

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

Case No. 2023/AT/02

Appellant

vs.

European Bank for Reconstruction and Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Thomas Laker (Chair)

Chris de Cooker

Joan Powers

11 May 2023

I. Introduction

1. With the present Appeal, the Appellant seeks the status of “International Hired Staff” (IHS) that applies to staff who are appointed or transfer to mobility assignments on or after 1 April 2022. In particular, the Appellant requests the application of the recently amended internal rules of the European Bank for Reconstruction and Development (“Bank”) on this matter.

II. Facts and procedural background

2. The Appellant joined the Bank as ‘Analyst’ in 2017. From end of October 2019 to end of April 2021, he worked in this position in one of the Bank’s Resident Offices (RO).

3. After completing a competitive selection process, the Appellant was appointed as ‘Associate Banker (Band level 5)’ at B as from 1 May 2021. At that time, due to the Bank’s internal rules, only staff in positions higher than Band level 5 were eligible for IHS status and the associated benefits and allowances.

4. On 30 March 2022, the Bank adopted new rules on eligibility for IHS status, applicable for appointments and transfers to mobility assignments on or after 1 April 2022. From then on, staff appointed or transferred to positions at Band level 5 or higher would be considered eligible for IHS status. However, the Directive on Compensation of Staff Members Eligible for Internationally Hired Status, DIR/2022/8 (“IHS Directive”) explicitly excluded Band level 5 staff members who - like the Appellant - had been appointed or transferred before 1 April 2022.

5. When subsequently the Appellant raised the matter with the Head of Employee Relations and People Solutions & Advisory (Head of ER), the latter informed the Appellant that his enquiry would be discussed with the relevant department.

6. By email of 21 June 2022, the Appellant was informed by the Head of ER that “there is no way for us to retroactively apply the change in the SHB that now provides IHS status to Band 5 Bank Personnel. I’m sure it’s not what you were hoping for and unfortunately, there is no provision

that will allow me to change the outcome.”

7. On 5 August 2022, the Appellant submitted a request for administrative review. His request was rejected on 5 September 2022, mainly arguing that the message of 21 June 2022 “did not give rise to a new individual decision in relation to your IHS eligibility that would be subject to the administrative review process ...”.

8. On 31 October 2022, the Appellant submitted a request for review to the Bank’s President. The President rejected this request by decision of 21 November 2022. In her decision, the President found the request inadmissible as there had been no individual decision. Further, she rejected the Appellant’s request to grant him a waiver with a deviation from the requirements of the internal rules on IHS status.

9. On 16 February 2023, the Appellant submitted the present appeal. On 20 March 2023, the Bank submitted a response.

III. The Appellant’s position

10. In the Appellant’s view, his appeal is admissible because he had requested application of the new IHS policy to the issue of his eligibility for IHS status and, on 21 June 2022, received a new individual answer to this request. This answer resulted in an unfairness because he continued to be discriminated against.

11. Pursuant to the Directive, the Bank’s President may grant a deviation from a requirement of this Directive, and she should grant an individual exception in his case, since his case might be unique and warrants consideration.

12. The Appellant requests the Tribunal to reverse the President’s decision on admissibility and remand the case for initiation of the administrative review process, and/or to direct the President

to grant a waiver from the requirements of the Directive on IHS. Also, the Appellant requests anonymity, including the RO he is working in.

IV. The Respondent's position

13. The Bank states that the Appellant's eligibility for the IHS status was correctly determined at the date of his latest appointment in B. Further, the Bank emphasizes its discretion to change its terms and conditions of service and to implement them without retroactive effect.

14. The Bank considers the Appeal to be inadmissible, since the Head of ER did not take a new individual administrative decision when informing the Appellant by email of 21 June 2022 of his existing ineligibility for IHS status.

15. The changes in the eligibility criteria for IHS status were not due to a recognized unfairness in the previous criteria; rather, they were intended to encourage mobility in an attempt to decentralize resources.

16. Only the Bank's Board of Directors has the authority to alter the Bank's benefit and compensation policies, and there is no room for a deviation. In the Bank's view, the authority to deviate from a requirement in a Directive may not be exercised for changing benefits or their applicability in individual cases.

17. The Bank invites the Tribunal to reject the Appeal in full.

V. The Tribunal's evaluation

18. At the outset, the Tribunal notes that its analysis of the appeal is based on the nature of the Appellant's requests. When considering the present appeal, the Tribunal has taken into account the contested decision of 21 November 2022, concluding that the Appellant's request for administrative review is inadmissible, as well as the Appellant's submissions and requests in the present Appeal.

19. Further, the Tribunal recalls that, pursuant to Section IV, paragraph 3.02 of the Directive on the Appeals Process, DIR/2021/28 (“Appeals Directive”), it “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”, including “the body of rules and procedures issued in writing by or under the authority of the President, the Vice President, Human Resources and Corporate Services & Chief Administrative Officer and the Managing Director, Human Resources & Organisational Development”.

20. In light of the above, the Tribunal will firstly identify the core issues of the present appeal and then set forth the applicable law before drawing its conclusions regarding the Appellant’s requests in his Appeal (cf. the Tribunal’s approach in case No. 2021/A/02, paras. 47 – 49).

a. Subject of dispute

21. The Tribunal takes note that the Appellant’s requests are two-fold: On the one hand, he requests the Tribunal to reverse the President’s decision on admissibility and remand the case to her, so that she will initiate the administrative review process in line with the Directive on the Administrative Review Process (“ARP Directive”). On the other hand, as an alternative (“and/or”), the Appellant’s request is to direct the President to allow an exception based on his circumstances. The Tribunal will address these different requests in turn.

b. Request to remand the case to the Bank’s President

22. The Appellant does not contest that the Bank correctly applied the IHS Directive to him. In addition, he concedes that his request “was not in relation to the correctness of the determination of [his] eligibility for IHS at the time of [his] transfer.” The Tribunal further notes that the new version of the IHS Directive itself excludes the respective eligibility for appointments and transfers before 1 April 2022 (see IHS Directive Section IV “Scope”). Accordingly, the appeal addresses these specific provisions of the new version of the IHS Directive, rather than contesting their application to the Appellant’s individual case. Thus, it is clear that the Appellant contests the new

version of the IHS Directive insofar as it excludes his eligibility as such, rather than a legal error/mistake in applying the Directive to his individual case.

1. Applicable law

23. Within the Bank’s internal justice system, the requirements of the administrative review process are contained in the ARP Directive. Section IV, paragraph 3 (c) of this Directive stipulates that specific categories of administrative decisions “are not subject to the Administrative Review Process“, including “Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors” (iii), as well as “Individual Decisions taken by the President” (i).

24. The glossary of terms in Section IV, paragraph 2 of the Directive on General Provisions and Glossary of Terms for the Staff Handbook, DIR 2021/15, defines the different types of decisions as mentioned in the ARP Directive as follows:

- Regulatory Decision(s) taken by the President, the Board of Directors or the Board of Governors are “a policy or directive of the Bank affecting the terms and conditions of employment of all EBRD staff members ...”;
- Individual Decision is “an administrative decision that affects the terms and condition of employment of only one staff member...”.

25. Regarding the President’s denial to grant a waiver, the Tribunal takes note that, pursuant to Section V of the IHS Directive, it is only for the President to grant a deviation from a requirement of said Directive. As the right to grant a waiver from a requirement of the IHS Directive is limited to the Bank’s President, the decision to deny such a waiver has to be considered as an “Individual Decision taken by the President” within the meaning of Section IV, para. 3 (c) (i) of the ARP Directive.

26. Further, paragraph 3 (d) of the said provision clarifies that administrative decisions “that fall under paragraph 3 (c) above may be reviewed by the Tribunal in accordance with the Directive on the Appeals Process. There are no appropriate channels for administrative review of such decisions and, therefore, no requirement to exhaust such channels prior to recourse to the Tribunal”.

27. Finally, with respect to the scope of the Appeal, the Tribunal reiterates that its decisions are related to and limited by the requests submitted to it. The general principle of procedural law that a decision may not grant more than what was asked for (“*ne ultra petitur*”) also applies to the proceedings before the EBRD Tribunal (see case No.2021/AT/02, para. 62).

2. Conclusion

28. It follows from the above that the Appellant’s request to remand his case to the administrative review process must fail. Both contested decisions, i.e. a regulatory decision in terms of the IHS Directive, as well as the President’s individual decision not to grant a waiver, are not subject to the administrative review process. As demonstrated above, the Bank’s internal law does not foresee a prelitigation procedure in such cases and establishes the Tribunal’s competence to review such decisions directly.

29. Having determined that the request is not admissible, the Tribunal clarifies that, in the context of the Appellant’s first request, it will not deal with his arguments regarding the alleged unfairness of not applying the new rules of the IHS Directive to him. Such handling would exceed the Appellant’s request to remand the case to the level of administrative review and, therefore, would violate the principle of *ne ultra petitur*.

c. Request for a waiver

30. Regarding the Appellant's request to direct the Bank's President to grant a deviation from a requirement of the IHS Directive, by using the formulation "and/or", the Applicant has indicated that this second submission shall prevail in case his first request has no success.

1. Applicable Law

31. Section V of the IHS Directive provides that the Bank's President "may grant a deviation from a requirement of this Directive".

32. As recognized under the Tribunal's established jurisprudence, based on principles of international administrative law, the use of the word "may" in the regulatory framework for staff employment indicates that the designated official enjoys broad discretion in exercising his or her authority, such as the authority to approve a deviation or waiver from the rule. Accordingly, the scope for judicial review in such cases is limited, and the Tribunal will not substitute its views for discretionary decisions properly taken (see case No. 2019/AT/08). The Tribunal will generally defer to a discretionary decision so long as it falls within the bounds of reasonableness, is based on a thorough review of the available relevant facts, is not tainted by improper motives or procedures and is consistent with Bank law and international administrative law (see case No. 2021/AT/04 (preliminary decision), para. 73).

2. Conclusion

33. The Tribunal notes that the IHS Directive, in its Section II, includes clear and specific rules about eligibility for IHS status to different groups of staff members, depending on their respective dates of appointment or transfer to mobility assignments. Thus, these dates constitute a "requirement" of the Directive at stake, from which the President, pursuant to Section V of the IHS Directive may grant a deviation.

34. In view of the President's competence, the Tribunal does not share the Respondent's view that this authority "shall not be construed as allowing the President to grant deviations to provisions that implement the decisions and policies set by the Board of Directors". As a matter of law, Section V of the IHS Directive does empower the President to grant exactly such waivers.

35. Also, the Tribunal does not accept the Respondent's allegation that "deviations from a requirement in a Directive are not for changing benefits or their applicability in individual cases and a President's waiver is not intended to be an avenue for staff members to request such individual exceptions". On the contrary, the option to grant a waiver obviously serves the purpose to consider individual circumstances unforeseen in the general provisions of a Directive.

36. Of course, there is no legal obligation to create the authority to approve waivers. However, once such authority is established to such a broad extent, as does Section V of the IHS Directive, it cannot be minimized and rendered meaningless.

37. Regarding the President's discretionary decision not to grant a waiver and to deny the Appellant's respective (and admissible) request, the Tribunal does not find a legal error.

38. Firstly, it is clear from the contested decision that the President was fully aware of the relevant facts of the Appellant's situation and took them into consideration.

39. Further, the President correctly emphasized the purpose of the amendments of the IHS Directive in stating "that the rationale behind such change was not that the Bank recognized an unfairness to its criteria ... but rather the Bank wished to encourage mobility to its Resident Offices at the lower level bands in an attempt to decentralize resources and increase mobility." This purpose does not apply to the Applicant's situation since he has already been working in the respective RO since May 2021, nearly one year before the new rules came into effect. Granting a

waiver and conferring the new status on someone who has not taken up a mobility assignment after the effective date of the new eligibility rules would not fulfill the underlying objectives of this legitimate mobility policy.

40. Also, the Tribunal concludes that the differential treatment of those at Band 5 level appointed or transferred to a mobility assignment before 1 April 2022 and those who did so after this date does not amount to a violation of the doctrine of equal treatment of similarly situated staff. The difference in treatment is reasonably related and adapted to the underlying objectives, i.e. the aim to decentralize resources and to encourage mobility (cf. ILOAT Judgment No. 3298 (2014), consideration 21).

41. Finally, the Tribunal notes that the Appellant is not permanently excluded from receiving the IHS status. Such privilege may be achieved if he were to transfer to another Resident Office.

VI. Request for anonymity

42. The Appellant requests to remain anonymous, and the Bank does not oppose this request. The Tribunal grants this request, recalling that it is inherent to an appeal process that certain facts and opinions become known, both inside and outside the Bank. This being said, it is the Tribunal's established approach to limit to the maximum extent possible, inter alia, the exposure of facts or descriptions that may identify participants of the process.

VII. Costs

43. 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.

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

VIII. Decision

45. The Tribunal rejects the Appeal in its entirety.

11 May 2023

For the Administrative Tribunal

A handwritten signature in dark ink, appearing to read 'Thomas Laker', is written over a horizontal line.

Thomas Laker

Chair of the Panel