

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

**Case No. 2023/AT/01**

**Appellant**

**vs**

**European Bank for Reconstruction and Development,**

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**DECISION**

**by a Panel of the Administrative Tribunal comprised of  
Maria Vicien Milburn (Chair)  
Marielle Cohen-Branche  
Chris de Cooker**

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**6 October 2023**

## **I. Introduction**

1. The statement of appeal (the “Appeal”) concerning these proceedings was filed with the Tribunal on 16 January 2023. The Appellant (Ms. X) challenges a decision by the President of the European Bank for Reconstruction and Development (“EBRD” or “the Bank”) taken on 20 October 2022 in Case No. ARC 69/2021 (the “President’s Decision”). This decision endorsed the Administrative Review Committee (the “ARC”) Report and recommendations adopted on 30 September 2022 (the “ARC Report”). The ARC Report was adopted on the Appellant’s request for Administrative Review Decision, submitted on 27 October 2021 ( the RARD), contesting the decision by the President of the Bank that she did:

“not consider that the standard of proof required for a factual finding of misconduct (that is, on a balance of probabilities) has been met in relation to any of the allegations .... made against the line manager as set out in .... [the] complaint .... [and that ] in the same vein, ..... the Administrative Decision was lawful, reasonable and procedurally fair.”

## **II. Facts and Procedural History**

2. The Appellant entered the service of the Bank on 9 February 2004. She has served as an Associate Director and Senior Banker in [Team] at the Bank’s Headquarters since 1 April 2014. The Appellant (Ms. X) and her line manager (Mr. Y) were colleagues and Senior Bankers, serving in the same team, under the supervision of Ms. Z who separated from the Bank in early 2017.

3. On 1 June 2017, Mr. Y was appointed Head of [Team] to succeed Ms. Z. Both the Appellant and Mr. Y had applied for the same position. In 2019, Mr. Y was promoted to the position of Director. The Appellant alleges that, after assuming the role of Head of [Team], Mr. Y repeatedly removed the Appellant from projects and re-allocated her clients. This was before [Team] formally re-allocated business development roles in 2021. The Appellant alleges that Mr. Y’s conduct amounted to a pattern of abuse of authority and discriminatory treatment against her.

4. On 6 January 2021, the Appellant filed a complaint before the Managing Director, Human Resources and Organizational Development (“MDHROD” or “Managing Director”) against her line manager, pursuant to the Respectful Workforce Procedures (“RWPs”) as

well as Rule 2(d) of the Code of Conduct for EBRD Personnel, alleging harassment, bullying, abuse of authority and discriminatory treatment. The Managing Director recommended a “facilitated resolution” as provided in Section 1.4 of the RWPs in the interest of improving the working relationship between the Appellant and her line manager in future. In a communication dated 19 February 2021, the Appellant declined, on the basis that she had previously engaged in discussions with her line manager without a positive resolution to the issues. On 25 February 2021, the Managing Director decided to “close the matter with no further action, as per paragraph 1.4(c) and 1.3(c)(i)(c) of the RWPs.”

5. On 2 March 2021, the Appellant submitted a report to the Office of the Chief Compliance Officer (“OCCO”) pursuant to the Directive on the Conduct and Disciplinary Rules and Procedures (“CDRPs”) alleging misconduct by her line manager.

6. OCCO conducted an initial inquiry. On 4 May 2021 it interviewed the Appellant by telephone; later, at the Appellant’s request, it interviewed witnesses (the Appellant’s colleagues) and informed the Appellant on 24 September 2021, that following the initial inquiry, it had determined that there was insufficient evidence to conclude that the allegations against Mr. Y could be construed as misconduct and that the matter would be closed with no further action.

7. On 27 October 2021, the Appellant filed a request for review of OCCO’s determination that “all aspects of Appellant’s complaint would not amount to misconduct and in accordance with Section 4.03(i) of the CDRPs the matter will be closed.” The Appellant’s request was filed on the basis that OCCO “did not give proper consideration to the fact that [her complaint was] about a pattern of reckless and intentional behaviour facilitated by the Subject’s managerial role, which was very offensive, diminishing, intimidating and damaging.”

8. On 17 November 2021, the President of the Bank informed the Appellant that her Request for Review met the requirements of the ARP Directive and communicated her determination to the ARC.

9. On 30 September 2022, the ARC adopted its Report and made its recommendations. Its recommendation reads as follows:

“The ARC confirms there is no evidence of harassment or abuse of authority and therefore, it is recommended that the Complaint made by Ms. X against Mr. Y is closed without any further action.

The ARC does not grant any legal costs since the Complainant is self-represented.

This is a unanimous decision of the ARC panel.”

10. On 20 October 2022, the President of the Bank issued her decision on the ARC report. It reads as follows:

1. I refer to the Report and Recommendation by the Administrative Review Committee (“ARC”) dated 30 September 2022 (“Report”) in the matter of your Request for Review, Case No. ARC69/2021 (“Request for Review”).

2. Your Request for Review contests the decision by the Chief Compliance Officer (“CCO”) informing you that your complaint of alleged improper behaviour by your line manager was not tantamount to misconduct and that the matter would be closed with no further action (“Administrative Decision”).

3. I have carefully considered the findings and conclusions of the Report in relation to the impugned Administrative Decision. Pursuant to Section IV, paragraph 6.4.3 of the Directive on the Administrative Review Process, I set out my reasoned decision below.

4. In its Report, the ARC found the Bank properly followed its internal procedures and there was no evidence of any breach of its internal policies nor of any other procedural irregularity. In particular, the ARC clarified that an investigation and subsequent disciplinary action can only take place if there is sufficient evidence of misconduct, and concluded that the Office of the Chief Compliance Officer (“OCCO”) had fully considered all relevant elements in reaching its conclusion.

5. I agree with and adopt the conclusions of the ARC, which reject your assertions that the Administrative Decision was tainted because it did not involve a consideration of the totality of the evidence. Specifically, I note that OCCO, as well as the ARC, reviewed all the available information and, as referred to above, interviewed a number of witnesses, including witnesses proposed by you as being able to corroborate your allegations. Furthermore, you were provided with several

opportunities to make representations during the OCCO investigation both in writing and in telephone calls, as well during the ARC proceedings, all of which have been considered.

6. As it relates to whether the OCCO conclusion, i.e., that there was insufficient proof to establish a factual finding of the allegations as made by you against your line manager, was arbitrary, discriminatory or improperly motivated and whether such conclusion was consistent with the Bank's internal law, I confirm and agree with the following:

a. The Report found "that the evidence produced before it does not support the allegations made by Staff Member against [your] line manager, rather it shows that most of the issues pointed out in [your] complaint relate to business strategies and managerial options that do not reach the threshold of misconduct."

b. The Report further noted that "none of the witnesses that testified before the ARC corroborated [your] views or perceptions about [your line manager's] management. On the contrary they were all congruent and unanimous in considering him a proactive, engaged senior manager who was willing to improve the [team's] overall results."

c. As to one of the projects that you had been heavily involved in (the ICHF [Integrated Cultural Heritage Framework] project), the Report noted that over time it became evident that the Bank could not continue to support that project. Within the context of such project, the Report considered that the line manager's decision to wind the project down "cannot be seen as detrimental to [you] nor as an attempt to undermine [your] role in that initiative. Instead it needs to be understood in the overall restructuring context of the [...] team."

d. The Report further found that in relation to other initiatives, your line manager decided to "change the allocation of countries and clients to improve efficiencies and increase staff's productivity." The Report noted that "all the witnesses confirmed [your line manager] was a committed manager, a good communicator that involved people in his strategic views and that his managerial options were intended to increase the importance of [Team] in the Bank, which [your line manager] did successfully."

e. As regards your line manager's decisions to make some changes to the functions performed by some of his senior bankers, including you, the ARC did "not see any ill-intent and [did not identify] any wrongdoing on your line manager's initiatives." As to the meeting with UNWTO, the ARC did not identify any unlawfulness in your not being invited. The ARC accepted your line manager's explanation that the meeting was solely related to the team's new strategy and that there were already several staff members from the Bank who were attending. It did not find your allegations of gender bias to be substantiated.

f. Concerning the assumption by one of the senior bankers in the team of a deputy role within the team, you had contended that this was an attempt by your line manager to favour that colleague to the detriment of other members of the team. The Report rejected those contentions, concluding that such colleague was in fact the recipient of a delegation of authority, which was "duly justified and authorised by senior managers."

g. Finally, in terms of remedy, the Report recommended that the complaint against your line manager be closed without any further action. The ARC did not grant any legal costs.

7. Given the totality of evidence reviewed both during the investigative process and the ARC proceedings, I concur with the Report and do not consider that the standard of proof required for a factual finding of misconduct (that is, on a balance of probabilities) has been met in relation to any of the allegations you made against the line manager as set out in your complaint. In the same vein, I find that the Administrative Decision was lawful, reasonable and procedurally fair.

8. For the reasons set out above, which have been based on the findings in the Report and all available information gathered and reviewed through the ARC proceedings, I have decided to accept the conclusions of the Report and confirm the Administrative Decision and determine that no remedies should be awarded to you.

9. Pursuant to Section IV, paragraph 6.4.3(b) of the Directive on the Administrative Review Process, this Decision now exhausts the Administrative Review Process.

11. In her Complaint dated 16 January 2023, the Appellant requests:

- a. rescission of the President's Decision;
  - b. specific performance in the form of the initiation of a misconduct investigation;
  - c. moral damages; and
  - d. legal costs incurred.
12. She further requests that new evidence which has come to light and was not known by the Complainant at the time of her complaint, be admitted pursuant to Rule 7.01 of the Appeals Directive.

### **III. The Findings of Fact in the ARC Report**

13. The ARC summarized its findings of fact as follows:

#### **“II- Findings of fact**

##### *The Complaint*

After a careful review of the evidence available on file and witness testimonies provided at the hearing on the merits, the ARC has established the facts of the case, as follows:

20. The Staff Member is currently a Senior Banker of the EBRD, working in [Team]. She is based in London and has been working for the Bank since 2004.

21. She is involved in business development, and, in that capacity, she generates projects, take projects for approval while keeping close relationships with the Bank's clients.

22. Mr. Y, her line manager and the person against whom the staff member has made the Complaint, was a colleague of the Complainant (as a Senior Banker) and member of [Team] until May 2017. During that period, they both had worked under the supervision of Ms. Z, the former Head of [Team] who left the Bank in early 2017.

23. Mr. Y has started his career in the EBRD as a Junior Banker between 1999- 2001, then left to [...] where he was working as Development Director and returned to the EBRD in 2011, as a Senior Banker.

24. As of 01 June 2017, he was appointed as Head of [Team] (to replace Ms. Z who had left the Bank), a position for which the Complainant has also applied for, without being successful.

25. In 2019, Mr. Y was promoted to the role of Director.

26. After assuming that position, he has implemented some changes in management, as well as, in the [Team].

27. At the time Mr. Y was appointed Head of said team, “[Team]” did not have much visibility at the Bank as their portfolio of projects was only worth 100 to 150 million Euros.

28. Also, the team’s strategy was 10 years’ old and not aligned with the realities of the modern market. After taking over the role of Head of team, Mr. Y has implemented a new strategy and made some changes in the Team including, reallocation of clients and changes in the business development plan.

29. For instance, he established clear targets for each of his senior staff (who should be running three projects per year of around 65 million) and led them to start mentoring more junior staff.

30. The Complainant, who had a good and close relationship with the previous Head (Ms. Z), did not agree with some of Mr. Y’s initiatives and strategic options for the team and, consequently, their professional relationship started deteriorating.

#### *Integrated Cultural Heritage Framework (ICHF)*

31. The former Head of [Team] (Ms Z), before leaving the Bank, was working in a new initiative – The Integrated Cultural Heritage Framework - which had been cherished by the former First Vice President of the Bank and resulted from a MOU with the Smithsonian Institute in April 2017.

32. Said initiative was a new policy of the Bank, it would involve cross-sectorial cooperation, a pipeline of projects and was to be piloted in a few countries.

33. Before leaving the Bank, Ms. Z asked the Complainant to be her successor in leading that project. To that effect, on 4 May 2017, the Director for the First Vice-President’s Office, circulated an email to the [...] Group informing that Ms. X would assume Ms. Z’s role in leading the initiative.

34. Mr. Y and his direct supervisor, Managing Director for [...] decided to present the initiative to the Board for approval.

35. The Complainant was also present at that Board meeting.

36. It was then decided to implement it for a five-year period, during which, its success would be assessed through a Midpoint review. It was agreed that, after two



and half years a follow up session would take place and a report would be presented to the Operations Committee (“OPSCOM”) and the Board.

37. Despite the Bank and the Complainant’s commitment to this initiative and her willingness to move it forward, as time went by, it became evident it would be difficult for the Bank to continue to support it.

38. In fact, it was supposed to be a policy financed by donors but most of the financing came from the Bank itself through SSR.

39. The Bank spent two years reaching out to potential donors, establishing partnerships with local entities, SME, municipalities and universities and spent around 2 million Euros in technical assistance.

40. In 2020, when the Midpoint review took place, Ms X requested more human resources as she was overburdened with work and providing technical assistance, but the pipeline of projects was very poor and only one project of a small family hotel of around 300,000 Euro had been approved under that initiative.

41. It was then decided, at a managerial level, that the resources allocated to the initiative were more significant than the value added, and a decision was taken to wind down the initiative, to focus only in Uzbekistan (instead of enlarging it to Greece, Jordan and Romania) and leave it up to the Regional office.

42. This option was made bearing into account a cost-benefit analysis and the core mandate of the Bank.

43. In January 2020, during her appraisal meeting, Mr. Y communicated to her his intention to discuss the future of ICHF as it was not generating projects for the [Team].

44. This situation had a negative impact on the Complainant’s motivation and professional esteem as she felt she was being side-lined and her work was not being valued.

#### *Sourcing Pipeline in Romania*

45. In 2017, the Complainant was trying to identify projects in Romania that could be developed under the ICHF and identified one possible client – Continental Hotel.

46. On 14 August Complainant sent Mr. Y the HO’s (Heads of Terms) of Continental project and requested support from the [xx] office to continue with it.

47. On 22 August she followed up with him on this request. However, as she did not get immediate feedback, on the 23 August she called [the Director in xx RO] for help finding someone who could help her with that project.

48. Mr. Y later communicated to her they were not going to move forward with that client because Risk would not authorise it.

49. In February 2018, [the Director in xx RO] informed her and Mr. Y he was considering a partnership with a local [...] NGO to sign a MOU, under the ICHF.

50. While she disagreed with said partnership, Mr. Y (who was reluctant at the beginning) and [the Director in xx RO] supported it and the MOU was signed in

#### *Reallocation of clients*

51. In the context of his new functions as Head of [Team], Mr. Y has made some changes in his team and on the functions performed by some of his Senior Bankers including the Complainant. For instance, until 2018, the Complainant had been working with [AAA] and [BBB] Fund. In August 2018, Mr. Y allocated [Mr. X] Associate Director, Senior Banker] to the [BBB] Fund and he was presented as the lead.

52. The Complainant was excluded from the new bond deal with [...] in 2017 and 2019.

53. In relation to the [...] clients, she was left with the [...] and [...].

#### *Meeting with UNWTO*

54. On 9 January 2017, [Team] contracted with UNWTO, under the ICHF, to do the mapping for the heritage framework in Uzbekistan.

55. The Complainant was involved in the extension of the MOU, finalising a yearlong negotiation with said partner and reviewing the legal documents with the assistance of a lawyer.

56. When a meeting with UNWTO took place, she was not invited to attend as Mr. Y explained to her that said meeting was only related to the [Team] new strategy and there were already been invited several staff members from the Bank.

57. The meeting with UNWTO was attended by the President of the Bank, Mr. Y, [...], [...] and the Director of the [...] Teams.

#### *[Team] 2019- Year End Presentation*

58. On 4 December 2019, Mr. Y sent an invitation for a [Team] meeting which included the MD, Debt and Equity Risk, ICA, TC, EPG, Equity, E2C2 and some based RO staff members working on property.

59. The Agenda showed two areas of focus: 2019 Achievements and Performance and 2020 Core and Potential Pipeline.

60. The Complainant's 2019 performance was not included in said presentation namely, the 50 Million Euro NEPI Bond in which she was involved.

61. When she confronted him with the reasons for said absence, he explained the intention of said meeting was only to include "the first type of deals" and not the full year performance.

*Mr. W "Deputy Role"*

62. By the end of 2019, Mr. Y has granted an informal deputy role to Mr. W.

63. Mr. W (who was with the bank since 2006) was, in 2015, promoted to the role of Associate Director by the former Head of [Team] (Ms. Z).

64. This informal appointment was made by Mr. Y, in agreement with senior managers of the Bank, due to heavy workload Mr. Y had at the time and to health issues he was going through.

65. Nevertheless, this role was performed on a voluntary basis and did not represent either a promotion or an increase in his income.

66. Mr. W covered the SEMED region and Greece, and he also started reviewing projects so that Mr. Y would focus more on innovation and business development.

67. As per senior management's decision, he has also responsibilities in project approval, *i.e.* sign off rights on CRM's and FRM's."

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

14. The Appellant alleges that in conducting its preliminary inquiry to determine whether misconduct occurred, OCCO applied both incorrect legal tests and the wrong burden and standard of proof to her claims. Pursuant to Article 6.01(a)(iv) of the CDRPs, a formal investigation will result in preparation of an investigative report, which among other things, reaches "conclusions about whether the evidence substantiates the suspected misconduct, *i.e.*, whether it is more likely than not that the misconduct did occur as alleged or whether the evidence exonerates the Subject or is insufficient to make a finding."

15. The Appellant first argues that the OCCO Inquiry Officer must reach a decision on: 1) whether - if proven - the conduct would amount to misconduct, and 2) whether the matter is capable of proper investigation. The Appellant contends that when reaching his conclusion, the Inquiry Officer addressed a different question: namely, whether “the conduct attributable to [Mr. Y] [was] on a reasonable basis either offensive or inappropriate.” He therefore elided the following two questions: 1) if proven, would the conduct amount to misconduct and, if the answer was in the affirmative, 2) whether the matter could be investigated. The Appellant argues that the Inquiry Officer’s report does not appear to reach a conclusion on the first question and that he also failed to take into account the reliability, gravity and availability of supporting evidence. The Appellant submits that the Inquiry Officer’s failure to conduct that balancing exercise renders OCCO’s conclusions unreliable. The Appellant further submits that the MDHR made the same error.

16. Furthermore, the Appellant argues that the ARC erred in requiring the Appellant to prove misconduct by a preponderance of the evidence. The Appellant contends that the ARC should have considered instead whether OCCO correctly applied the two stage test stipulated in Article 4 of the CDRPs. According to the Appellant, it would not have been until the formal investigation stage that the preponderance of the evidence threshold would be relevant.

17. The Appellant also submits that the OCCO Inquiry Officer failed to prove a demonstrable basis for his conclusions. An organisation’s processes must be sufficiently documented to be amenable to review by Tribunals. As has been held by the EBRDAT “[t]he giving of reasons is regarded in international administrative law as a fundamental requirement of administrative justice and an important component of procedural fairness. Moreover, reasons for an impugned administrative decision are not reasons unless they are properly informative. They must explain the evidentiary basis upon which the impugned decision was taken and provide adequate justification.” (para 27 of Appeal quoting from EBRDAT Case 2021/AT/04 at para 55) The Appellant maintains that the OCCO report did not rest upon such adequate justification.

18. The Appellant further alleges that the OCCO Inquiry Officer and the ARC failed to engage with the vast amounts of documentary evidence provided by the Appellant and did not offer observable conclusions for why that evidence was insufficient.

19. Instead, the Appellant asserts that the OCCO Inquiry Officer and the ARC, in making their conclusions, incorrectly relied upon irrelevant factors to the exclusion of relevant ones and made manifest errors in findings of fact. The Appellant submits that both the OCCO Report and the ARC placed disproportionate weight on the views of her colleagues who were interviewed as part of the initial inquiry process. The Appellant argues that this testimony was relied upon despite the existence of contrary contemporaneous documentary evidence, and that both the OCCO Report and the ARC's recommendations failed to adequately balance this evidence. The Appellant further argues that these colleagues had either a conflict of interest or directly benefitted from the alleged misconduct against the Appellant and thus, the ARC's and the OCCO's reliance upon that evidence is improper.

20. The Appellant further maintains that the Bank applied "an arbitrary threshold of gravity or offensiveness" in assessing the Appellant's allegations of misconduct and failed to take adequate account of the fact that her allegations concerned a pattern of behaviour.

21. Finally, the Appellant submits that new evidence has emerged since the ARC's report that supports her claims of misconduct. According to the Appellant, one of her colleagues, Mr. W assumed the role of "deputy" within her team without the conduct of a formal promotion process and thereby assumed roles that were not contained in his job description. The Appellant alleges that this is an example of a *de facto* promotion, to the Appellant's detriment, and evidence of mistreatment by Mr. Y against her, as the *de facto* promotion has stripped certain job elements from the Appellant. The Appellant also alleges that Mr. Y continues to belittle and demean her in front of colleagues and clients, supporting her allegations of a pattern of misconduct. The Appellant cites both specific instances of behaviour and compensation discrepancies as evidence of this misconduct. The Appellant seeks the Tribunal's permission to submit new evidence.

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

22. The Respondent argues that OCCO and the ARC correctly applied the legal tests to determine misconduct and the proper standard and burden of proof. The Respondent agrees with the Appellant that the test under Article 4 of the CDRPs has two components but argues that the test is cumulative in nature: if one of the elements in that test is not satisfied, then the matter does not proceed to formal investigation. The Respondent notes that the ARC, in conducting its review of the OCCO Report, concluded the same - that an investigation and subsequent disciplinary action is permissible only if there is sufficient evidence of

misconduct. As OCCO concluded that there was insufficient evidence to substantiate that Mr. Y's actions constituted misconduct, it did not need further consider whether the matter should be formally investigated. Furthermore, the ARC properly allocated the burden of proof to the Appellant, and applied the appropriate standard of proof, requiring that the Appellant prove her claims by a preponderance of the evidence.

23. The Respondent also posits that the Appellant's request to introduce new evidence should be disallowed. Pursuant to Rule 7.01(c) of the Tribunal Appeals Procedures, new evidence should be admitted only if it was not available during the initial Administrative Review. Likewise, the Appellant may only raise arguments on appeal that have previously been raised in their request for review. The Respondent contends that the new evidence submitted by the Appellant was either known to the Appellant at the time of the ARC proceedings and not submitted, or raises entirely new arguments against the Respondent which are separate from these proceedings and have not undergone any investigation under the CDRPs.

24. The Respondent further requests the Tribunal to disregard the Appellant's arguments concerning the erroneous application of the legal test required by Article 4. The Respondent denies that OCCO did not provide reasons for its conclusions and asserts that OCCO took account of proper and relevant factors in its review of the case. The Respondent maintains that the primary question to be addressed by the OCCO Investigator was not the effect of the malign behaviour on the Appellant but rather, whether the conduct would cause offence or humiliation to a reasonable person. The Respondent submits that though the Appellant made allegations of sexism and bullying, the conduct reviewed by OCCO was properly assessed to not cause offence or humiliation to a reasonable person and did not corroborate the Appellant's account of the circumstances.

25. The Respondent further submits that the ARC's review of the case was proper. The ARC reviewed OCCO's actions in the initial inquiry undertaken under Article 4 of the CDRPs. The ARC properly concluded that an investigation and a subsequent disciplinary action can only take place if there is sufficient evidence of misconduct. As OCCO concluded that there was no such evidence, the Respondent submits that the ARC's recommendations were arrived at correctly.

26. In addition, the Respondent contends that OCCO and the ARC provided adequate reasons for their respective conclusions and therefore, the Appellant's claim that the ARC

made manifest errors in its findings of fact is without merit. The Appellant's argument that after considering the available evidence, OCCO did not sufficiently document the procedure followed to assess the Appellant's initial complaint, is unsustainable. The Inquiry Officer's conclusions and underlying evidence were fully disclosed to the ARC and the ARC provided the evidential basis upon which they reached their conclusions.

27. With regard to a manifest error by the ARC, the Respondent argues that the ARC carefully balanced and considered the evidence collected by the OCCO Inquiry Officer and based its conclusion on that evidence. Furthermore, the Respondent notes that "manifest error" is a high legal bar to reach and the Appellant has not succeeded in reaching it.

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

28. The question to be determined by the Tribunal is whether the President's Decision to follow the ARC's recommendation and maintain the decision that the Appellant had not met the standard of proof required for a factual finding of misconduct (a balance of probabilities) in relation to any of the allegations made against the line manager was lawful, reasonable and procedurally correct.

29. For the reasons set forth below, the Tribunal concludes that the President's Decision should be maintained and that the Appeal should be rejected.

30. In reaching its conclusion, the Tribunal will first address the following preliminary points:

### **a) ANONYMITY**

31. The Appellant has not requested anonymity, but the Respondent has asked the Tribunal to "adopt [its] 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."

32. 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, para 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.

33. Under these circumstances, and in accordance with its established jurisprudence, the Tribunal grants the Respondent's request (Cf. 2022/AT/22, para 35).

b) REQUEST FOR NEW EVIDENCE

34. The Appellant has requested the introduction of new evidence.

35. The Appellant argues that since the issuance of the ARC report, "a few further matters have come to light which were not known to the Appellant at the time of her complaint [and] should therefore be admitted now pursuant to Rule 7.01, as it could not have been earlier."

36. The Appellant states that beginning in October 2022 another staff member of the Division, began appearing in the Bank's internal system as Head of Transactions and was being introduced as such to clients. The Appellant argues that this staff member's new role "is essentially demoting the Associate Directors to a more junior role as he is taking the lead in business development and internal negotiations with departments which are core responsibilities of Associate Directors-Senior Bankers." The Appellant submits that this constitutes a *de facto* promotion. She also submits additional previously unaddressed instances of mistreatment by Mr. Y and limitations placed on the geographical regions the Appellant was supposed to cover, as new evidence of Mr. Y's misconduct.

37. In addition, the Appellant requests permission to submit a Pay Transparency and Career Progression Survey published by the Staff Council on 8 December 2022, based on a survey carried out among staff over the summer of 2022. She submits that this document attests that her compensation has been affected by her line manager's actions since he assumed the function of Head of [Team]. She states in this regard: "While the evidence identified w[as] known to the Appellant prior to the submission to the ARC, [it] became relevant in the context of the Pay Transparency and Career Progression Survey results published by the EBRD's Staff Council in December 2022. ...." She submits that "it is particularly noticeable that the Appellant's compa-ratio has dropped significantly below the average of 80%, including in 2018 when her 2017 performance was at a high level, and that started with the first year of [Mr. Y's] tenure as Head of [Team]."

38. The Appellant also requests to submit new evidence to prove that contrary to Mr. Y's testimony, she participated in tours organized by the team. One explanation offered by Mr. Y for the treatment of the Appellant was a lack of participation in tours and office events.



She states that “[w]hile such evidence is not new, the Appellant re-discovered it recently and wanted to refer to it, if it can be admitted now pursuant to Rule 7.01.”

39. Respondent argues that the “new” evidence ought not to be admitted on the basis that it either (i) was already known to the Appellant at the time of the ARC proceedings and as such is not “new” or (ii) it levels entirely new accusations at the line manager which have not undergone any investigative process under the CDRPs and are therefore inadmissible.

40. Article 6.03(a) and (b) of the Appeals Procedures provides that the proceedings before this Tribunal shall be based on the following documentation: the Appeal, the Bank’s Response, the ARC Report (including the Findings of Fact) and a transcript of proceedings before the ARC. In addition, at any time during the proceedings, the Tribunal may require evidence or additional arguments. In case a party requests to be allowed to produce new evidence, according to Rule 7.01 (c) it shall detail such new evidence and explain why the new evidence was not available to that party during the Administrative Review, as well as when and how the evidence became available to that party. The Appellant shall make such request in the Statement of Appeal, if the evidence was available at that time (Rule 7.01(c)(i)).

41. The opportunity for the parties to request to be allowed to submit additional evidence is subject to the following restrictions: (i) The Findings of Fact contain a manifest error, are perverse or reached in breach of the applicable law, or (ii) new evidence is allowed, that was not available before the ARC.

42. The Tribunal has examined the Appellant’s request and finds that the evidence to support the proposition that Mr. W’s appointment was a *de facto* promotion and automatically prompted the consequent demotion of Associate Directors was available to the Appellant prior to the conclusion of the ARC proceedings and, therefore, cannot be admitted at this stage. The Tribunal notes that issues relating to the functions of Mr. W were discussed during the ARC proceedings.

43. Likewise, the evidence concerning the Appellant’s compensation cannot be considered “new”. It could have been presented to the ARC which heard the testimony of witnesses who discussed whether the Appellant’s compensation may have been affected by management changes. Nor does the document from the Staff Council dated 8 December 2022 constitute “new evidence” as it contains a general statement from the Staff Council directed to all staff rather than affecting the Appellant individually. As stated, a discussion

on the Appellant's compensation took place during the ARC hearings. The photograph of the Appellant on the tour does not constitute "new" evidence either. The Appellant herself admits in her submission to the Tribunal that "such evidence is not new" and was simply "re-discovered" in preparation for this Appeal. For these reasons, the Appellant's request to enter new evidence onto the record is rejected.

c) THE APPLICABLE BURDEN AND STANDARD OF PROOF AND  
LEGAL TESTS

44. The Tribunal will next address the Appellant's contentions regarding the applicable standard and burden of proof and the legal tests. The Appellant argues that the PARD is unlawful because the ARC and OCCO "applied incorrect legal tests and burden of proof ... failed to provide a demonstrable basis for their decisions [and]...took into account irrelevant factors and failed to consider relevant factors."

45. The Directive on the Appeals Process, provides in Article 3.02 that in considering an Appeal the Tribunal shall base its decisions on the provisions of the Staff Member's contract of employment, the internal law of the Bank and generally recognised principles of international administrative law.

46. The applicable law consists primarily of the Staff Regulations, the Code of Conduct, the Staff Handbook, the CDRPs as well as principles of international administrative law, including principles on due process cited above. These sources set out a general duty to deal with employees in a fair and impartial manner (Section 3(a) of the Staff Regulations).

47. In deciding on the merits of the application, the Tribunal must examine whether OCCO and the ARC properly interpreted the Code of Conduct for EBRD Personnel that defines harassment, bullying and abuse of authority and whether in making a determination that no further investigation of Mr. Y's behaviour was warranted, the OCCO Investigation properly applied the standard of proof required by the applicable CDRPs quoted below.

d) CODE OF CONDUCT

48. Rule 1 of the Code of Conduct provides as follows:

"Bank Personnel shall observe the highest standards of integrity and ethical conduct and shall act with honesty and propriety. Their personal and professional conduct should, at all times, command respect and confidence in their status as officials of an international organisation."

49. Rule 2(d) of the Code of Conduct for EBRD personnel provides as follows:

“In their dealings with colleagues and Bank staff, Bank Personnel must show respect and tolerance for varied cultures, beliefs and backgrounds. They must avoid behaviour that constitutes harassment, sexual harassment, bullying or abuse of authority, or that could be perceived by others as harassment or bullying.”

50. The Guidance Note for Bank Personnel on Rule 2 notes:

“Any behaviour that is reasonably perceived to be offensive or intimidating by other Bank Personnel, regardless of the intention of the initiator, must be avoided [...]. Bank Personnel must be aware that it is how the conduct is received, not the intention of the person saying the words or engaging in the conduct, that is important.”

51. The Guidance Note goes on to clarify and define key terms:

“3. Harassment, Sexual Harassment, Bullying and Abuse of Authority

#### 3.1 Definitions

(3) Harassment, Sexual Harassment, Bullying and Abuse of Authority often arise from a course of conduct, but may also arise from a single incident, if it is sufficiently severe. This conduct does not necessarily need to occur face to face. It may occur virtually through other means. [...] Bank Personnel should not engage in this conduct directly, either acting alone or with others, or indirectly by way of acting through, or influencing the conduct of, others. Bank Personnel must be aware that it is how the conduct is received, not the intention of the person saying the words or engaging in the conduct, that is important. Bank Personnel must always consider carefully the potential impact and reception of their behaviour and words.

(4) “Abuse of Authority” is the improper use by Bank Personnel of his/her Bank position of influence, power or authority by Bank Personnel against other Bank Personnel or Service Providers. Abuse of Authority may occur: (i) by pressuring other Bank Personnel or Service Providers to take actions for one’s personal benefit or to violate Bank rules or (ii) by unreasonably impeding the ability of other Bank Personnel or Service Providers to work effectively. It may also arise where there is an improper use of influence, power or authority to arbitrarily influence the career or employment conditions (including, without limitation, the giving or withholding

salary increase, performance based compensation, promotion, or recommendations in respect of any thereof) of another Bank Personnel or Service Providers.”

52. As to the inquiries into the Appellant’s allegations, the document titled Directive-Conduct and Disciplinary Rules explains the proper procedure:

#### “ARTICLE 4 INITIAL INQUIRY

4.01 After opening the Confidential File, the inquiry officer shall determine whether the conduct would amount to Misconduct for the purposes of these Rules and whether the matter may be properly investigated taking into account the reliability of the information received, the gravity of the suspected Misconduct and the availability of relevant evidence.

4.02 In making this determination, the inquiry officer may, but is not obligated to, undertake any of the following actions:

- (i) meet with the person who reported the suspected Misconduct in order to confirm understandings about the key facts and issues involved;

- (ii) gather and review any evidence concerning the report of suspected Misconduct, including interviewing witnesses or others who may be in a position to provide relevant in-formation; and/or

- (iii) together with the Chief Compliance Officer, consult with the General Counsel and/or the Chief Internal Auditor.

4.03 Upon completion of the Initial Inquiry, the Chief Compliance Officer shall make a de-termination that:

- (i) no further action need be taken on the matter, in which case s/he shall record her/his decision in the Confidential File; or

- (ii) the matter should proceed to a formal investigation as provided for in Article 5.

4.04 The Chief Compliance Officer may also decide to refer the matter to law enforcement authorities in accordance with Article 18.

#### ARTICLE 6 COMPLETION OF THE FORMAL INVESTIGATION

## 6.01 Preparation of Investigative Report

6.01(a)(iv)(iv) conclusions about whether the evidence substantiates the suspected of Misconduct, i.e., whether it is more likely than not that the Misconduct did occur as alleged, or whether the evidence either exonerates the Subject or is insufficient to make a finding.”

53. The Appellant challenges both the OCCO and ARC processes alleging that both mechanisms “failed to take into account the Appellant’s perspectives” and that the “ARC fell into error.” She cites examples of conduct that she alleges were “objectively offensive and/or belittling” and that the ARC purportedly failed to take into account for in their decision. In relying on these flawed processes, the Appellant posits that the President’s Decision is inconsistent with the RWPs and the Code of Conduct as it does not promote a work environment free of harassment, sexual harassment, bullying or abuse of authority and so breaches the Appellant’s Terms and Conditions of Employment.”

54. The Appellant cites at least nine instances of manifest errors in the findings of fact by the ARC. She argues that “several issues raised as part of the complaint were completely ignored by the ARC in their investigation, not addressed at all during the interviews, nor included in ARC’s findings of fact.” She also maintains that the ARC erred in requiring her to prove misconduct by the standard of a “preponderance of evidence.”

55. The Appellant also argues that the ARC improperly weighted “[t]estimony from colleagues that were conflicted” or were “direct beneficiaries of her complaint.” She contends that two of the witnesses would have no direct knowledge of the 20 plus instances referred to in her detailed report on misconduct. The Appellant further argues that one of the witnesses, Mr. W, received “preferential treatment” from Mr. Y. She notes that Mr. W was appointed to a “deputising role” ... “with no selection process without following the rules....” which constituted a de facto promotion to the Appellant’s detriment and renders his testimony unreliable. She also maintains that Mr. Y “treated her differently” than her colleagues and that the evidence uncovered by the OCCO investigation corroborated this claim.

56. The Tribunal first addresses the OCCO investigative process and then turns to the ARC process.

e) THE OCCO PROCESS

57. The Tribunal finds that the initial inquiry conducted by OCCO to determine whether the behaviour of the accused could constitute misconduct and should be referred for an investigation was lawful and was correctly conducted.

58. Under Article 4.02 of the CDRPs cited above, in making his or her determination, the inquiry officer may, but is not obliged to undertake any of the following actions: “(i) meet with the person who reported the suspected Misconduct in order to confirm understandings about the key facts and issues involved; (ii) gather and review any evidence concerning the report of suspected Misconduct, including interviewing witnesses or others who may be in a position to provide relevant information; and/or (iii) together with the Chief Compliance Officer, consult with the General Counsel and/or the Chief Internal Auditor.

59. Actions (ii) and (iii) above constitute an initial decision for the purposes of the Directive on the Administrative Review Process (DIR/2019/16). The staff member thus has the right to challenge the legality of this decision and the correctness of the proceedings followed. The Tribunal agrees with the Appellant that, in order to be able to do so, s/he must be put in a position to fully understand the reasons for the decision and the procedure that was followed.

60. The Appellant argues that the OCCO Inquiry Officer erred because he applied incorrect legal tests and an incorrect standard and burden of proof. The Appellant contends that the Inquiry Officer was required to conduct a two-step analysis: First, determine whether, if proven, the conduct would amount to misconduct; second, determine whether the matter was capable of proper investigation. The Appellant argues that when reaching his conclusion, the Inquiry Officer addressed a different question: whether “the conduct attributable to Mr. Y was on a reasonable basis either offensive or inappropriate.” In addition, the Appellant maintains that, as she “perceived” the conduct as abusive, it should have been investigated formally.

61. The Tribunal is of the view that in the present case the procedure was correctly followed. The Tribunal has reviewed the records from the OCCO Inquiry Officer and notes that he examined thoroughly the extensive documentation provided by the Appellant, as well as the Bank’s IT department and the HR records and also interviewed the Appellant and several witnesses that she identified. At the Appellant’s request, the Inquiry Officer also conducted further interviews of her colleagues before issuing his report. It was on the basis

of this preliminary review that he determined that there was insufficient evidence to warrant moving forward to a formal investigation of whether misconduct had occurred, under Article 5 of the CDRPs.

62. That is the first step of the process required under the rules. The Inquiry Officer has a certain degree of discretion as long as due process is followed and reasons are provided. The Tribunal does not concur with the Appellant that OCCO did not provide demonstrable reasons for its conclusion. The OCCO review contains detailed accounts of the documentation provided by the Appellant and the Inquiry Officer's assessment of the evidence. OCCO's conclusion that the examples the Appellant provided did not amount "on a reasonable or observable basis" to an abuse of authority were therefore based upon sufficient evidence.

63. The Tribunal sees no reason to depart from the ARC's analysis of its findings of fact that "an investigation and a subsequent disciplinary action can only take place if there is sufficient evidence of misconduct..." OCCO concluded in its initial inquiry that there was no such evidence. The Tribunal agrees. Misconduct is an extremely serious charge and the individual who alleges misconduct bears the burden of proving misconduct. The Tribunal agrees with the ARC that "[i] Investigations and disciplinary action are an exclusive prerogative of the Organisation and internal justice mechanisms cannot replace the decision-maker."

64. The Appellant cites two rulings of the World Bank Administrative Tribunal, Cases No. 659 and 660 of 2021, to support her argument that the OCCO decision did not rest upon a reasonable or observable basis. The Tribunal finds, however that those cases are misplaced in this context. In those cases before the World Bank Administrative Tribunal, the maligned managerial decision was the selection of certain candidates for positions, and that selection had taken place before the finalisation of selection criteria. This was an obvious example of a decision taken without a reasonable or observable basis, as standards for the decision had not been set before the decision was made. Here, however, the OCCO investigation was taken pursuant to Bank Regulations and the CBRDs, wholly distinguishing it from those cases.

65. The Tribunal observes, in accordance with its adopted jurisprudence, 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.” (EBRDAT Case No 2018/AT/06; EBRDAT Case No 2021/AT/03). The Tribunal also recalls its holding in Case No. 2021/AT/03, 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.” (EBRDAT 2022-AT-22 Para 41).

66. For example, this Tribunal has held in the context of a decision to terminate employment of an employee during the probationary period, that “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” (Cf. 2022-AT-22 Para 41) (Cf. EBRD Code of Conduct, Rule 2(d)).”

67. The Tribunal therefore finds that the initial inquiry conducted by OCCO to determine whether the behaviour of the accused could constitute misconduct and should be referred for an investigation appropriately followed the principles of due process and therefore was correctly conducted under the rules of the Bank and international administrative law.

#### f) THE ARC PROCESS

68. The Tribunal next assesses the adequacy of the ARC’s investigation into the Appellant’s claims, addressing first the issue of the burden and standard of proof and second, whether the process had manifest errors in the findings of fact.

69. Paragraph 7.01 of the Directive for the Appeals Process states:

##### “7.01 Reliance on Findings of Fact

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

(b) The Tribunal shall take full account of the Findings of Fact made by the Administrative Review Committee in the Administrative Review Committee’s Report and Recommendation unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error on the face of the written materials before it (including the Findings of Fact and the transcript) or are perverse



or are reached in breach of applicable law or the Tribunal grants a request of either party to present new evidence not available to that party before the Administrative Review Committee.”

70. In accordance with Article 7.01(b) of the Appeals Process cited immediately above, the Tribunal may depart from the ARC report if the report is:

- “i manifestly wrong on the face of the written material in front of the Tribunal,
- i. perverse or
- ii. in breach of the applicable law, or
- iii. if there is new evidence.”

71. In summary, the Appellant maintains that the ARC:

- “a. failed to take into account the Appellant’s perception of the conduct and its impact;
- b. failed to consider that much of the conduct was, on any view, offensive and belittling;
- c. failed to attach any weight to the comments of colleagues, unless they agreed with the Bank;
- d. failed to consider the cumulative effect of the allegations;
- e. took into account that the Appellant had not challenged each individual instance contemporaneously; and
- f. took into account Mr. Y’s performance rather than confining themselves to his conduct.”

72. The Appellant maintains that instead, the ARC should have considered whether OCCO had correctly applied the two-stage test in Article 4 of the CDRPs, i.e. whether Mr. Y’s conduct amounted to misconduct and whether the matter may be properly investigated based upon the reliability of the information received, the availability of relevant evidence and the gravity of the alleged misconduct. The Appellant contends that subjecting her claims to a “preponderance of evidence” standard was improper, as that standard of proof is not required until a formal investigation has commenced. Instead, the Appellant appears to argue that the burden of proof should have shifted to OCCO and the accused party to show that the investigation was properly conducted and that the maligned treatment did not amount to misconduct.

73. The Appellant maintains that the imposition of this improper standard of proof not only perpetuate[d] OCCO's error, but it misunderstood how harassment and bullying occurs: the Appellant was not claiming that her line manager bullied the entire team, but that he treated her differently.

74. The Tribunal notes that, in its Report, the ARC determined that in international administrative law, the burden of proof concerning harassment and abuse of authority lies with the individual making those allegations. In this case, it was incumbent on the Appellant to allege and provide sufficient evidence that her line manager abused his authority, harassed and discriminated against her. The Tribunal further concludes that the standard of evidence to demonstrate misconduct in accordance with the Bank's internal legal framework is a "preponderance of evidence." This standard of proof requires that the evidence be weighed, and the complaining party may only succeed if he or she demonstrates that it is more likely than not that the maligned conduct amounted to harassment or an abuse of authority. A party cannot simply make allegations without providing sufficient evidence to support them, and the burden does not shift to the accused, solely because of allegations made against him or her.

75. The Tribunal agrees with the Bank's assertion that the ARC appropriately referenced the proper burden and standard of proof in its report and applied them both to the facts of this case and to its review of the OCCO investigation. As the ARC applied the proper burden and standard of proof, the Tribunal rejects the Appellant's claims on this point.

76. The Tribunal now turns to the sufficiency of the evidence considered by the ARC and the Appellant's allegations of manifest errors of fact in the ARC report. The Appellant submits that the ARC "did not consider the overall picture of the examples presented and denied that there was a pattern of behaviour exhibited by Mr. Y towards the Appellant, despite all those examples happening rather immediately from the moment Mr. Y was nominated as Head of [Team], including at a time when the Appellant was a high performing banker in [Team]. Plainly the actions were not justified by a lack of or poor performance by the Appellant. ARC did not step back to consider why the various acts had occurred."

77. The Appellant has submitted dozens of contentions that allegedly support her claim of manifest fact finding errors by the ARC. For example, she submits that there was "no misalignment on strategy" between her and Mr. Y since "both parties agreed on and collaborated on the new strategy for [Team]." Furthermore, the Appellant contends that the

ARC report failed to properly address changes in the manner that the Appellant's project with respect to the ICHF had been treated upon Mr. Y's assumption of a supervisory role. She notes that "[i]t was a programme that had also been approved by the President of the EBRD at the time and by several Directors, Managing Directors and other stakeholders." Despite this, the Appellant argues that relevant components of the ICHF, including "...the projects signed and the pipeline are intentionally ignored by the ARC, essentially reiterating [Mr. Y's] views expressed during the interview..." She also asserts that the ARC's findings regarding the project in Uzbekistan are erroneous. She contends that the ARC "failed to note the relationship between Mr. Y and the [xx] Office that had negative implications for the Appellant, indicating Mr. Y was also influencing the conduct of other staff to jeopardize the progress of the ICHF." Lastly, in connection with the ARC's finding that "the winding down of the ICHF had a negative impact on the Appellant's motivation..." she states that the ARC report failed to mention that her mid-year review did not acknowledge her achievements and work for the Cultural project."

78. In addition, the Appellant contends that with respect to the re-allocation of her clients and the re-assignment of her work that the ARC "[g]rossly failed to note that the documentary evidence provided shows the preponderance of cases of removal/exclusion of the Appellant from projects she was previously involved with and projects in the region she was covering show that Mr. Y was systematically impeding the ability of the Appellant to work effectively and deliver on her objectives." The Appellant further submits that the Bank applied "an arbitrary threshold of gravity or offensiveness" in assessing her allegations of misconduct and failed to take adequate account of the fact that her allegations concerned a pattern of behaviour.

79. In addition, the Appellant argues that "OCCO repeatedly relied on the Appellant having not challenged individual instances when they first occurred." She maintains that as intimated in the Guidance Note for Bank Personnel on Rule 2: "Harassment, Sexual Harassment, Bullying and Abuse of Authority, often arise from a course of conduct, but may also arise from a single incident, if it is sufficiently severe." The Appellant further notes that an individual is not obliged to challenge every individual instance when it occurs, and indeed may not have grounds to do so, and that a failure to make such a challenge does not undermine that misconduct might ultimately be found. In holding this against the Appellant, OCCO and the ARC committed the same error.

80. The Tribunal notes that the ARC considered “the totality of the evidence produced by the [Appellant], as well as all the documentary evidence contained in the case file, namely, OCCO’s Initial Inquiry.” In addition, the ARC held hearings and interviewed six witnesses:

- Witness A, the Appellant (Ms. X)
- Witness B, the Appellant’s Line Manager (Mr. Y) and subject of the Complaint
- Witness C, the Managing Director [...]
- Witness D, the Associate Director, [...] Resident Office
- Witness E, Associate Director, [Team]
- Witness F, Associate Director, [Team] (Mr. W)

81. The ARC found “that the evidence produced before it does not support the allegations made by the staff member against her line manager, it rather shows that most of the issues pointed out in her complaint relate to business strategies and managerial options that do not reach the threshold of misconduct. None of the witnesses that testified before the ARC corroborated the Appellant’s views or perceptions about Mr. Y’s management. On the contrary, they were all congruent and unanimous in considering him a proactive, engaged senior manager who was working to improve the overall results of the [Team].”

82. According to the ARC Report, at the time Mr. Y was appointed Head of [Team], the Appellant’s team “did not have much visibility at the Bank as their portfolio of projects was only worth 100 to 150 million Euros.” Upon assuming the position, Mr. Y “implemented some changes in management” and realigned the team’s strategy that was “10 years’ old and not aligned with the realities of the modern market.” Furthermore, according to the ARC Report, “the Appellant did not agree with some of [Mr. Y’s] initiatives and strategic options for the team, and consequently, their professional relationship started deteriorating.” The Appellant challenges this finding. She asserts that a formal re-allocation of business did not take place till 2021, yet Mr. Y’s “reallocation and attempts of reallocation of Appellant’s clients started from 2017 after he assumed the Head role and continued throughout the period and still continues.”

83. In this regard, the Appellant highlights that her colleague Mr. W allegedly assumed the role of “deputy” without undergoing a formal recruitment process and exercising functions that were not within his original job description. She maintains that, in this manner, Mr. Y attempted to favour Mr. W to the detriment of the Appellant and other team members

and to prepare his own succession. She contends that misrepresentations were made during the testimony of Mr. Y and Mr. W because his “deputizing role” started “well before Covid, in December 2019.” The Appellant argues that the reliance by the ARC on these transcripts was another error in the proceedings.

84. The Tribunal has reviewed the transcripts of the interviews of Witness C (Managing Director) and Witness A (Mr. Y) and concurs with the ARC that Mr. W’s assignment to this position constituted an exercise of managerial discretion that Mr. Y deemed necessary. The ARC was “satisfied with the explanations given at the hearing by Witness C (Managing Director) and Witness A (Mr. Y), [as] both confirmed that Mr. W assumed those functions (without being compensated for it) due to the heavy workload and health issues Mr. Y was experiencing.”

85. The ARC found that witnesses also clarified that Mr. W’s assumption of new duties was not a promotion nor a recruitment process to a new job opening. In practice, it was a “delegation” of authority which in the ARC’s view, “does not appear to be illegal per se if duly justified and authorised by senior managers, as it was the case.”

86. In this regard, the Tribunal concurs with the ARC’s conclusion that “in international administrative law, an administrative decision is presumed to be regular unless evidence is provided to the contrary..., the standard of preponderance of evidence in relation to misconduct was not met and therefore, the ARC conclude[d] that those managerial decisions were not blatantly illegal, nor irrational.”

87. In addition, in accordance with its case law, the Tribunal observes that it is within the managerial discretion of the Bank to organize its staff in the way that the Bank finds most suitable to achieve its goals in an efficient manner. The Tribunal does not have any plenary authority to review the Bank’s exercise of its managerial discretion. It is only when the discretion is exercised in an abusive manner, that the Tribunal has authority to order remedies. (Cf. EBRDAT 2017/AT/03 para 39).

88. The Tribunal therefore sees no reason to depart from the ARC's analysis that the claim of abuse of authority and harassment must be dismissed. The ARC detailed how the Director's new strategies led to positive results within the team and the Bank. These improvements gave a reasonable and observable basis to the decisions taken by the Director. The Tribunal thus concludes that the ostensible effectiveness of these decisions places them squarely within the realm of the managerial discretion granted to the Bank.

89. The Tribunal appreciates that the Appellant disagrees with many of the ARC findings of fact and interprets them in a different way. However, the Tribunal notes that, in accordance with Article 7.01(b) of the Appeals Process, cited above, the Appellant must demonstrate a manifest error in the ARC process for the Tribunal to depart from the ARC recommendation. While the Appellant has indicated a series of findings of fact that the Appellant disagrees with, to be actionable before the Tribunal, those issues must reach a high bar of error (“manifest error”). The Appellant’s submission in this regard is extensive, but the Tribunal notes that the primary differences between the Appellant’s submission and the ARC report amount to the perception of certain actions and incidents, rather than manifest errors made by the ARC. Although the Appellant substantiates her differences with the ARC Report, such differences are in the nature of disagreements with the ARC evaluations. The Tribunal notes in particular, that both the OCCO and the ARC, after their extensive processes, concluded that even if “the facts as alleged were proven, they would not amount to misconduct.”

90. The Tribunal also appreciates that the Appellant’s perception of the facts in question does not align with both the OCCO and the ARC analysis. This Tribunal’s mandate, however, is to analyse the decisions for manifest error. In this respect, the Appellant’s disagreement with the ARC’s evaluation is not, in the Tribunal’s view, sufficient basis to depart from the general rule set forth in Article 7.01(a) of the Appeals Procedure. The Tribunal has also reviewed the record and has considered the Appellant’s arguments but cannot concur that her line manager’s actions establish a pattern of abuse of authority or misconduct. Accordingly, the Tribunal does not agree with the Appellant that the ARC report is affected by a manifest error. The Tribunal rejects this claim.

91. For the foregoing reasons, the Tribunal concludes that the Appeal must be rejected in its entirety.

92. This being said, the Tribunal notes that the Appellant is a valued banker. Her contribution and acuity were acknowledged in testimony during the ARC hearings. The Tribunal is of the view that the Appellant’s differences with Management with respect to the assignment of her work should be resolved. The Tribunal has reviewed her submissions and finds that, for example, no proper explanation appears to have been provided for removing her from the [...] Project. The Tribunal regrets that omission, as the Appellant appears to have made significant contributions and provided guidance to the staff that continued with the project. The exchange of emails in the record also indicates a fraught relationship

between colleagues that the Bank should make a good-faith effort to resolve. Similarly, with respect to the ICHF project, the ARC noted that the decision not to invite the Appellant to the UNWTO meeting was within the scope of managerial discretion and not taken “with ill intent.” However, the Tribunal notes that the Appellant contends that she was invited personally by the UNWTO and that her non-participation at the meeting was more than disappointing. The Tribunal does not wish to interfere with management but this was clearly a situation that should have been avoided in the light of the Appellant’s long standing commitment to the project. In sum, though the Appeal is rejected, the Tribunal recommends that the parties make efforts to remedy the tensions present between the Appellant and management to ensure that her contributions to the team are properly acknowledged.

## **VII. Costs**

93. The Appellant requests reimbursement of legal costs. Paragraph 8.06(a) of the Appeals Directive provides:

If it upholds an Appeal, in whole or in part, the Tribunal may order that the respondent reimburse the appellant for such reasonable expenses, including reasonable legal costs, the appellant has incurred in presenting the Appeal. Exceptionally, the Tribunal may order that the respondent pay all or some part of the appellant’s legal costs where the Appeal has not succeeded.

94. Because the appeal has been rejected, no reimbursement of legal costs is due. The Tribunal also sees no reason to order that the Respondent pay exceptionally all or part of the Appellant’s legal costs.

## **VIII. Decision**

95. The Tribunal rejects the Appeal in its entirety.

**For the Administrative Tribunal**



**Maria Vicien-Milburn**

**Chair of the Panel**

**6 October 2023**