

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

Case No. 2023/AT/03

Appellant

vs.

European Bank for Reconstruction and Development

DECISION

**by a Panel of the Administrative Tribunal comprised of
Joan Powers (Chair)
Chris de Cooker
Thomas Laker**

20 July 2023

I. Introduction

1. This case concerns a challenge by the Appellant (“A”) to a recruitment process in which his candidacy did not continue beyond the first interview round. In the pre-litigation stages, he claimed that he had not received full and fair consideration in the process, and raised two principal arguments: (i) the selection process was procedurally flawed, and (ii) the selection process was tainted by the involvement of the hiring manager (“M”), who was (un)consciously biased against him. The case was heard by the Administrative Review Committee (“ARC”), which found in favour of A as to both aspects and recommended to the President of the European Bank for Reconstruction and Development (“EBRD”) that A be compensated accordingly, in the amount of three months’ salary for loss of chance and GBP 5,000 for moral damages, based on medical evidence.
2. The President accepted the ARC’s finding as to procedural flaws in the selection process. However, she disagreed with the ARC’s finding that the process was tainted by (un)conscious bias on the part of M.
3. The primary issue before the Tribunal is the validity of the President’s final decision insofar as it rejected the ARC’s finding of (un)conscious bias of M in connection with the impugned selection process, and declined to award further compensation to A on this basis. Thus, the Tribunal must examine the issue of alleged bias on the part of the M as hiring manager for the recruitment in question, and consider whether the President’s rejection of the ARC’s finding in that regard was a reasonable exercise of her discretionary authority.

II. Procedural History

4. On 3 March 2022, in light of the fact that his candidacy for a vacancy had not proceeded beyond the first interview, A submitted a request for review to the Managing Director for Human Resources & Organisational Development (“MDHR”), raising concerns about how the process and the decision-making had been conducted.
5. On 29 March 2022, the MDHR responded to A’s request, acknowledging that there had been a breach of procedure in the selection process, in that the selected candidate had not passed the requisite probationary period, and awarded him compensation in

the amount of GBP 3,000 due to the irregularities in the process. She otherwise upheld the administrative decision and dismissed the remainder of his request.

6. On 20 May 2022, A filed a Request for Review with the President.
7. On 8 June 2022, the President informed him that the Request for Review was admissible and had been forwarded to the ARC for its consideration.
8. On 28 December 2022, the ARC issued its report and recommendation. The ARC recommended relief in the form of financial compensation to A, in lieu of rescission of the impugned administrative decision, in the amount of three months' net base salary as well as GBP 5,000 as moral damages.
9. On 25 January 2023, the President issued her decision in relation to the report and recommendation of the ARC. The President concurred that there had been procedural irregularities, in that the candidate selected for the post had not completed the probationary period, and that there had been a breach of the requirements of the Bank's Procedure for Filling Vacancies (PRO/2021/21).¹ Given these findings, the President accepted the ARC's conclusion that the selection decision was procedurally flawed, as well as its recommendation, in lieu of rescission of the contested decision, regarding the payment of financial compensation for the harm to A's career, as well as moral damages. A has thus already been awarded three months' net base salary in total, for both compensation in lieu of rescission and for loss of a chance, as well as GBP 5,000 in moral damages, based on medical evidence as to the link between his health issues and the contested decision.
10. However, the President did not agree with the ARC's overall conclusion that there was (un)conscious bias on the part of the hiring manager, regarding this as not well-founded. She therefore rejected the ARC's findings and conclusions on this particular aspect of A's complaint.

¹ In particular, PRO/2021/21, Section IV(2)(e), prescribes that "[t]he line manager shall, **in conjunction with the relevant representative of the Human Resources Department**, shortlist candidates who (i) meet the eligibility requirements of the vacant position and (ii) are most suitable against the selection criteria." [Emphasis added.] The ARC also recommended that a member of HR be directly involved at all stages of a recruitment process including, in the screening of candidates for the first round of interviews (short-list process), and that minutes of said screening be kept, saved, and stored in an appropriate HR file.

11. A filed his Statement of Appeal with the Tribunal on 21 April 2023. The receivability of the appeal has not been challenged by the Bank.
12. The Appellant has requested anonymity, as permitted under Sec. 9.03(c) of the EBRD Directive on the Appeals Process, to which the Bank does not object.
13. Neither party has requested oral hearings or the production of documents.

III. The Facts

14. A joined the EBRD in 1998 as a Senior Banker. Starting in 2009, he held the position of Associate Director, Senior Risk Officer, in one of the Bank's departments. This department was restructured in 2015, and A moved to a newly created department. He applied for the position of Director of the newly created department but was unsuccessful. M, an external candidate, was appointed Director.
15. In October 2018, M initiated a restructuring of the new department and requested the team's views on said restructuring exercise. A provided his feedback and criticized some of the proposed options.
16. As part of the restructuring, two new roles as Head of Team were created. A applied for one of these roles but was not selected. One of his younger colleagues was selected as Head of Team and became his direct line manager.
17. Since 2018, A has applied for eight positions within the EBRD and was shortlisted for six, but he was not selected for any of them.
18. In January 2019, he received his performance review for 2018. It included *inter alia* the following comments from M, who at that time had become the Appellant's second line manager:

"It seems to me that [A] mentored, rather than managed, his juniors. . . . [B]ut he needs to be sure that he does indeed drive for results and drive engagement. I have not always felt supported by [A] in spite of his perceived seniority in the team, and whilst in the past I have worked around this, his generally negative attitude in the past few months makes me dwell on whether he puts sufficient weight on team involvement and the need to support all your colleagues, at

whatever level of seniority. He needs to demonstrate more willing support of management to prove his support of the whole organisation.”

19. In 2021, his performance review, which was done by his line manager, A was considered as “performing below expectations”.
20. Toward the end of 2021, A applied for a position of Associate Director, Head of Country/Regional XY Risk Team. A total of 74 candidates applied for that position. A was interviewed, as were three other candidates, as part of the first round of interviews, which were conducted by M (as hiring manager) on his own. However, although M short-listed the other three candidates to participate in the second round of interviews, which took place before a four-person assessment panel, he excluded only A from the second interview round.²
21. The five EBRD behavioural competencies against which A and the other candidates were assessed were Collaborates, Communicates Effectively, Instils Trust, Drives Engagement and Ensures Accountability. As the successful candidate would be responsible for increasing the engagement of the team, the final two competencies, which were managerial competencies, were considered by M to be particularly important.
22. In January 2022, A learned that the position had been filled, and that he had not been short-listed for the second round of interviews and had thus been excluded from competing further for the role.
23. In January and early February, he sought feedback from M and Human Resources (HR) on the process and the short-listing decisions. M replied by email, listing the five competencies on which the interviewees had been assessed, and stating that A had scored lower than the others in the first interview round, in particular with respect to the competencies that reflected managerial ability. In this regard, M considered that A did not demonstrate an adequate realisation of the challenges of getting a group of

² The President’s decision acknowledged that the screening of candidates from 74 to 4 (i.e., the creation of the initial shortlist) was done by M alone, and that no representative of the Human Resources Department was involved at the stage of further short-listing for panel interviews (i.e., the short-listing from 4 to 3 candidates), in contravention of PRO/2021/21. She further noted that M himself accepted that he alone conducted the short-listing processes prior to the panel stage, without consultation with HR.

varied individuals to pull together into a coherent team, and that he blurred the role of mentor and that of manager.

24. A thereupon initiated the Administrative Review process (see para. 4 above).
25. In August 2022, A transferred laterally to a position in a different directorate in the Bank.

IV. The Findings of Fact in the ARC Report

26. In its report and recommendation, the ARC found that A had not been afforded full and fair consideration for the position for which he had applied. It reached this conclusion on two primary bases:
 - (i) there were two procedural breaches in how the selection process was conducted, i.e., breach of the Procedure on Filling Vacant Positions (PRO/2021/21), Section IV paragraph 2(d) and (e) relating to HR's lack of involvement in the process and paragraph 1.2(c) regarding the hiring manager's selection of a candidate who had not passed their probationary period; and
 - (ii) M had not selected A to be interviewed in the second round, based on "his own perceptions and (un)conscious bias about [A's] competencies for the role."
27. Firstly, the ARC observed that the screening of the 74 candidates was only performed by a single person, with little involvement from HR. In fact, according to the ARC, the evidence on file showed that HR was more involved in the drafting of the job opening and the selection of the relevant criteria and competencies for the role than in the short-listing process itself. HR was not actively involved in the first round of interviews.
28. Secondly, according to the evidence provided by A (which the ARC considered reliable and was not contested by the Bank), the first round was more of a conversation with the hiring manager than a formal interview. Accordingly, in the opinion of the ARC, this apparent informality between the two (line manager and staff member) was more likely than not to have induced A to think that the process has not ended at that stage.
29. The ARC noted that the assessment of "full and fair consideration in a recruitment process" is not a mere formality nor a "checklist exercise". Accordingly, the ARC

considered that, in order to reach its decision, it was necessary to take into consideration all the circumstances of the case, including its factual background, and look at the professional and inter-personal relationship between A and M throughout the years.

30. In this regard, the ARC noted that A had applied for M's position a few years before, that he was someone very experienced and well regarded at the Bank who had helped his line manager during his transitioning period. This was corroborated by two other relevant witnesses (who knew both A and M) and who stated that M may have felt threatened by A, his experience and expertise, and postulated that M thought that A had been responsible for criticism of M in anonymous staff surveys.
31. The ARC also pointed to the testimony of several witnesses who had worked with A and had expressed the view that, as panel members in the second round of interviews, they were expecting to interview A in the second round, as he was highly experienced and technically skilled for the job.
32. Given this testimony, the ARC found that M's explanations as to why A's candidacy did not advance to the second round of interviews was not persuasive. The ARC found that A (having been short-listed as one of four out of 74 candidates for the first round of interviews) had a reasonable chance of moving forward to the second round of interviews. From the ARC's perspective, A was, in fact, prevented from being interviewed before a larger group of professionals (some of whom had also worked with him) and by doing so, M did not give him a "fair" chance to have other people asking him questions, requesting examples from his prior experience, and assessing his overall competencies and skills including managerial ones.
33. The ARC therefore expressed the view that, based on the witnesses' testimonies at the hearing and the overall circumstances of the case, as described above, it is more likely than not that M did not select A to advance to the second round of interviews by the panel members "based on his own perceptions and (un)conscious bias about the staff member's competencies for the role."

V. The Appellant's position

34. A is challenging the President's decision on the following grounds:
 - First, it was an error to dismiss the ARC's findings that the selection process was tainted by bias. He contends that the ARC's overall conclusion that there was

(un)conscious bias on the part of the hiring manager in taking the administrative decision was correct and was substantiated by the evidence.

- Second, as the compensation granted by the President was redress only for the losses following from procedural breaches and moral injury, the compensation should be increased to account for the bias that tainted the process.
- Third, even without the element of bias, the compensation granted is inadequate redress for the Bank's material breaches of its own internal law, and the impact this has had on him.

35. A relies on several facts in support of his claims of (un)conscious bias, e.g., that M conducted the first round of interviews on his own, without input from HR or other assessors in reducing the next round of interviews from four to three candidates (i.e., excluding only A from the original short-list of four to proceed to the next stage). Nor did M keep any records to document the interview process.
36. A also points to a previous restructuring of the department in 2015 introducing a new managerial layer in the department, in which he was not selected for either of the new managerial positions created. He thus alleges that this exercise reflected M's bias against him, which has continued over time and adversely affected his career, i.e.:

“Based on the evidence . . . that I would have been a strong candidate for the position, coupled with [M's] animosity towards me, the only reasonable inference is that he conducted the process in this way to ensure that I would not be in a position to compete with his preferred candidate or be in a position to be selected for the role. The fact that [M] kept no proper records to document the process further supports this contention. As previously highlighted by the Tribunal, ‘the absence of a written record can easily be used to mask bias, inattention to material facts or arbitrariness. In certain cases, the absence of a written record may be used as circumstantial evidence that a selection decision was not a proper exercise of authority; without a record, the fact-finder may decide there is not sufficient evidence to show that the decision-makers gave reasoned consideration to each candidate’ (2019-AT-09, para. 56). This is clearly the case here.”

37. In maintaining that the amount of compensation he has already received is inadequate, A points out that the purpose of compensation in lieu of equitable relief is to place the staff member in the same position that he or she would have been in, had the unlawful decision not been made. In his view, the tainted process—in which HR failed to play any meaningful oversight role—enabled his manager “to abuse his managerial discretion to, not for the first time, exclude [A] from a process and eliminate any chance [he] had at success”, thus warranting additional compensation.
38. By way of relief, A is seeking the following remedies from the Tribunal:
- i. Reversal of the finding of the President that the administrative decision was not tainted by (un)conscious bias; and
 - ii. Upward adjustment in the compensation granted/remedial measures in the amount of 15 months’ salary.

VI. The Respondent’s position

39. The Bank offers three arguments in response to the Appeal:
- (i) The President’s decision rejecting the ARC finding of “unconscious bias” on the part of M was reasonable, as the ARC finding was not adequately reasoned and/or based on sufficient evidence;
 - (ii) Even if the President had upheld the ARC finding with respect to (un)conscious bias, it would not have made a difference in the financial outcome of the case, as the Bank agreed to pay A the full amount proposed by the ARC;
 - (iii) The level of compensation proposed by the ARC and accepted by the Bank was appropriate and should not be increased further, as there is no justification for the additional 15 months’ salary sought by A.
40. The Bank points out that, in the first round of interviews, the candidates were assessed on the basis of five competencies (collaboration, communication, instilling trust, driving engagement, and ensuring accountability), and that A scored the lowest of all four shortlisted candidates. The final two competencies were particularly critical, given the expected managerial role that the successful candidate would assume.

41. According to the Bank, the hiring manager (M) considered that, in some of A's responses, "he did not demonstrate an adequate realisation of the challenges of getting a group of varied individuals to pull together into a coherent team. Furthermore, in the view of the hiring manager, [A] blurred the role of mentor and that of manager. These conclusions were entirely legitimate for the hiring manager to draw and were based on his own appraisal of the Staff Member's performance during the first round of interviews."

VII. The Tribunal's evaluation

42. The Tribunal recalls its established jurisprudence that it is inherent in an appeal process that certain facts and opinions become known, both inside and outside the Bank (cf. EBRDAT Case No. 2019/AT/08, paragraph 41). This being said, it is indeed the Tribunal's established approach to limit to the maximum extent possible, *inter alia*, the exposure of names, facts or descriptions that may identify participants in the process. However, an absolute guarantee cannot be given. Under these circumstances, the Tribunal grants the anonymity requested by the Appellant.
43. Noting that neither party has requested oral hearings, and bearing in mind Section 7.02(a) of the Appeals Process, the Tribunal does not consider that there are exceptional circumstances present in this case that would warrant holding oral hearings *sua sponte*.
44. The Tribunal has relied on the facts found by the ARC but has made its own legal assessment of the validity of the President's decision, in particular with respect to the issue whether the recruitment process was tainted by (un)conscious bias on the part of M, such that A's candidacy did not receive full and fair consideration.
45. The Tribunal takes note of the test applied by the United Nations Dispute Tribunal in reviewing allegations of bias with respect to a selection process, namely whether "a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the [selection process] was biased against the Applicant."³ If so, the selection process would be unlawful, insofar as the applicant was deprived of a full and fair assessment of his candidature.

³ Nwuke, UNDT-2013-158, para. 82.

46. The jurisprudence of the Administrative Tribunal of the International Labour Organization (ILOAT) is to the same effect, recognizing that:

“for the right to take part in competitions to be effective, ‘it must necessarily include the right to demand that the arrangements for the competition ensure the appointment of the candidate who is really the best qualified. In other words, at every stage of the competition including the arrangements made, the conduct of the tests and the evaluation of their results, every candidate must be treated on an equal footing and with full impartiality’”.⁴

47. In the view of the Tribunal, the serious procedural flaws in the recruitment process identified by the ARC preclude it from reaching a firm view as to whether A was treated on an equal footing with other candidates and with full impartiality. Although it does not necessarily endorse the ARC’s finding as to (un)conscious bias on the part of M, the Tribunal considers that, given these flaws and the lack of transparency as a result, it is impossible to rule out the possibility that the selection process was tainted by bias against A.

48. In this regard, the Tribunal has taken into account the following factors:

- There was only one assessor during the first round of interviews, which was not in line with the relevant procedure on filling vacancies.⁵
- That assessor (M) did not keep notes of the interview of A and the other three candidates in the first interview round. As a result, there is no contemporaneous written record as to what questions were posed to the candidates, their responses, and how these were assessed and compared. There is only anecdotal information from M in responding to A’s later inquiry in January as to the basis for the decision not to advance him to the second round.
- Given the lengthy working relationship between M and A, a necessary aspect of full and fair consideration of A’s candidacy would have been to take steps to avoid even the suspicion of bias or pre-conceived judgment on M’s part with respect to A’s candidacy.

⁴ M. v. ITU, ILOAT Judgment No. 4408 (2021), Consideration 21 [citations omitted].

⁵ Section 2 of the Procedure (PRO/2021/21) provides that once the short-list is prepared, an Assessment Group will be created in order to assess the short-listed candidates and make a recommendation as to their ranking. There is no mention of a preliminary interview round to be conducted exclusively by the line manager after the initial short-listing.

49. The Tribunal thus shares the view of the ARC that allowing A to be interviewed by all four members of the assessment panel “would have been a more transparent, reasonable, and rational exercise of managerial discretion.” In a previous judgment, the Tribunal recognized the importance of documenting the selection process in order to allow an assessment of its fairness and impartiality. Accordingly, it recommended as follows:

“ . . . that the Bank develop a procedure for documenting the reasons why individual candidates have or have not been short-listed. Such information can be included in a document specific to the short-listing decision (e.g., notes listing the pros and cons of each candidate) or it can be derived from the entire record made of the decision-making process. In either event, the Bank should ensure that the Tribunal has sufficient documentation to allow it to assess whether fair and impartial decisions have been made when short-listing candidates. The availability of documentation will avoid the need for or can supplement witness recollections.”⁶

50. In that previous decision, the Tribunal recommended that the Bank develop a procedure for documenting the short-listing stage, which would include reasons as to why individual candidates have or have not been short-listed. However, this guidance was not followed in the initial interview process in this case, such that it is not possible for the Tribunal to assess whether the decision to exclude A from the second round of interviews was fair and impartial.
51. Accordingly, the Tribunal concludes that, although it would have been possible to do so, the recruitment process did not include measures to preclude any potential bias in the consideration of A’s candidacy. In the view of the Tribunal, this defect, and the impact it had on A’s health and wellbeing, warrants the payment of additional moral damages to A.

VIII. Costs

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

⁶ Case No. 2019/AT/09, para. 60.

“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.”

53. 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.

IX. Decision

54. The Tribunal rescinds the President’s decision in part.
55. The Tribunal orders the Bank to compensate the Appellant through the payment of additional moral damages in the amount of GBP 5,000.
56. All other claims are rejected.

20 July 2023

For the Administrative Tribunal



Joan Powers
Chair of the Panel