appeal by 19 May 2022.

9. The Response was received on 19 May 2022.

10. On 25 May 2022, the Appellant requested permission to submit a Statement in Reply to

the Bank's Response.

11. On 27 May 2022, the Appellant was informed that the Tribunal had denied her request, as the Appeals Process Directive does not provide for a second exchange of written arguments.

### **III. The ARC Report and the Administrative Review Decision**

#### **The ARC's findings of fact**

12. The ARC summarized the facts as follows:

...

5. The Staff Member, a British national, commenced employment at the Bank on 16 March 2020 on a 3-year fixed-term contract as Principal, Principal Counsel in the [...] team of the Office of the General Counsel ("OGC [...]"). Her appointment was subject to a one-year probationary period ending on 15 March 2021.

6. The Staff Member qualified as a solicitor in 1997 and worked exclusively as an employment lawyer up to the date she joined the Bank. She trained at the international "Magic Circle" London Headquartered law firm, Clifford Chance in the mid-1990's, and spent 18 years working in well-regarded employment practices in two other law firms. During a 12-year period spent working for the law firm Hogan Lovells International, she spent 7 months on secondment to the Bank between 2010 and 2011, covering another lawyer's maternity leave. She moved from private practice to work "in-house" in 2014, taking on a full-time role as Lead Employment Counsel at a global firm of insurance brokers where she led a small team of employment lawyers and trainees for 6 years.

7. The Staff Member is a single mother to three school-age children who were 12, 13 and 15 at the time of her appointment to the Bank. She is a mixed-race woman of white and Asian descent.

8. The OGC [...] team advises on matters related to human resources (policy, procedural questions, contentious and non-contentious matters), the Agreement Establishing the Bank as well as the Bank's status, privileges and immunities. Excellent drafting skills, punctuality and adherence to deadlines are essential to the functioning and reputation of the team. The Job Description for Principal Counsel provides that the incumbent will assist in the development of policy and ensure that legal risks and issues relating to matters assigned to him/her team are identified, addressed and managed and will serve as a focal point for the provision of all relevant legal services in his/her area of responsibility, ensuring the highest standards of documentation, protection of EBRD's interests and compliance with EBRD's mandate, policies, and procedures.

9. The Job Description also puts emphasis on the requirement for excellent drafting, negotiation and project management skills as well as excellent interpersonal and communication skills.

10. The Staff Member's first six months at the Bank (16 March to September 2020) coincided with the first six months of the COVID crisis, the first lockdown in the UK and the introduction of remote working by the Bank. She started a new job at the Bank on the first day of remote working.

11. The Staff Member also had to face several personal challenges and bereavements during this period. At the start of the lockdown she was informed by doctors that her youngest child was

clinically vulnerable due to a history of severe asthma and accordingly had to shield at home against Covid. This required the Staff Member to furlough her nanny /domestic help during her first week at the Bank. In effect, the Staff member lost her support system which had previously enabled her to juggle her professional responsibilities as a senior lawyer with those of a single mother to three children. The Staff Member's second child suffers from a learning disability (dyslexia and dyspraxia which is a sensory processing disorder) and needs more support than other children her age. With the closure of schools, the Staff Member was the sole adult responsible for three teenagers, who, for extended periods, were confined to a small flat until September 2020 when schools in the UK re-opened.

12. The Staff Member was accordingly faced with the sudden need to combine domestic responsibilities under lockdown with the exigencies of starting a new job remotely in a completely new legal discipline (international administrative law) for a new line manager under intense pressure whom she had only met once in person. She was compelled to work "the double shift" that many single professional mothers are obliged to perform, made worse by the fact that she had to work in the confines of her small flat with the children at home during working hours.

13. Two weeks after commencing employment with the Bank, on 31 March 2020, the Staff Member's father died alone when COVID impacted in care homes. She was unable to travel, be with the rest of her family or attend her father's cremation. A couple of days after her father's cremation, she was informed that her youngest daughter's eleven year old best friend had been found dead by her parents in her bedroom in "a tragic and senseless accident influenced by social media". She thus had to deal not only with her own grief but also with her youngest child's grief at this loss. The Staff Member and her child were obliged to attend this funeral online on 11 May 2020.

14. Added to that, the Staff Member's middle child has a learning disability. She became withdrawn during the lockdown and would not leave her bedroom. The Staff Member discovered in early June that this child had opted out of attending any online lessons for 10 weeks.

15. The Staff Member maintains that the combination of starting a new job, the pandemic, working remotely, the lockdown, her personal grief, the emotional and practical challenges facing her children, her total lack of support at home and her unfamiliarity with her new work environment impacted negatively on her work performance. As she put it:

"Trying to work in a new and unfamiliar role while managing these unforeseen pandemic-generated domestic dramas and be counsellor, carer, cook and cleaner was extremely difficult, not least as it was impossible to predict what each day would bring."

16. The Staff Member says she is a positive and resilient person but by mid-August, had become physically and mentally exhausted from lack of a break. Judicial notice may be taken of the notorious fact that during the pandemic many single mothers in the position of the Staff Member have experienced similar pressures which undoubtedly have had adverse impacts on their working and family lives. These are exceptionally trying times for many.

17. The Bank accepts that the Staff Member faced great difficulty in getting to grips with her new responsibilities remotely. The Staff Member could not immediately gain access to the Bank's IT system (e.g. e-mail and archives). She had to wait until 24 March 2020 to receive a Bank laptop. As a consequence, while the Line Manager sent to the Staff Member on 18 March 2020 a series of documents to get familiarised with the Bank's legal framework, the Line Manager did not allocate any work assignment to her before 26 March 2020. The Bank also acknowledged that the remote working situation created challenges for the Staff Member. The Line Manager and the Staff Member sought to ameliorate the problem by having regular exchanges with a view to finding an adequate working schedule allowing the Staff Member to meet both her family and work commitments.

18. Throughout her probation period, the Staff Member was allocated a number of assignments and was regularly informed by the Line Manager about the way her performance was perceived and assessed, as well as how it could be improved. The Bank referred in particular to five work assignments – described as Projects A-E.

19. Project A, allocated on 26 March 2020, involved a case before English courts where the only outstanding issue was a costs issue. The Line Manager's e-mail contained a description of the case as well as of the next steps needed to be taken, in cooperation with the external counsel. The limited scope of the Staff Member's role was to instruct the external counsel, liaise with him and report internally.

20. On 14 April 2020, the Line Manager and the Staff Member had a discussion about Project B, a contentious matter which had been initiated before the Staff Member joined the Bank and which had been pending completion of an OCCO investigation. While the Staff Member asserts that she was not provided with any hand-over note or summary she did have a conversation with Line Manager on that day and received, following this exchange, all relevant information in nine distinct e-mails containing all information about the case.

21. On 30 April 2020, Project C, relating to a request for review of a performance appraisal, was assigned to the Staff Member. Project C subsequently developed into an ARC case relating to termination during probation. In her email, the Line Manager also briefly described the role of HR during this pre-contentious procedure.

22. Fourthly, Project D involved discussions about the situation of a staff member who, during the remote working period, decided to work from a non-member country (which contradicted the guidance issued by the Bank requiring staff members to only work in Bank member countries).

23. Fifthly, Project E related to the participation of the Staff Member in the "Return to Work" working group, addressing issues linked to the work management post COVID-19.

24. On 9 July 2020, the Line Manager and the Staff Member had a discussion amounting to a mid-year performance review during which the Line Manager detailed three main areas requiring improvement.

25. The first area requiring improvement concerned the provision of notice or the early flagging of circumstances that may impact work delivery/attendance. There was concern with regard to Project B in respect of which the OCCO investigation had concluded in late May 2020. The Line Manager followed up with the Staff Member asking her if she was up to speed. She also expected the Staff Member to follow up with the next steps. This did not happen and, on 19 June 2020, the Staff Member wrote to the Line Manager with a question about how to print the materials relevant to the file. The Line Manager expressed her surprise considering a request evidencing the fact that the Staff Member was still not familiar with the documents she received two months before. This prompted further discussions and resulted in the matter being reassigned to another team member.

26. Furthermore, in March/April 2020, both the Line Manager and her assistant had followed up on the Staff Member's issues with regard to access to IT systems. However, by early July 2020, it transpired that the Staff Member continued to have IT system issues and had not alerted the Line Manager about their impact.

27. Another issue arose with regard to Project A. The Staff Member arranged a meeting with her Line Manager and external counsel. On the day of the meeting, and without notifying anybody in advance, the Staff Member joined the meeting 10 minutes late. Therefore, the first 10 minutes of the meeting were uncomfortable as neither the Line Manager nor the external counsel were clear



on the purpose of the meeting, nor did they know when or if the Staff Member would join.

28. The second area of concern was the need for the Staff Member to familiarise herself with the EBRD policies, directives and procedures, in particular as regards procedural steps on HR matters. In this regard, the Line Manager referred to Project B, in which the Staff Member, as the senior lawyer in charge of the file, failed to prevent a procedural flaw as she did not inform the internal HR client about the procedural deadline to be met following receipt by the MDHR of the outcome of an OCCO investigation under Section IV.1.6 of the RWPs.

29. The third issue raised in the mid-year review was the need for shorter emails and more focussed advice. The Staff Member was asked to set out the recommendations or advice so as to mitigate risk that clients may misunderstand or pick and choose from such advice. An example of this was found in the context of Project E where the Staff Member was asked to prepare a paper a “guidance note on the duty of care”. On 6 May 2020, the Line Manager commented on a first draft, providing a mark-up and adding suggestions for restructuring this paper, “taking it one level up in terms of principles” and requesting that the next draft be much shorter. The Line Manager then provided further comments on 20 May and 26th May.

30. In her Request, the Staff Member addresses these specific criticisms of her work performance but also adds a general perspective of the lack of support that she received as a newly on-boarded staff member expected to come to grips with a new work environment remotely. She said:

“The personal difficulties which the Applicant experienced during the First Lockdown Period were exacerbated by the fact that the Applicant’s manager was under significant pressure herself. The Applicant’s manager had only recently been appointed to the Acting Chief Counsel role which involved managing a growing team of lawyers (two of whom, including the Applicant, were new joiners from non-IFI backgrounds) and two assistants, (one of whom had also joined just before the First Lockdown Period). The manager also had to take on the duties of the recently retired Deputy General Counsel until his replacement began in early September 2020.

The extreme pressures during the First Lockdown Period left the Applicant’s manager, understandably, with little time to on-board and manage the Applicant remotely. Although never acknowledged, a lack of managerial contact and support is relevant to several examples cited by the manager of the Applicant’s “unsuitability” during that period.

The sense of lack of support was shared by other new joiners. In the July 2020 engagement survey, which was discussed at a team meeting on 2 September 2020, there was a stark divide between the positive feedback between established staff members, all lawyers from IFI backgrounds and new joiners within the HR [...] team who were not. A new joiner who was open about being a detractor in a meeting on the survey commented on a “lack of communication by [my] line manager” and “lack of contact and feedback”. This lack of communication or more accurately, lack of managerial patience towards the Applicant magnified the professional challenges the Applicant had to deal with.”

31. With regard to the specifics, the Staff Member explained:

“On 14 April 2020, the manager sent papers for “Project B” to the Applicant. Project B was a complex multi-claim employment dispute which had been running for over 18 months. The different complaints had been brought at different times under various procedures and were each at different stages of review. The documentation on this case was voluminous, running to several hundred pages and was sent to the Applicant in a series of 13 emails many of which contained multiple email attachments. The Applicant was not provided with any hand-over note or summary.

At the time, the Applicant could only view these files on a small laptop. She did not have access the Norwel/Prescient filing system which meant she could not organise the documentation electronically. Working remotely, she could not print off materials to order them manually. The case also involved multiple internal HR procedures (the Administrative Review Process, the CDRPs, and the RWP) of which the Applicant had no prior experience. In short, the Applicant was required to digest a significant amount of factual and procedural information on Project B in the immediate aftermath of two bereavements, working remotely, in a new role, in the early weeks of the First Lockdown Period, without standard office equipment and with multiple interruptions on the domestic front.

On 6 May 2020, the Applicant had a short call to discuss Project B with her manager. The Applicant was surprised at the manager's curt and impatient reaction when the Applicant used the term "grievance" process rather than the ARP process. Instead of neutrally correcting the term used, the manager abruptly cut short the conversation, reprimanded the Applicant and instructed the Applicant to "go back and read the Staff Handbook". This was the first signal that the manager took little account of the fact that although the Applicant was a senior lawyer, she was working to digest information about a new system of law in highly disrupted circumstances."

32. The Staff Member provided fuller context and clarification of the complaint that she missed a procedural deadline as follows:

"On 12 May, (the day after the funeral of the Applicant's daughter's friend), the Applicant had a call with the manager and a senior manager in ER to discuss the latest email from OCCO to the complainant, notifying them of the outcome of an investigation. During that discussion, neither the manager nor the senior manager in ER who are both experienced in the Bank's internal law and processes alluded to the requirement for the MDHROD to follow-up on OCCO's notification.

Prior to this, on a different matter involving a Request for an Administrative Review concerning a performance rating ("**Project C**"), the manager had informed the Applicant "*In terms of process, ER draft the responses and we review them.*" The Applicant had therefore understood that the same principle would apply in this instance if a response was needed.

The Applicant takes ownership for the fact that she had not identified that after an outcome of no misconduct had been communicated by OCCO, a further step was required under section IV paragraph 1.6 of the RWPs. That oversight was largely due to the amount of factual and procedural information the Applicant had to digest in the short time since taking on the case in mid-April and the fact that she was still learning about how OCCO, HR and OGC interfaced.

However, the fact that both the senior manager in ER and the Applicant's manager, both highly experienced and expert in dealing with the Bank's internal law, also did not register that deadline until after it had passed is relevant to the weight attributed by the manager to this oversight by the Applicant, particularly if responsibility for drafting the follow up letter for the MDHROD fell to the ER team.

The heavy censure which the Applicant received regarding this oversight showed a tendency to "*finger point*" rather than provide the kind of management support that the manager might show to a more integrated member of her team. More importantly, it revealed a reticence to follow HR Guidance and adjust managerial expectations to reflect the reality of the Applicant's circumstances....



A further example of a lack of managerial support on Project B arose in June 2020 when the Applicant approached the manager to ask if there was a way to print out the materials so she could order and annotate them. The Applicant raised the issue after she had unsuccessfully tried to resolve the matter independently.

The manager reproached the Applicant, stating *“I’m a bit surprised that this is where we are considering that I assigned the [ ] matter to you and sent you the documents more than 2 months ago. Let’s discuss.....”* This overlooked the fact that (i) all staff members had been told that it was not possible to print and (ii) the Applicant was a new joiner and did not immediately wish to “admit to their line manager that they are in some way struggling with their current working arrangements caused by COVID 19”. This quote, taken from MDHROD’s 12 June 2020 Intranet post, indicates that the Applicant was not unique in taking a cautious approach in navigating managerial expectations, particularly as the manager appeared to have little availability to give guidance and the Applicant did not know her. This comment again, felt adversarial rather than collaborative, and showed little sensitivity to the Applicant’s circumstances.....

The Applicant and the manager (at the manager’s suggestion) agreed that it would be prudent to transfer Project B to another long-serving and experienced team-member due to the Applicant’s lack of bandwidth over the Summer Holiday. A significant reason why the Applicant agreed not to continue with this case was because she realised, regardless of seniority, a lack of management support mattered if the Applicant was to lead a complex, long running case under a system of law which she was still learning about under lockdown conditions. It was already clear to the Applicant that she would not get that support from the Manager.”

33. On 13 August 2020, the relevant HR team member wrote to the Line Manager reminding her that the Staff Member’s fixed term appointment was subject to 12 months probationary period and a mid-probation review was due in September 2020 and recommending that the Line Manager and the Staff Member carry out a mid-probation review to discuss performance and support actions. The letter noted that it was very important that any points of concerns be addressed, allowing sufficient time to set up a support plan and to monitor progress during the remainder of the probationary period. It concluded that it was imperative that the Line Manager contact her HR Business Partner as soon as possible if there were specific issues to be addressed.

34. On the same day, the Line Manager contacted the HRBP noting:

“I have ongoing concerns with [Staff Member’s] performance. Some of these I have documented as guidance/development points as part of the mid-year review and I will continue to provide [the Staff Member] with appropriate feedback, including via Webex calls and emails as appropriate. However, I will also need to have a formal mid-probation review. Let me structure my thoughts and objectives for this review (i.e. over and above what [the Staff Member] and I discussed at mid-year a few weeks ago) and I would like us to please discuss so that I can have the necessary support from HR. I can then schedule a formal mid-probation review with [the Staff Member] in early September. Shall you and I discuss tomorrow or early next week?”

35. On the same day, and in a meeting documented by the Line Manager, the Line Manager and the Staff Member discussed various matters. The Line Manager referred to the Staff Member’s drafting of an inadmissibility decision two days earlier and contended that the Staff Member had failed to adopt a concise and clear drafting style. Exhibit 24 of the Bank’s response contains an edited version of the admissibility decision reflecting the Staff member’s original version and the edits and corrections (tracked changes) effected to it by the Line Manager. The document adds support to the Staff Member’s contention that she was perhaps subjected to harsh censure. The edit

reveals a somewhat over-zealous resort to the red pen. The original version was an adequate rendition of the decision – though which no doubt could have been improved in some respects, yet in other respects was possibly clearer than the edited version. The changes in some instances amount to no more than stylistic or grammatical preferences. They do not support a claim of incompetence or poor performance.

36. Under normal circumstances, a line manager wanting to reformulate a colleague's work would engage personally (rather than virtually) with tactful suggestions making allowance for stylistic differences. In the virtual world brought about by Covid, the opportunity for collegial exchanges of this kind is often lost.

37. The Line Manager also made much of the Staff Member failing to meet the pre-agreed deadline for the admissibility decision and sending the document the day after, without informing the Line Manager and after being reminded. The Staff Member had agreed to send the draft on Monday 10 August 2020. She instead sent it early the next morning, Tuesday 11 August 2020, at 07h25. It is unclear whether the late submission was prejudicial in any way. It seems unlikely. If that is so, the seizing upon it as an instance of alleged poor performance is pedantic, even petty, and worryingly indicates a reluctance to accommodate an obviously vulnerable and relatively senior colleague who was clearly struggling with remote work, the effects of the pandemic and getting to grips with a new job in a new work environment to which she had not been on-boarded in the ordinary and usual way. The Staff Member saw it as follows:

“The Applicant assumed that the lack of visibility due to remote-working contributed to the manager forming sceptical and negative judgements about the Applicant's character. However the micro-aggressions resulting from these judgements became more pronounced and frequent as time progressed.”

38. On 21 September 2020, the Line Manager and the Staff Member had a mid-probation review meeting. The Line Manager maintained and illustrated further the performance concerns identified during the mid-year review and classified them in the same three categories: i) familiarisation with EBR; ii) focused advice and communication; and iii) work delivery and attendance.

39. With regard to the familiarisation with EBRD, the Line Manager gave additional examples that had taken place since the previous review. The first example related to Project C where the Staff Member did not address the specific question of the Line Manager and made a parallel between EBRD situation and English law regarding the calculation of payment-in-lieu-of notice under English law. This demonstrated to the Line Manager “a surprising lack of recognition of the EBRD legal status as an IFI”. Again, this seems a bit pedantic. The Staff Member does not address this criticism, but it is hard to imagine how a mistaken analogous reference to English law in an exchange between legal colleagues can be consequential.

40. The second example relates to Project D where the Staff Member ignored relevant provisions of the Bank's internal law in her analysis of the options available to the Bank in a situation where a staff member had relocated to a non-member country during the remote working period and the Bank needed him to return to a member country. This prompted the Line Manager to redraft the document. This, according to the Bank, again demonstrated the Staff Member's lack of knowledge of the essentials of the Bank's legal framework while most of the relevant information had been sent to her three days after she commenced remote employment. This lapse may be of concern, but perhaps amounts to an understandable error by a new staff member who had not been inducted adequately into the work environment and has been denied the benefit of the normal corridor engagements so vital in adjusting to a new work environment. It is an error that could be expected from a new employee, unfamiliar with the work environment, working remotely under enormous emotional pressure during the pandemic and without adequate domestic assistance.

41. Many of the other criticisms of the Staff Member are of similar order and also point to a lack of familiarisation with the Bank's internal law and procedures. Again, such lack of familiarity, in fairness, is perhaps to be expected from an employee who since the commencement of her employment has not worked at the workplace and is unacquainted with its practices, systems etc.

42. Other criticisms of the Staff Member raised at the meeting of 21 September 2020, are, however, more germane to the claim of unsuitability. The line manager had legitimate concerns about "focused advice and communication" and "work delivery and attendance". At the meeting, the Line Manager gave a series of examples of the Staff Member's communications which "can often be long-winded/wordy and sometimes digressing from the key legal risks and issues in point". The Line Manager believes that "the lack of focus in your communications makes you appear unprepared, and it also leaves participants with an impression that a meeting lacks focus and progress". The Staff Member's propensity to be long winded and lacking in focus is reflected to some extent in her Request and replies in this ARC process. On the other hand, she writes well and makes her case lucidly. If she is given an appropriate opportunity to improve her style through collegial engagement, the problem may be surmountable. She is quite evidently an able solicitor who in better circumstances may be able to adapt to requirements different to those to which she was accustomed elsewhere.

43. As an additional example, the Line Manager referred to an instance where she asked the Staff Member to prepare a briefing for the General Counsel prior to an Executive Committee meeting. The Staff Member missed the deadline for the briefing and, when she provided the briefing, she did it in various e-mails and documents with a series of open questions which prompted the Line Manager to redraft the document and to claim again that the Staff Member demonstrated a lack of knowledge of the essentials of the Bank's legal framework.

44. The Line Manager pointed to other problems of delivery. She again referred to the deadline missed for the briefing, the inadmissibility decision in Project C and "repeated absences or delays for team meetings or calls" and a lack of effective communication with assistants on IT issues; and the fact that the Staff Member did not regularly and appropriately file her work assignments and documents in the "Norwel" system, to which she had access since, at least, June 2020. The Line Manager then emphasised that "punctuality and meeting deadlines should be a given, but if you cannot do so because of something unexpected, at least you need to notify me or your assistant in advance" and also underlined that the Staff Member had been given all the flexibility desired and a lighter workload compared to other colleagues.

45. At the conclusion of the meeting, the Line Manager advised the Staff Member that she was requiring her to "demonstrate considerable improvement in all three areas" and set a 6 weeks review period (the "Performance Plan"), with bi-weekly meetings (instead of monthly), at the end of which a further probation meeting would be scheduled. The Line Manager then concluded that, based on her assessment, she did not consider that the Staff Member was "presently meeting the suitability criteria for the position of Principal Counsel in OGC".

46. The Staff Member states in her Request that the instigation of the Performance Plan crystallised her misgivings that the process instigated by the Line Manager to assess her suitability was tainted by discrimination and unconscious bias. On 28 September 2020 she wrote to the Line Manager expressing those misgivings in relevant part as follows:

"I asked you in our meeting to have due regard to my performance over the remaining six months of my probation and to keep an open mind. You demurred and emphasised that the Bank is entitled to give due weight to the first six months of my employment.

I am not negating either the difficulties that have arisen or the fact that this must have been difficult for you to manage. But this approach feels precipitous and unfair as there were limits on what either of us could do to resolve matters in June, July and August when we

discussed your concerns.

In order for my suitability for permanent employment to be fairly and impartially assessed:

Proper account needs to be taken of the impact of lockdown on my performance and the limited scope I had as a single mother to address your concerns during the first six months of my employment before the reopening of schools.

Now that my circumstances have changed, I should be given a fair opportunity to prove my worth during the rest of my probation period.

Given the extreme challenges around finding work in the current climate, as a responsible employer, I believe it is fair (absent any egregious behaviour) to give me until the end of the prescribed 12 month probationary period to prove my suitability.

Looking at this question from a broader perspective, I also want to draw your attention to the London School of Economics study on the impact on women of the Covid lockdown. In their report ... Professor Barbara Petrongolo, Associate in Labour Markets at the Centre for Economic Performance, is quoted as saying:

“The Covid-19 crisis is currently widening the gender gap at work, where women are more likely to lose their jobs than men, and at home, where women are taking on the bulk of childcare. The closure of schools and nurseries has added education and childcare services to pre-existing home production needs, with a likely increase in pre-existing disparities between the childcare contributions of mothers and fathers.”

I allude to this to emphasise that mine is not an isolated case and employers need to apply their processes carefully to ensure they do not disadvantage women disproportionately compared to men. That is not to say the Bank is a charity or should agree to sub-standard service. Rather, I should be given a fair chance now that my working conditions at home have improved to be judged on what I deliver going forward after a tumultuous and unforeseen six months.”

47. In another document, the Staff Member stated:

“Proper account needs to be taken of the impact of lockdown on my performance and the limited scope I had as a single mother to address your concerns during the first six months of my employment before the reopening of schools...Now that my circumstances have changed, I should be given a fair opportunity to prove my worth during the rest of my probation period...Given the extreme challenges around finding work in the current climate, as a responsible employer, I believe it is fair (absent any egregious behaviour) to give me until the end of the prescribed 12 month probationary period to prove my suitability”.

48. The Staff Member thus conceded that there were problems regarding her performance. She explained these as being the result of the pressures and difficulties brought about by the pandemic and essentially asked for more time to demonstrate her suitability. On 29 September 2020, the Staff member sent a table of comments to the manager on the grounds given to justify the Performance Plan in which she “sought to strike a balance between being receptive towards the manager’s feedback and pushing back where mistaken or biased assumptions or exaggerated conclusions were used inappropriately to justify the Performance Plan.”

49. It does not seem that the Line Manager responded to the Staff Member in writing addressing directly the Staff Member’s claim that the pandemic had affected her performance and

requesting more time for further evaluation. However, according to the Bank, on 29 September 2020, the Line Manager offered to discuss the Staff Member's comments during their catch up meeting on 9 October 2020 and the Staff Member orally informed the Line Manager that she did not want to dwell on the past and wanted to look forward.

50. On 20 November 2020, the Staff Member and the Line Manager met to discuss the Performance Plan. The Line Manager first detailed the performance concerns identified in the context of an ARC submission in Project C. The Line Manager's complaints were similar to the earlier ones namely "continued lack of familiarity with the Bank's internal law and lack of focus, clarity and attention to detail" or "lack of awareness for the work involved in preparing submissions with voluminous annexes". The main concern here was that while the Staff Member prepared her draft submission relating to Project C between the 14 October and 7 November 2021, she only submitted, a few days after the agreed deadline, an incomplete first draft that had to be substantially redrafted in a short period of time to reach usual quality standards. The shortfalls in the first draft were pointed out by the Head of HR ER (main client of the OGC [...] team on the matter) in the following e-mail to the Staff Member:

"By way of feedback, I would like to share that I found the writing style and the length of the document somewhat a departure from the other submission drafts the Bank prepared in the past. I very much appreciate that each counsel has their own style, and also the staff member has submitted a large amount of information with the RRAD which should be considered. However, I found myself having to re-read paragraphs on several occasions to grasp the statement within, the language in places too "expressive" and taking attention away the meaning of the argument, and on few occasions wondering if some seemingly general statements are supported by evidence.

Another new element I noted is the use of names of individuals who are not parties to the submission, e.g. HRBP, colleagues and other managers. Unless this is absolutely necessary for the narrative, I would like to suggest that they are either referred to as other staff members or the job titles are used instead of names. Similarly, there are occasions where use of pronouns could be replaced with Staff Member/Line managers as applicable, to add clarity. I also would like to recommend that where possible "his line manager" is replaced with "the line manager", I have changed this in some places but not all.

Given the tight time frame before the document needs to go to [name] and the volume of the present submission, I will appreciate it if the next draft could be shared with me on Friday so that I can have another read through over the weekend before [Line Manager] reviews on Monday".

51. The criticisms again point to the Staff Member's difficulty in acquiring familiarity with the requirements of the Bank. As appears in Exhibit 37, the Line Manager substantially redrafted the document. A reading of the tracked changes of the edited document shows that while it had some weaknesses requiring improvement, it too was in many respects adequate. There appears again to have been an over-zealous, somewhat exasperated application of the red pen to give effect to what in many instances were stylistic, grammatical and editorial preferences. The impact on the Staff Member would have been demoralising, especially if there was no prior engagement with her. An edit of this order of a senior colleague's work, virtually entirely dismissing her effort and much good in the document, adds credence to the Staff Member's repeated contention that the Line Manager was dismissive of her difficulties and gave insufficient heed to the possible causes of them.

52. The Line Manager and her Assistant also had issues about the formatting of the document and the last minute preparation of the relevant exhibits and the number of emails about the preparation of the bundle of exhibits. These events, in the opinion of the Line Manager, showed "the lack of preparation and organisational sense of the Staff Member". They also may indicate the



difficulty of a new employee battling to get to grips with the workings of a work environment into which she had not been inducted.

53. At the meeting of 20 November 2020, the Line Manager again referred to the same three areas of concern identified since the mid-year review, a lack of familiarity with the Bank's systems, and "shortcomings with respect to the accuracy, precision and consistency expected of a lawyer at the Principal Counsel level".

54. The Line Manager focussed on errors made by the Staff Member in the context of assignments based on standard templates. She paid particular regard to a response to a request from the prosecutor's office in the context of a criminal investigation in a country of operation in which there were inconsistencies and inaccuracies in the draft response that the Staff Member prepared for review of the Line Manager, including an erroneous reference to Chapter VII rather than Chapter VIII on privileges and immunities and incorrect quoting of the title of this Chapter from the AEB. It is not clear whether the Staff Member as a new employee was familiar with such requests or if the Line Manager had given the Staff Member any guidance or instruction regarding them. Another example given by the Line Manager related to the issuance of a power of attorney and certificate confirming the designation of an authorised signatory. The error on this occasion was that the draft "contained inconsistent use of terminology in the form of a defined term without a definition" that made the certificate inconsistent with the accompanying power of attorney. The precise nature and impact of this error is uncertain, though one imagines the problem could easily have been remedied in a manner that might have ensured its unlikely repetition.

55. The Line Manager also highlighted that comments made during the mid-year review about the proper archiving and filing matters had not been addressed by the Staff Member. A number of grant review items had apparently been incorrectly filed as institutional matters instead of under co-financing area of the corporate portfolio overseen by the Matrix Manager. According to the Line Manager, the Staff Member, as the assigned lawyer for these matters, bore the responsibility to check that matters are opened and filed correctly, even if the actual matter opening and filing is done by assistants. The error here is a minor error again possibly the result of an inadequate on-boarding of an employee. There is no indication whether the Staff Member (who had not visited the Bank's offices) was given any instruction or guidance on the filing system.

56. The Line Manager concluded her assessment as follows:

"I appreciate that some of the examples above may not seem particularly material taken separately. However, taken together they demonstrate a continued lack of attention to detail, precision, consistency and in general the level of quality assurance that is expected from the assigned lawyer with responsibility for a matter".

57. The Line Manager is correct. The errors relied on by her were not particularly material. Taken together they equally may well signify that the Staff Member was not on-boarded properly and probably received inadequate guidance, instruction and familiarisation with the Bank's policies and procedures as a result of her having to work virtually from the commencement of her employment. She was also subjected to somewhat harsh scrutiny and exacting standards in what clearly was an extremely difficult time for her personally. The following observation of Staff Member in her Request would appear not to be entirely misplaced:

"The Applicant and manager had 3 catch up sessions during the Performance Plan Period on 9 and 30 October and a 2-hour meeting on 20 November 2020. The manager followed up the 2 hour meeting immediately with a pre prepared document running to 5 full A4 pages of unrelenting and exclusively damning feedback. This feedback subjected the Applicant in some cases to microscopic levels of scrutiny and failed to reflect any of the Applicant's comments in mitigation put to the manager over the course of their call earlier that day.



The manager's failure to acknowledge any of the Applicant's feedback during the Performance Plan and her refusal to recognise any positive qualities whatsoever in work produced by the Applicant strengthened the Applicant's misgivings that the manager had been going through the motions and treating the performance management process as a tick-box exercise to support a pre-determined outcome."

58. In her assessment of 20 November 2020, the Line Manager concluded that despite providing guidance and feedback, the Staff Member had not improved. She added:

"I would note that, if performance of a team member remains below what is required or expected, as a line manager, I am not expected or required to devote an exceptional amount of time and effort in the attempt to bring performance to the standards required for the position. In my assessment, since the mid-probation discussion in September, you have not demonstrated sufficient improvement in the areas identified."

59. The Staff Member provided feedback on the Line Manager's written feedback of 20 November 2020 in writing on 26 November 2020 and at a meeting on 4 December 2020. Her written feedback again made the point that she was not properly integrated into the team at the Bank and was subjected to unreasonable scrutiny. She said:

"Your evaluation on 20.11.20 runs to five A4 pages of exclusively damning commentary. At no point do you acknowledge that I have brought anything of value to the Bank. This is not balanced or fair.

There is almost no analysis within your conclusions of comments I have provided on your feedback. In fact, for the most part, my comments are not mentioned at all. This is not balanced or fair.

Your evaluation appears to hold me to a different standard to others. This appears most starkly in your description of me as "lacking in personal sensitivity" in response to a practice which appears to be endorsed in the work of another senior team member. Whilst I believe this will have been unconscious, I have flagged other examples of inconsistency which should be considered.

You have criticised me for ineptitude in cases where you have made relatively minor comments on my work (see my comments on the coaching / guidance criticism – attached, and my comments on your 30 October feedback in my 26.11.20 note)

You have treated as incompetence any divergence from your way of thinking, describing judgements which I have carefully considered as the product of carelessness and a lack of familiarity with the Bank's internal law. I cannot speak to the difficulties experienced by others from non-IFI backgrounds who joined our team this year. However, the last engagement survey suggests a shared sense of feeling undervalued as compared to those from IFI backgrounds. This points to more general challenges around integrating those from non-IFI backgrounds into the team.

In places, you criticise my working style / matters of process as incompetence without acknowledging that there are different ways of reaching an acceptable result. This is a prescriptive approach."

60. On 7 December 2020, the Line Manager sent to the Staff Member a draft recommendation to the MDHR in which the Line Manager was planning to recommend to the MDHR to terminate the employment of the Staff Member before the end of the probationary period. On 24 December 2020, the Staff Member submitted her comments. On 7 January 2021, the Line Manager sent to the

MDHR a recommendation for termination (the “Recommendation”), together with the Staff Member’s comments. The Recommendation summarises and provides evidence about the identified performance shortcomings, the steps taken by the Line Manager and the reasons why the employment of the Staff Member shall be terminated.

61. On 12 January 2021, the Staff Member wrote to the MDHR, asking the MDHR not to accelerate her termination date, should a termination decision be taken.

62. On 25 January 2021, the MDHR issued the decision to terminate the Staff Member’s employment. The MDHR noted that the Line Manager suitably informed the Staff Member of the duties and requirements of Principal Counsel, [...] position and provided the Staff member with guidance to address weaknesses and performance shortfalls and underlined that the Line Manager had made and suggested reasonable adjustments to the Staff Member’s workload and working hours to take in to consideration the Staff Member’s personal challenges due to the pandemic and its implications. The MDHR consequently decided to accept the Line Manager’s assessment that the Staff Member’s performance continued to be less than fully satisfactory in spite of efforts to improve it and that the Staff Member is not suited for longer-term employment with the Bank. Taking into account the exceptional circumstances of the ongoing pandemic and its implications the MDHR decided to apply a 18 weeks’ notice period instead of the minimum 12 weeks’ notice period foreseen in the SHB and that, as allowed by paragraph 6.2 (c) of the Procedure on Ending Employment, she had decided that it was in the Bank’s interest to accelerate the notice period of the Staff Member and bring forward the end date of her employment to 5 February 2021 instead of 15 March 2021, the last day of her probationary period.

### **The ARC’s considerations**

13. The ARC ‘s considerations are as follows:

64. Section 5(c) of the Staff Regulations provides inter alia that an appointment shall commence with a probationary period, the length of which shall be determined at the discretion of the Bank, which shall however not exceed one year to allow the Bank and the staff member to assess their suitability to each other. Section IV, paragraph 2.6 (Probation) of the Directive on Entering Employment provides that upon entering employment with the Bank a Staff Member shall be subject to a probationary period for the purpose of assessing suitability of employment of the Staff Member by the Bank. Unless expressly waived in the letter of appointment, the duration of the probationary period shall be 12 months for a Staff Member with a Regular or Fixed-Term appointment in a position non-eligible for overtime pay. At any point during or at the end of the probationary period, the Staff Member’s line manager may recommend to end a Staff Member’s employment by non-confirmation of appointment and, as a result, the relevant Staff Member’s employment may be terminated in accordance with the Directive on Ending Employment.

65. Section IV, paragraph 3 (Termination during probation) of the Procedure on Ending Employment provides that at any time during a Staff Member’s probationary period, the Managing Director, Human Resources & Organisational Development may take a reasoned decision to terminate the Staff Member’s employment, following a recommendation in writing by the line manager, in consultation with their own manager at Director level or above.

66. Section IV, paragraph 5 (Termination during probation) of the Directive on Ending Employment provides that the Bank may terminate the employment of a Staff Member who is on probation and who fails to demonstrate suitability to continuing employment with the Bank by

providing the applicable written notice of termination. The notice period shall not count towards the duration of the probation and where the notice period extends beyond the end of the probationary period, the Staff Member's employment with the Bank shall end at the end of the probationary period and, if applicable, the Staff Member shall receive a payment in lieu of notice in respect of any such applicable notice period which extends beyond the end of the probationary period.

67. Section IV, paragraph 6.2 (c) (Notices) of the Procedure on Ending Employment provides that upon the request of the Staff Member or where this is in the interest of the Bank, the Managing Director, Human Resources & Organisational Development may decide to place the Staff Member on administrative leave for the duration of the notice period or to accelerate a Staff Member's notice period and bring forward the end date of employment.

68. The purpose of probation is to enable an organisation to assess an individual's suitability for a position. The employer has a wide discretion regarding decisions concerning probationary matters including the confirmation of appointment, any extensions of a probationary period, and the identification of the organisation's own interests and requirements. A decision not to renew a staff member's appointment is discretionary and will be set aside only if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. The purpose of probation is to ensure that new staff members are the best qualified. So an organisation must be allowed the widest measure of discretion in the matter and its decision will stand unless the defect is especially serious or glaring.

69. However, in order to fulfil the purpose of probation, the employer must properly evaluate the staff member. This requires the employer to assess the staff member's performance and to determine the factors contributing to any poor performance. The requirements of reasonableness oblige the employer to afford the staff member reasonable evaluation, instruction, training, guidance and counselling. The process of investigation and evaluation is particularly important in that it should ascertain whether any poor performance has been caused by circumstances beyond the staff member's control. Poor performance for which the staff member is not to blame may arise from a variety of causes. Investigation is therefore essential because it may well be that a staff member's poor work is attributable to extraneous factors like inadequate equipment or organisational problems.

70. The documentary record in this case, as mentioned more than once, and as recognised by the Bank itself, demonstrates that the Staff Member working remotely struggled to familiarise herself and adapt to the Bank's organisational culture, systems, regulations and practices. This is a difficult task for new employees under normal circumstances. It is even more difficult where a Staff Member is required to do so virtually and remotely without a proper induction and without direct contact with colleagues other than in virtual meetings. The pandemic has brought with it significant challenges, one of them being the requirement that some employees work remotely. Many will adapt easily enough, but others, especially those who have not had the benefit of being present in the workplace, may struggle.

71. While it cannot be denied that the Staff Member's work was in some respects below par, and that she evinced a lack of knowledge of the Bank's requirements, we are not persuaded that the evident weaknesses were entirely her fault. It is doubtful that the Staff Member, being unacquainted

with the work environment as she was, facing very real practical and emotional difficulties brought on by the pandemic, was given a full and fair opportunity to acquit herself. Considering that she is a senior legal professional with a prior satisfactory work record, it is unfair to assess her on the limited basis upon which she was evaluated. An incomplete assessment with so damning a result will cause her disproportionate reputational damage.

72. Moreover, many of the criticisms of her written work point to stylistic issues and her inexperience with the Bank's house style, standard documentation and the like. As the Line Manager rightly acknowledged, some of the errors were not material and most likely might have been easily corrected if the Staff Member had been working alongside colleagues in the office. A fuller induction and regular engagement with colleagues at the workplace would have better acquainted the Staff Member with the work environment, the ethos, the work culture, the systems, the procedures and the predilections of her colleagues, while allowing her an opportunity to foster collegial relationships. Being required from the first day of her employment to work remotely, alone and virtually from an overcrowded, small flat, without domestic support, in a state of exhaustion, anxiety and grief, she was denied that opportunity.

73. In the circumstances, the Staff Member was not afforded a fair evaluation and the decision to terminate her employment was disproportionate and unreasonable. A more proportional response would have been to recognise the stress she was under and to extend her probation in order for a just evaluation to be done after a proper, fuller induction.

74. Having reached that conclusion it is not necessary to determine if the Staff Member was subject to racial and gender discrimination. Suffice it to say the claim of racial discrimination seems unfounded. The Staff Member has furnished no facts supporting a claim of racism. Her case for indirect gender discrimination is more compelling. The prohibition on indirect discrimination is based on the realisation that, though the basis of differentiation may, on the face of it, be innocent, the impact or effect of the differentiation is discriminatory. The requirement to work at home virtually during the pandemic while applying equally to men and women is likely to adversely impact on women more, especially single mothers. As the Staff Member rightly points out, statistically more women have primary responsibility for childcare within the family unit. The situation the Staff Member found herself in was not atypical.

75. An employer has a duty to provide an employee with appropriate premises and the tools to carry out her duties. If the employer is unable to do that, it can be expected to make reasonable accommodation taking account of the wholly unsatisfactory circumstances brought about by the pandemic requiring the Staff Member to work the "double shift" which is the lot of many single mothers expected to work at home.

76. The Staff Member contends that the decision to accelerate her notice period and not to place her on paid administrative leave until the end of her probation period was unreasonable. There is no merit in these claims. Where the notice period extends beyond the end of the probationary period, the staff member's employment ends at the end of the probationary period. The MDHR moreover has the right to accelerate notice periods when it is in the Bank's interest. The MDHR took account of the exceptional circumstances of the pandemic and decided to apply an extended notice period of 18 weeks. The calculations of the amount owing appear to be unassailable. The termination of the employment and the acceleration of the notice period had no impact on the fact that a staff member leaving before 3 years of service or before the end of their contract does not

have the right to any Final Salary Plan related benefit. The Bank has decided to provide the Staff Member with an amount under the Money Purchase Plan corresponding to what she would have received had her service ended on 15 March 2021. The Staff Member was covered by the Bank's group life insurance for less than 12 months and was therefore not eligible to request a continuation of the cover after her departure.

77. The recommendation of the ARC in terms of Section IV paragraph 6.4.2(i) of the ARC Directive in circumstances such as these would be that the contested decision to terminate the Staff Member's employment be reversed and modified with a decision extending the Staff Member's probation for a period the President considers appropriate. However, correspondence from the Staff Member on record indicates that she has already found alternative employment. The details of that are unknown. The appropriate remedy in the circumstances is that the President should pay the Staff Member compensation in an amount equal to the remuneration she would have received for the full period of her probation and an additional payment of the equivalent of three months' remuneration as moral damages for the procedurally unfair nature of her dismissal

### **The Administrative Review Decision (PARD)**

14. The President disagreed with the ARC's conclusions and recommendations as follows:

In its Report, the ARC concluded that the Administrative Decision was "*disproportionate and unreasonable*". In connection with such overall conclusion, I have carefully considered the ARC's Report and I find that the ARC's conclusions and recommendations are fundamentally flawed or deficient and I do not agree with them for the following reasons:

(a) In the Report, the ARC engages in a so-called microscopic review of your performance and suitability for employment at the Bank and substitutes its own evaluations for the Bank's evaluations of performance and suitability. This is illustrated throughout the Report [...] where the ARC replaces its own assessment of work deliverables for the Bank's assessment or makes assumptions as to the impact of performance shortcomings (such as, for example, the impact of missed deadlines or delivery of incomplete or incorrect work products) and reaches its own conclusions as to such impact. This is inconsistent with, and contrary to, the applicable legal framework as referred to above.

(b) Further, the ARC's Report constitutes an incomplete and imbalanced consideration of the facts, with facts being disregarded or being given disproportionate weight. For example:

- whilst the ARC references that adjustments were made or proposed to support you, taking into account your personal circumstances [...], the ARC does not make any findings or take such adjustments into consideration in reaching its conclusions;

- the ARC concludes that more support should have been provided to you. However, in reaching this conclusion, the ARC does not appear to make findings or recognise the support and guidance that you in fact received (including, in regular meetings with the line manager on work assignments, regular one-to-one meetings with the line manager (monthly and, later on, bi-weekly), periodic performance feedback and suggestions on how to improve performance, regular weekly meetings with the team, regular monthly meetings with the team (on specific topics), regular (at least weekly) sharing and cascading of management

and administrative information and other forms of virtual interactions). Further, the ARC references lack of guidance or instructions on the Bank's filing system in contradiction of the written record which demonstrates that guidance and training were in fact provided;

-the ARC appears to place a disproportionate weight on the fact that you were a new staff member in a new job [...]. Firstly, I note that any assessment of performance or suitability during probation is guided by the fact that a person is new to the role and this was the case for you and other new joiners in the same team. Secondly, I find that in its conclusions as to the assessment of your performance and suitability, the ARC does not appear to give due consideration, for example, to the fact that you are a senior and experienced lawyer with over 24 years of experience, appointed to a role commensurate with your level of experience (having also had at least some exposure to the Bank during a 7-month secondment at the Bank in 2010-2011).

(c) Having reached its conclusions with regards to its own evaluation of your performance during probation, and notwithstanding your Request for Review with respect to your claims of discrimination, the ARC noted that it did not consider it necessary to determine whether you were subject to racial and/or gender discrimination [...]. Further, the ARC noted that your claim of racial discrimination was "*unfounded*" but that your claim of indirect gender discrimination "*is more compelling*", including because "*statistically more women have primary responsibility for childcare within the family unit*" and "*[t]he requirement to work at home virtually during the pandemic...is likely to adversely impact on women more, especially single mothers*". Thus, the ARC asserts in generic terms that your claim of indirect gender discrimination may be compelling because you are a woman and a single mother but the ARC does not make any findings or assessment of any facts that may be relevant to a claim of gender discrimination in your specific circumstances. I turn to these points further on below.

(d) With respect to the ARC's recommended remedies, I note that the ARC's Report appears to misconstrue or to fail to take into account the facts and the Bank's legal framework:

- the ARC's view, that one of the potential remedies in your case could have been the extension of your probationary period, seems to fail to take into account the fact that the maximum probationary period established at the Bank is 12 months. In accordance with the Bank's applicable internal law (the Staff Regulations), this period cannot be extended by me (or by the Bank's management) as this is a matter that falls under the authority of the Bank's Board of Directors;

- one of the ARC's recommendations is that the Bank should pay you compensation equivalent to the salary you would have received until the end of the probationary period. However, your probationary period and employment with the Bank ended on 5 February 2021 and you received a payment in lieu of notice equivalent to 18 weeks salary from that date (the applicable notice period usually being 12 weeks).

Consequently, I consider that the ARC's recommended remedies are also flawed. For the reasons set out in this decision, I also do not consider that payment of moral damages is appropriate.

15. This is the impugned decision.



#### IV. **The Appellant's position**

16. The Appellant acknowledges that the facts of her case do not fall within the circumstances outlined in Regulation 3.03 - Guiding Principles of the Bank's Appeal Procedure (*Cf. infra*, paragraph 39). She invites the Tribunal, however, to depart from the above-mentioned guiding principle as her appeal raises important questions about how the law on indirect (or disparate impact) sex discrimination applies to protect staff members of the Bank. She submits that a guiding principle is not a rule and that the text provides that a decision shall normally be upheld, meaning that the Tribunal may depart from it if there are good reasons to do so. She adds that the Tribunal has so far not given detailed consideration on the concept of indirect sex discrimination.

17. She contends that the stance the Bank has adopted and legal tests the President has applied to analyse her complaint of indirect sex discrimination have been muddled and are fundamentally flawed. She submits that remote working arrangements in 2020 during the first year of the Covid pandemic were likely to adversely impact women more than men.

18. She alleges in this respect that the President should have gone on to consider:

- a. Whether the approach taken by the Bank to evaluate the Appellant's suitability for employment took adequate account of the greater professional disadvantages faced by single working mothers with childcare responsibilities during the 2020 Covid lockdown period as compared to men.
- b. Whether the Bank could have adopted an alternative approach to evaluating the Appellant's suitability for employment which would have mitigated against the gender-based disadvantages she experienced by being subject to the Bank's standard performance processes during the 2020 lockdown, leading to her dismissal.
- c. Whether the Bank is able to justify deploying its standard performance processes in this situation because of adjustments it claims to have made to the Appellant's working conditions.

19. The Appellant contends that the President did not address any of these questions correctly and overlooked the Bank's serious and consistent failure to recognise that its deployment of standard performance methods to evaluate the Appellant's suitability was liable to (and did) disproportionately disadvantage her as a single woman joining the Bank during the 2020 Covid lockdown due to her greater childcare responsibilities and the loss of outside help compared to men. Furthermore, the President failed to consider if the Bank could have adopted less discriminatory alternative routes to evaluate suitability and failed to analyse whether the alleged adjustments adequately mitigated any discriminatory impact on the Bank's performance processes during the Covid pandemic.

20. Lastly, she submits that the President erred in considering if the examples of unsuitability relied upon to dismiss the Appellant were proportionate.

21. The Appellant requests anonymity.

22. The Appellant submits that it is likely had she not been dismissed she would have remained in post for the full 3-year period of her employment contract. She reserves the right to claim reinstatement if she has not found a permanent position and the Tribunal upholds this appeal.

23. In the case reinstatement is not practicable, the Appellant requests compensation for all financial losses, less any income earned by way of mitigation including but not limited to:

- the payment of performance-based compensation assuming a performing as required rating should have been applied had the manager adjusted expectations in line with HR Guidance and not discriminated against the Applicant indirectly based on sex,
- lost salary adjusted to account for any pay rise the Applicant may have received absent the vitiated evaluation,
- the value of lost benefits including employer pension contributions which would have accrued during the period for which compensation is awarded.
- moral damages / compensation for injury to feelings, harm and suffering to reflect the negative impact on the Applicant's dignity and general mental health during her employment in 2020 and 2021,
- interest, and
- any legal fees which may be incurred in the future conduct of this Appeal.

## **V. The Respondent's position**

24. The Respondent contends that the PARD was taken on a reasonable and observable basis, was lawful, procedurally fair and rational. The Respondent considers that the termination decision during the probationary period was a legitimate exercise of managerial discretion and supported by a well-documented record of the discretionary assessment of unsuitability for continued employment with the Bank. It adds that the claim of indirect sex discrimination was not supported by the evidentiary record. Taking into account the Appellant's personal circumstances and the impact of the Covid-19 pandemic remote working arrangements, the evidentiary record supports that reasonable adjustments, in line with the Bank's guidance, were made for or offered to, or in consultation with, the Appellant throughout her employment with the Bank during the probationary period.

25. It underlines that pursuant to Section IV, paragraph 3.03 (a) of the Appeals Directive, the Tribunal shall uphold any decision not to confirm a staff member's appointment during the probationary period unless the following criteria are met: (i) an express assurance was given that the appointment would be confirmed; (ii) the Staff Member changes their position in reliance on the assurance; and (iii) the assurance was unqualified or the staff member met all the qualifications. The Bank submits that these criteria do not apply in the present case and that the Appellant has confirmed this.

26. The Respondent draws the attention to the fact that the Directive on Entering Employment, Section IV, paragraph 2.6, provides that at any point during or at the end of the probationary period, the staff member's line manager may recommend to end a staff member's employment by non-confirmation of appointment, triggering termination in accordance with the Directive on Ending Employment. The Directive on Ending Employment, Section IV, paragraph 5, then provides that the Bank may terminate the employment of a staff member who is on probation and who fails to demonstrate suitability to continuing employment with the Bank by providing the applicable written notice of termination.

27. It refers to this Tribunal's jurisprudence regarding the termination of appointment during the probationary period, in particular case 2021/AT/03. It also refers to pertinent jurisprudence of the World Bank Administrative Tribunal (WBAT), of the International Labour Organization Administrative Tribunal (ILOAT), and of the United Nations Appeals Tribunal (UNAT).

28. It argues that due process with respect to a probationary period requires an organisation to make staff under probation aware of the possibility of adverse decisions being taken and to offer an opportunity to be heard. This was done.

29. Regarding discretionary decisions where more than one alternative course of action or approach may be available to an organisation or a decision maker, the Bank notes that tribunals have held that it is not the role of a tribunal to consider the correctness of the choice made amongst the various courses of action. Nor is it the role of a tribunal to substitute its own decision for that of the decision maker.

30. The Bank further submits that the Appellant's arguments in relation to indirect sex discrimination are not supported by any evidence. It notes and acknowledges that the Covid-19 pandemic and remote working arrangements in 2020 had an impact for all staff members including other working parents (often with young children) in the Appellant's team who, like the Appellant, were faced with juggling home and work responsibilities, in a remote working environment. In addition to the Appellant, there were other (female) new joiners in the Appellant's team in the same period who were parents of young children as well as other (male and female) staff members in the team, also parents of young children. Also the ARC observed that such situation was not atypical and that these were exceptionally trying times for many.

31. The Bank invites the Tribunal to reject the Appeal in full without any award of the requested remedies.

## **VI. The Tribunal's evaluation**

### **a. Oral hearing**

32. The Tribunal recalls that Section IV, paragraph 7.02, of the Directive on the Appeals

Process (DIR/2019/14) 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.

33. The parties not having requested an oral hearing and no exceptional circumstances being established, the Tribunal does not deem it appropriate to hold an oral hearing.

b. Anonymity

34. The Appellant requests anonymity, to which the Bank does not object. The Bank notes, moreover, that it is the Tribunal's approach to limit, to the maximum extent possible, the exposure of facts or descriptions that may identify participants in the matter pertaining to the appeal process and requests the Tribunal to adopt such approach also in this case.

35. The Tribunal recalls that it is inherent to an appeal process that certain facts and opinions become known, both inside and outside the Bank (*Cf.* 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. An absolute guarantee can, however, not be given. Under these circumstances the Tribunal grants the anonymity requested by the Appellant and grants the Respondent's request for the names of staff members of the Bank, including the line manager, not to be made public by the Tribunal.

c. Merits

36. The Tribunal fully realises that the Covid pandemic disrupted the private and professional lives of almost everybody. New ways and means had to be found urgently in order to allow the professional life to continue with a new work and private life balance. Many accommodations had to be made for specific situations and many lessons will undoubtedly be learned about this episode.

37. It is, however, important to emphasize at the outset that an international administrative tribunal makes its assessment in law on the basis of established facts and evidence. It is also appropriate to recall in this respect that paragraph 7 of the Directive on the Appeals Process stipulates that the Tribunal shall take full account of the Findings of Fact made by the ARC. The Tribunal understands that the ARC did not conduct an evidentiary hearing and that the Appellant was not given the opportunity to present her case in person. The Tribunal repeats (*Cf.* Case No. 2021/AT/03, paragraph 43) to find this regrettable as the case concerns the termination of the Appellant's employment. It understands, however, that a hearing was not requested. The Tribunal concludes that the case file with its many annexes was sufficient to convey both parties' factual and legal positions to the ARC and properly formed the basis for the ARC's Findings of Fact.

38. The Tribunal also emphasizes that the decision to terminate an appointment is of a discretionary nature. It is constant that the review of such cases by an international administrative tribunal is limited. In this respect also paragraph 3.03 of the Directive on the Appeals Process provides that the Tribunal is guided by the following principles:

...

(b) 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.

39. The review by the Tribunal of decisions not to confirm appointments of staff members on probation is even more restricted. Paragraph 3.03(a) of the Directive on the Appeals Process in this respect provides:

(a) Notwithstanding any other provision of this paragraph 3.03, an Appeal by a Staff Member on probation against a decision not to confirm their appointment, or by a Staff Member on a fixed term contract not to renew or extend the term or convert their fixed term appointment to a regular one, shall normally be upheld only if it is established:

(i) that the Staff Member was given an express assurance by an officer of the Bank whom the Staff Member was entitled to consider as having authority to give such assurance, that their appointment would be confirmed or regularised, or their contract renewed, or extended, as the case may be;

(ii) that the Staff Member changed their position in reliance on this assurance; and

(iii) that the assurance was unqualified, or that the Staff Member subsequently met all the qualifications attached to it.

40. The Tribunal reiterates what it held in EBRDAT Cases Nos. 2018/AT/06 and 2021/AT/03:

The Tribunal observes that, as a general matter, administrative tribunals do not have the power to review the exercise of managerial discretion. It is only when a decision is taken in violation of the applicable law, that tribunals have jurisdiction. In particular, in respect of a decision to terminate employment of an employee in the probationary period, a tribunal may verify that the decision was taken with due regard to principles of due process, but may not substitute its own evaluation to the employer's evaluations of the employee's performance or workload, or on how the employer organizes and carries out its activity.

The applicable law in this case consists primarily of the Staff Regulations, the Staff Handbook, as well as principles of international administrative law, including principles on due process.

These sources set out a general duty to deal with employees in a fair and impartial manner (section 3(a) of the Staff Regulations).

Regarding the probationary period, the internal law makes clear that the purpose of the probationary period is to allow to assess the suitability of the employee to the employer (section 5(c) of the Staff Regulations and section 2.5.2 of the Staff Handbook). On this basis, pursuant to section 12.2.2(1) of the Staff Handbook, the Bank

“may terminate the appointment of an employee who is on probation, by giving him/her notice in writing, at any time during the probationary period or at the end of this period.”

The termination of Appellant's employment during the probationary period is, in other words, the exercise of a discretionary right of the Bank, and the Tribunal does not have jurisdiction to rule on

the substantive reasons on which the decision was based.

41. The Tribunal recalls what it also held in Case No. 2021/AT/03 namely that, while the assessment of the Bank's managerial discretion falls outside the scope of the Tribunal's review, the limited review by the Tribunal does imply an evaluation of whether the procedure followed by the Bank in exercising its discretion and the decision taken were in compliance with the applicable law. In this respect, it is to be noted that the Bank's internal law provides that at any time during a staff member's probationary period, the MDHROD may take a reasoned decision to terminate the staff member's employment, following a recommendation in writing by the line manager (*Cf.* Section IV, paragraph 3, of the Procedure on Ending Employment). Moreover, the Bank has a duty to respect the principles of due process and to not abuse its powers. All staff members, but staff on probation in particular, must be informed of their shortcomings and weaknesses.

42. It is clear from the record, and not in dispute, that shortcomings were identified and brought to the Appellant's attention. A performance plan was set up and regular meetings were scheduled and held. The Bank had sufficient elements on which to base its discretionary decision to determine the Appellant's suitability and to confirm the Appellant in her appointment or not. This is an assessment to be made by the Bank, which has a large discretion in these matters and, as mentioned above, the Tribunal will not substitute that assessment with its own. The Tribunal is, moreover, satisfied that the process followed was regular.

43. The Tribunal recalls that Section IV, paragraph 2.6, of the Directive on Entering Employment, provides that upon entering employment with the Bank a staff member shall be subject to a probationary period for the purpose of assessing suitability of employment of the staff member by the Bank. The duration of the staff member's probationary period in this case was 12 months. At any point during or at the end of the probationary period, the staff member's line manager may recommend termination of the staff member's employment by non-confirmation of appointment and, as a result, the staff member's employment may be terminated in accordance with the Directive on Ending Employment. Section IV, paragraph 5, of the Directive on Ending Employment, which provides that the Bank may terminate the employment of a staff member who is on probation and who fails to demonstrate suitability to continue employment with the Bank. Lastly, and as noted *supra* in paragraph 41, the Procedure on Ending Employment provides that at any time during a staff member's probationary period, the MDHR may take a reasoned decision to terminate the staff member's employment, following a recommendation in writing by the line manager. The Bank thus has two obligations: it must demonstrate lack of suitability for continued employment and the decision to terminate must be reasoned.

44. This was scrupulously followed. The Appellant joined the Bank in mid-March 2020. On 9 July 2020, the line-manager made her first remarks about shortcomings and areas requiring improvement. The record shows that many meetings were held since then to discuss matters. On 7 December 2020, the Appellant was shown a draft recommendation to terminate her appointment. She commented thereon on 24 December 2020. This culminated in the formal recommendation dated 7 January 2020 to terminate the appointment. The Tribunal concludes that the Appellant received adequate feedback on her performance shortcomings and was adequately put in a position



to comment thereon. The Respondent's duties towards the Appellant in this respect were thus fulfilled. The Appellant was adequately put in a situation to understand the reasons why her appointment was not confirmed and her employment terminated. The Tribunal's role, as well that of the ARC, is limited, however, to determine whether the Bank's discretionary powers were abused or not in this respect. The Tribunal holds that this was not the case.

45. The President of the Bank has not followed the recommendations of the ARC. An organization's responsibility to provide reasons is particularly compelling where it utilizes a peer review procedure and the ultimate decision-maker does not accept the recommendations of an advisory body he or she has created. The ILOAT, for example, "*has consistently stressed the requirement that where a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated.*" (Cf. ILOAT Judgment No. 2339, Consideration 5). The Tribunal notes that in the present case the President has in great detail explained the reasons why she disagreed with the ARC (Cf. paragraph 14 *supra*) and concludes that the requirement to provide reasons was met.

46. The Appellant acknowledges that the conditions of Regulation 3.03 on the Appeal Procedure are not met (Cf. paragraph 16 *supra*). She, however, invites the Tribunal to depart from these provisions as her appeal raises important questions of indirect sex discrimination. She refers to her personal situation as a single mother during the first Covid lockdown. She has made many general observations and presented studies before the ARC and before this Tribunal in support of her claim. The ARC Report also refers to unfortunate events in the Appellant's environment, which certainly had their impact on the Appellant, but did not all have gender related reasons or effects. The Tribunal understands that the period between March and September may have been harsher on her as a single mother than on other groups of employees, but it must be added that she was not the only one in that situation.

47. The situation changed in September 2021 and also the probationary period entered a new phase. The sequence of events given in the ARC Report (Cf. paragraph 12, *supra*, subparagraphs 38-60) shows that at the conclusion of the mid-probation review meeting of 21 September 2020, the Line Manager advised the Staff Member that she was requiring her to "demonstrate considerable improvement in all three areas" and set a 6 weeks review period (the "Performance Plan"), with bi-weekly meetings (instead of monthly), at the end of which a further probation meeting would be scheduled. The Line Manager concluded that, based on her assessment, she did not consider that the Staff Member was "presently meeting the suitability criteria for the position of Principal Counsel in OGC". It is true that the Appellant commented thereon and drew attention to her personal situation and to the fact that, generally, women suffered harsher professional consequences than men during the pandemic.

48. The case before the Tribunal challenges the decision to terminate the Appellant's appointment during her probationary period, because the Bank had, in its discretion, arrived at the conclusion that she was not suitable for further employment. Shortcomings were identified and documented. It must be underlined that the Appellant was following the mid-probation review meeting given ample opportunity to improve under this time better circumstances. No substantial

improvement was, however, noted. The Appellant has not convincingly established that these shortcomings would not have occurred in different circumstances. The Tribunal can thus not share her view that she would under other circumstances have completed her first three-year contract.

49. The Tribunal concludes that the Appeal must be rejected in its entirety.

## **VII. Costs**

50. Paragraph 8.06 (a) of the Directive on the Appeals Process 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.

51. The Tribunal does not uphold the Appeal. The Tribunal further sees no reason to order that the Respondent pay exceptionally all or some part of the Appellant's legal costs, if any, where the Appeal has not succeeded.

## **VIII. Decision**

52. The Tribunal rejects the Appeal in its entirety. No remedy is awarded.

**15 June 2022**

**For the Administrative Tribunal**



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**Chris de Cooker**

**Chair of the Panel**