

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

**Case No. EBRDAT 2024/AT/01**

**Appellant**

**vs.**

**European Bank for Reconstruction and Development**

**DECISION**

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

**Marielle Cohen-Branche (Chair)**

**Chris de Cooker**

**Joan Powers**

**28 June 2024**

## **I INTRODUCTION**

1. On 11 April 2024, the Appellant submitted a Statement of Appeal pursuant to Section IV para 6.4.1(e) of the Directive – Administrative Review Process (“ARP Directive”) (DIR/2022/1), challenging the President's Decision of 17 January 2024 (“President's Decision”) finding inadmissible her 21 December 2023 request for reconsideration of an Administrative Decision taken by Human Resources (HR) to deduct 4.5 (or 5) days from her Annual Leave, which concerns leave taken by her during maternity in 2021 but of which she was allegedly unaware until HR's final decision of 26 October 2023.
2. The Appellant asks the Administrative Tribunal to annul the President's Decision on admissibility and to refer the case back to the President so that it can be referred to the Administrative Review Committee and be subject to Administrative Review.
3. The Appellant maintains that the accumulated negative balance was only communicated to her by HR on 26 October 2023, after five months of often contradictory telephone calls, discussions and exchanges of information and e-mails on AskHR.
4. The Appellant requests to remain anonymous and the Bank does not oppose this request. The Tribunal will grant this request.

## **II FACTUAL AND PROCEDURAL BACKGROUND**

5. The Appellant is a Staff Member of the Bank on a regular contract. She planned her Maternity Leave for the 2020-2021 leave year with the intention of taking all the paid Maternity Leave to which she was entitled, then all of the Annual Leave to which she was entitled, and finally unpaid leave. In addition, the Appellant wished to purchase five additional days' allowance and then take unpaid leave.
6. She wrote to AskHR on 4 November 2020 requesting a calculation of the number of days of Annual Leave she could take after her maternity leave (which covered the period 14 December 2020 to 14 May 2021), i.e. 22 consecutive calendar weeks. The reply, dated 11 November 2020 was that she had 35 days of Annual Leave, including five days purchased flexibly. The Appellant indicated that she would decide later if she wanted to use her Annual Leave after her maternity.

7. She began her paid maternity period by importing 15 days of Annual Leave from the 2019-2020 period. On 11 May 2021 HR Operations-Payroll informed her that, “you have carried over into 20/21 these days of Annual Leave plus 5 days you purchased in Flex for the leave year 21/22, giving you *a total of 50 days of Annual Leave to take*” [emphasis added].
8. The Appellant lost access to the Employee Self Service Portal (ESS) computer system during the period of 11 May 2021 until 11 October 2021, when her connection was restored.
9. On 11 May 2021, the Appellant requested 48 days of Annual Leave on ESS approved by the line manager through the ESS System from 17 May to 23 July 2021, the Appellant was on Annual Leave.
10. On 29 June 2021, the Appellant indicated by e-mail to her line manager, copied to HR Operations, that she wished to take unpaid leave until 8 October 2021.
11. On 12 July 2021, she asked HR Operations-Payroll “I would like to request unpaid leave between 26 July and 8 October”, that is, for a period of 13 consecutive calendar weeks, from 27 July 2021 until 8 October 2021. On the same day, HR replied: “just for clarification, are you requesting unpaid parental leave? No document upload is required for unpaid parental”. On the same day, the Appellant replied: “Yes, is there a limit for unpaid parental leave of my line manager's approval is enough [sic]?”. The HR answer was: “You have 65 days parental leave to take and all there is no limit on the amount you take as long as it is agreed with your line manager [sic]”.
12. HR provided the original Maternity Leave application and indicated that the Appellant should amend it to add the unpaid leave. On the same day, 30 June 2021 as she was aware that there had been some public holidays, the Appellant asked HR by letter to advise her of the exact day on which her Maternity Leave would end and her unpaid leave would begin.
13. On 18 August 2021, the AskHR helpdesk (to which HR had forwarded the Appellant's 30 June 2021 request) sent an e-mail stating: “You had 15 days annual leave for 20/21 and 30 days of annual leave quota for 21/22 plus 5 flexible purchased days, making a total of 50 days. You have taken the days below out of your 15 C/F days” [attached a list of absences from 17.05.21 to 8.06.21 listed]; “Your Annual Leave quota has been prorated to take account of your unpaid parental leave from 26.07.21-08.10.21” [attached a list of absences from 9.06.21 to 23.07.]; “After taking the following annual leave days, you have exceeded your annual leave by 4.50 days”.

14. On 19 August 2021, the Appellant asked for clarification of what this meant, and asked HR to kindly tell her what she should have done. The Appellant stated that she had never received a reply. The Bank indicated in its Response that the Bank did not receive such enquiry due to a technical error at the time resulting in the fact that the message came from a non-Bank email address.

15. The Appellant said that she was still unable to access EBRD systems and that she intended to follow up when she returned in October 2021. Unfortunately, she added that she had completely forgotten about this conversation and had hundreds of unread emails when she arrived at the Bank and was very distracted at that time due to lack of sleep and caring for her child.

16. On 14 October 2021, on her return from Maternity Leave, she saw that her new Annual Leave allowance was 28.5 days instead of 30 (or 35 if the additional leave days are included). HR explained the reason to the Appellant as follows: she had accumulated less Annual Leave during the unpaid leave, which was a satisfactory explanation according to the Appellant: there did not seem to be a problem and, more importantly, the ESS showed no negative quota, with a zero balance in the “remainder” section, which was in line with her expectations that she had taken all her Annual Leave. She indicated that everything was going well for her and for HR.

17. After taking five days of additional leave in November 2021, she bought additional days of Annual Leave through ESS, with the approval of her line manager. According to the Bank’s Response, the Bank understood that the Appellant had expected such days to be treated as paid return-to-work leave days granted to Staff Members after unpaid Maternity Leave, notwithstanding that she did not see the option to request such days in the ESS system.

18. During vacations in 2022-2023, she took 30 days of Annual Leave and bought five more days. She took no further Annual Leave until the end of March 2022.

19. In April 2023, at the start of the end-of-year vacations, she wanted to book a vacation and noticed for the first time a “minus” in the carryover vacation entitlement: there was “-10”. On 28 April 2023, not knowing what it meant or where it came from, the Appellant used the AskHR portal to ask the reason and meaning.

20. According to the Appellant, it took between 28 April and 26 October 2023 for HR to properly explain what had happened and how the calculations had been made, via the HR response. The Appellant indicated that these communications took a long time and were with different people within HR, requiring her to sift through confusing and contradictory

information in order to try to understand what decision had been taken, when it had been taken, what the reasons behind it were, their importance and their consequences.

21. On 10 May 2023, the Appellant was informed that, in leave year 2021-2022, she had exceeded her quota by 9.5 days and that in leave year 2022-2023 she had exceeded her quota by a further five days, carried over to leave year 2023-2024.

22. The Appellant replied that she did not understand where the extra 9.5 days came from in the 2021-2022 year and, in the 2022-2023 year, she did not take unpaid leave.

23. On 18 May 2023, HR clarified that, in the 2021-2022 leave year, the Appellant had been allocated 28.5 days, but had taken 38 (+ 15 of her leave carried over from the previous year), which explained why she carried over a negative quota.

“So, your quota of 28.5 days + 15 days of carried-over leave = 43.5.

You therefore have an excess of 53 days' leave, as shown below:  $43.5 - 53 = -9.5$ .”

24. On 26 May 2023, in an e-mail, the Appellant indicated to HR: “I was told that I had booked 10 extra Annual Leave days, which I don't even know how this is possible and why the system allows it without at least asking for an explanation or further approval from the line manager”.

25. On 22 June 2023, the HR representative replied that she would ask AskHR's manager to contact the Appellant directly because it was not something within “her remit or expertise”.

26. On 27 June 2023, the portal displayed an SAP screenshot that, according to the Appellant, was quite difficult to understand. In addition, HR informed the Appellant that, because she had booked “Parental Leave” instead of “Maternity Leave”, the five days of return-to-work leave had been booked as Annual Leave. According to the Appellant, this was the first time this explanation had been given. She felt that this was not at her own initiative, but rather as a result of HR's suggestions. Although the Appellant therefore refused to submit a revised request for Maternity Leave correcting the type of leave, HR changed the leave from “Parental Leave” to “Maternity Leave” without, according to the Appellant, notifying her. However, according to the Bank, it agreed to exceptionally and retroactively reclassify the type of unpaid leave that the Appellant had taken at the time, and consequently to reclassify the Annual Leave days taken in November 2021 as paid return-to-work leave days.

27. On 3 July 2023, at the Appellant's request, she had an unrecorded telephone conversation with HR. It was explained that in 2021-2022 the Appellant was entitled to fewer days because

she had not accumulated the usual 30 Annual Leave days and that this was the source of all the problems but in the end, the Appellant realised that she could not make sense of the concluding conversation.

28. On 3 August 2023, the Appellant opened a new AskHR file as the leave quota for the current year had been reduced from minus 10 to minus 5. She again spoke to HR, but said she had not obtained a satisfactory explanation, as she had clearly requested unpaid leave on 29 June 2021.

29. On 4 August 2023, HR informed the Appellant of its decision to reduce her excess leave of five days back-to-work for Maternity/Parental Leave and that she had only 4.5 days of leave left to take. HR confirmed that the excess leave taken amounted to 9.5 days and added that it had been reduced by five return-to-work days.

30. On 2 October, 2023, under the ARP Directive, the Appellant submitted a request to the Managing Director Human Resources and Organisational Development “MDHROD” for review of the decision to deduct 4.5 days from her Annual Leave, which had been communicated to her on 4 August 2023.

31. She requested primarily:

- The restitution of 4.5 or 5 days currently deducted from her Annual Leave balance related to the above issue,
- a clear explanation of her Annual Leave entitlement in 2020-2021, and which calendar days considered as Annual Leave were taken in excess,
- a formal apology from HR and acknowledgement of the errors made by HR, and
- in general, the need to review the system that allows staff to unknowingly book up to approximately 10 days of negative leave in ESS.

32. On 26 October 2023, the MDHROD issued her decision which, according to the Appellant, for the first time, properly explained what had happened and how the calculations had been made:

33. The MDHROD reiterated the Appellant’s position, i.e., that:

- Her Annual Leave balance, particularly regarding a negative balance in the following year 2021 Annual Leave, was based on an incorrect calculation made by HR,

- HR failed to meet its duty of care to her by explaining the extent and types of leave to which she was entitled in its previous communications when she requested the various leaves,
- HR did not immediately provide clear and complete explanations of how the deduction was made when she requested clarification.

34. The MDHROD apologised for the delay in providing explanations when the Appellant began to question her accumulated negative balance at the beginning of 2023, but considers that, in any event, the Appellant's intention to take unpaid leave for the period 27 July 2021 to 8 October 2021 during a leave year had the effect of reducing her Annual Leave entitlement for that year. Specifically, Annual Leave does not accrue during periods of unpaid leave, as provided for in Section IV, para 16 (c) of the Leave Procedure (PRO/2019/10), in force at the time.

35. According to the MDHROD, although the Leave Procedure (Section IV para 6.3) specifies that “Staff Members must inform the Human Resources Department at least 4 weeks before the end of their paid Maternity Leave period if they intend to take unpaid Maternity Leave and the expected duration of such unpaid maternity period”, the Appellant's intention to take unpaid leave was only communicated to HR by letter on 12 July 2021, just before her Annual Leave (from 17 July to 23 July 2021) and after her 22 weeks of paid Maternity Leave from 14 December 2020 to 14 May 2021.

36. Thus:

- The Appellant's basic Annual Leave entitlement of 30 days was reduced to 23.46 days rounded up to 23.5 days, plus five Flex days, plus days carried over, both unallocated = total entitlement for the year of 43.5 days Annual Leave. This reduction resulted in a negative Annual Leave balance at the end of the 2021-2022 leave year, i.e. -4.5 days of Annual Leave.
- She therefore began her 2022-2023 Annual Leave on 1 April 2023, with a total Annual Leave balance of 30.5 days (30 days plus 5 days purchased with the Flex allowance, minus 4.5 carryover days). She took 35.5 days of Annual Leave during her 2022-2023 leave year, resulting in a negative balance of -5 days at the end of the year.
- To complete the picture, the Appellant entered the 2023-2024 Annual Leave year on 1 April 2023 with a total Annual Leave balance of 30 Annual Leave days (30 days plus 5 days purchased through the flexible allowance, minus 5 carryover days). The Appellant has taken 26.5 days of Annual Leave to date. As things stand, her Annual Leave balance is 3.5 days.

37. As a result of Appellant's use of unpaid leave, HR had to prorate her Annual Leave entitlement. Despite the fact that communication with the Appellant could have been improved, the MDHROD considered that there were no irregular actions or breach of duty of care on the part of HR.

38. Furthermore, the MDHROD disagreed with the Appellant's contention that she acted on the basis of HR's confirmation of unpaid leave; while the MDHROD acknowledged that HR could have reiterated the effect of such unpaid leave in its email exchanges with the Appellant, HR only asked what type of unpaid leave the Appellant wanted, and she confirmed "parental" leave. The MDHROD pointed out that all staff have a responsibility to familiarise themselves with the Bank's Rules and Procedures, especially as HR colleagues, prior to her Maternity Leave, provided the Appellant with access to the relevant information by sharing links in their email to the Appellant dated 5 November 2020.

39. However, the MDHROD admitted that, although there was no substantive or procedural defect in the implementation of the Bank's Rules and Procedures, the negative balance of accrued Annual Leave was exacerbated by confusion over the type of unpaid leave the Appellant requested in July 2021. As it became clear in June 2023 that the Appellant in fact intended to request unpaid Maternity Leave rather than unpaid Parental Leave, HR retroactively reclassified the Appellant's 2021 unpaid leave as such, reducing the negative balance to 3.5 days for the 2023-2024 Annual Leave year.

40. In view of the above, there was no need for the Bank to deduct the equivalent amount from the Appellant's compensation, as it correctly reflects the equitable negative leave. The only financial consequence for the Appellant would be that, at the end of her employment, such a negative balance would remain and would have to be reimbursed to the Bank.

41. Ultimately, the MDHROD concluded that, as a courtesy, HR responded to provide clarification for the Appellant's benefit, but nevertheless stressed that she was aware or should have been aware of the treatment applied to unpaid leave and, if she wished to dispute this, should have raised the matter no later than the start of the 2022-2023 Annual Leave year. Her discussions and confirmations with the MDHROD colleagues are not considered as final new Administrative Decisions under the Bank's internal law.

42. On 21 December 2023, the Appellant requested a review of the MDHROD's Administrative Decision by the President of the EBRD pursuant to Section IV, para 6.4.1 (a) of the ARP Directive. The Appellant requested a review of the MDHROD's decision of 26 October



2023, concerning her entitlement to Annual Leave. In short, this request concerned the actions and decisions of HR that resulted in her accumulating a negative leave balance related to the leave she took during her maternity in 2021, which was only notified to her in October 2023 and which apparently only had an impact on her leave balance for the current year and on the related decisions taken by HR following her requests for explanations.

43. On 17 January 2024, the President issued her decision regarding the admissibility of the Appellant's request for reconsideration dated 21 December 2023 and concluded that the Request was not admissible for the reasons set out below:

“a) As noted in your Request, you seek a review of “*HR's actions and decisions resulting in my having accrued a negative leave balance related to leave I took during my maternity in 2021*”. You do not appear to dispute that the substantive actions and decisions that would have altered, in an adverse manner, or be in breach of, your terms and conditions of employment occurred in 2021. Instead, you seek to argue under the Admissibility section of your Request that such matters are nevertheless reviewable given that their effects only became known to you in 2023 and/or that your subsequent engagement with Human Resources colleagues in 2023 have modified such previous actions and decisions to the point of rendering them once again reviewable.

b) As a preliminary point, while you focus primarily on a negative annual leave balance, this is merely an effect of the underlying actions and decisions. The cause of such negative balance in 2021 were two separate matters. The first was a reduction in your annual leave entitlement for the 2021-2022 leave year as a consequence of unpaid leave taken in July 2021 (the “Reduction in Entitlement”). The second was the classification of such unpaid leave as unpaid paternity leave, leading to a reduction of your annual leave balance later in 2021 when you took annual leave thinking these were return-to-work paid leave days that staff members become entitled to under the Directive on Leave after unpaid maternity leave (the “Unpaid Leave Classification”). I am of the view that neither of these matters are subject to review under the ARP Directive.

c) With respect to the Reduction in Entitlement, this amounts to the correct application of your terms and conditions of employment, specifically Section IV, paragraph 16 (c) of the Procedure. Such non-discretionary application, which does not alter or breach the Bank's internal law, is generally not subject to review (EBRD Administrative Tribunal Decision on Cases EBRDAT 2018/AT/01 and EBRDAT 2018/AT/04). While you complain of poor communication from Human Resources colleagues having led to your

failure to understand such application, such allegations would not have been sufficient to render the matter reviewable at the time – after all improved communication would not have had the effect of entitling you to benefits to which you were otherwise not entitled, and therefore any poor communication could not have had direct legal consequences.

d) In any event, however, even were such matter to be deemed a reviewable administrative decision, a review is now out of time, as noted by the Managing Director, Human Resources and Organisational Development (“MDHROD”) in her response dated 26 October 2023. In this respect, I am of the view that already in 2021 you were aware or ought to have been aware of the Reduction in Entitlement and indeed its effects on your annual leave balance, at which point you could have challenged their legality should you have believed that they were substantively or procedurally flawed. I have formed this view on the following basis:

i. Such reduction and its consequence was expressly communicated to you by email on 18 August 2021, including notably that your annual leave balance had become negative (Annex 7 of your Request). On 14 October 2021, you had a further exchange on the subject, confirming again a pro-rating of your entitlement on account of annual leave (Annex 8 of your Request). Should further clarifications in this respect have been material to the exercise of your rights as a staff member, you could have followed up on your queries at the time.

ii. All staff members are required to familiarise themselves with the terms and conditions of their employment with the Bank. You ought therefore to have been aware that taking unpaid leave would accordingly reduce your annual leave entitlement and, given the amount of annual leave which you had already taken during that leave year, would consequently lead to a negative annual leave balance.

iii. Your revised annual leave entitlement and negative balance would have been reflected on the Employee Self Service (ESS) system at any time in the 2021-2022 leave year after 15 July 2021, when your unpaid leave was introduced. That you may not have closely verified such aspects on the system at the time does not change the fact that such information was available to you. Your claim that a negative balance only appeared in ESS in April 2023 is at odds with records in our back-end SAP system, to which ESS is synchronised.

e) Further, your interactions with Human Resources colleagues in 2023 had no effect on applicable timeframes. With respect to the Reduction in Entitlement, such communications merely confirmed and attempted to clarify for you the application of the Bank's internal law on leave, as indeed already communicated to you in August and October 2021. They are not reviewable under the ARP Directive, nor do they refresh the timeframes for review applicable to any underlying administrative decisions, which would be disruptive and incompatible with the need for an efficient dispute resolution system. The fact that Human Resources colleagues decided to modify the Unpaid Leave Classification as a matter of goodwill during such interactions does not affect the admissibility of a review in respect of the Reduction in Entitlement. As such, this matter remains not subject to review under the ARP Directive.

f) Turning to the Unpaid Leave Classification, it is not immediately clear from your Request that you are challenging such matter. For the avoidance of doubt, however, I note that Human Resources colleagues in substance granted your request in this respect, namely by retroactively reclassifying (i) your 2021 unpaid leave as unpaid maternity leave and (ii) 5 annual leave days taken in late 2021 as return-to-work leave days. This had the effect of increasing your annual leave balance by 5 days and unwinding any adverse effects stemming from the Unpaid Leave Classification. As such, given that there are no remaining adverse effects, nor indeed any clear allegations to that effect in your Request, this matter is not subject to review under the ARP Directive.

g) Finally, while your Request highlights concern over interactions with Human Resources colleagues and the functionality of Bank systems, there is no indication that such aspects are challenged independently as matters subject to review, and no allegations that these have in and of themselves altered, in an adverse manner, or breached, your terms and conditions of employment. In any event, such matters had no direct legal consequences independently, and as such are not subject to review under the ARP Directive.

This response constitutes my Administrative Decision under Section IV, paragraph 6.4.1(e) of the ARP Directive and is subject to Appeal under the Directive on the Appeals Process.

44. On 11 April 2024, the Appellant submitted a Statement of Appeal pursuant to Section 6.4.1(e) of the ARP Directive, in relation to the President's Decision. According to the Appellant, the President erred in her analysis of the admissibility of the Appellant's request.

45. The Appellant asks the Administrative Tribunal to annul the President's Decision on admissibility and to refer the case back to the President so that it can be referred to the Administrative Review Committee for purposes of Administrative Review.

46. The Bank submitted its Response on 14 May 2024. It contends that the President's Decision was lawful and taken in compliance with the Bank's ARP Directive, and that the Appeal was out of time.

### **III THE APPELLANT'S POSITION**

47. Firstly, the Appellant points out that, in accordance with the ARP Directive reconsideration process Section IV para 6.1 (a), the time limit for requesting reconsideration of an Administrative Decision is 40 days from the date on which that decision was notified and, in the case of multiple relative Administrative Decisions, the time limit applicable to the last Administrative Decision will apply.

#### **Regarding the President's Decision, para a):**

48. The Appellant stresses that it is incorrect to state that she does not dispute the actions and decisions that affected her during 2021. She points out that she trusted HR to ensure that there would be no negative effect on her right to leave in 2021. She questioned HR about the meaning of the terms "pro rata" and "excess days" and asked for clarification, but never received an answer. In October 2021, her ESS record correctly indicated that she had 0 days in the "remainder" section, so no adverse decision had affected her leave entitlement at that point.

49. It was not until 2023 that the unfavourable decision affected her leave entitlement, when the system displayed a constantly changing number of negative days. It was not until 3 August 2023 that HR told her: "Please see attached screenshot of the leave we have recorded in the SAP system that you have requested. Please check the dates to make sure they are correct. You also over took 5 days which has been deducted from this year's leave quota."

Regarding the President's Decision, para b):

50. The Appellant maintains that the first cause of the negative balance is HR's erroneous calculation of her entitlement to Annual Leave and unpaid Maternity Leave, and that the second cause is the erroneous decision to consider her unpaid leave as unpaid Parental Leave rather than unpaid Maternity Leave. This category was suggested by HR and entered into the system by them.

Regarding the President's Decision, para c):

51. The Appellant contends that HR violated the EBRD Leave Procedure, Section IV, para 1(d), according to which “Annual Leave shall not be advanced to a Staff Member for Annual Leave to be accrued in a leave year following the current leave year”. The Appellant interprets this provision as a lack of entitlement for a Staff Member to take leave in a given year on the basis of leave to be accrued in subsequent years.

52. According to the Appellant, this situation should not have arisen in the first place. HR should have guided her towards possible solutions, the most obvious of which, in her view, was to extend her unpaid leave”. The Appellant stresses that she is not responsible for HR's errors.

Regarding the President's Decision, para d) (i):

53. The Appellant submits that it is incorrect to state that the consequences of the reduction in her leave entitlement were expressly communicated to her; although she was informed of the reduction in her Annual Leave entitlement on 18 August 2021, this information was completely unclear as to its meaning and material consequences, and HR never responded despite her efforts to follow up on this matter at that time.

Regarding the President's Decision, para d) iii:

54. The Appellant disputes this assertion that the ESS system reflected her negative balance in 2021-2022: the ESS interface available to her did not show any negative days; she is unable to verify that the ESS system is correctly synchronised with the SAP system at all times. The ESS system is inadequate, displays incorrect information and does not alert the employee's line managers when an error is made.

Regarding the President's Decision, para e):

55. The Appellant disputes the President's assertion that HR's actions in 2023 do not affect the applicable time limit; she notes that HR itself is unable to specify exactly when the first Administrative Decisions in her case were made “during the 2021 Annual Leave year or at least

at the beginning of the 2022-2023 Annual Leave year”. More importantly, no indication was given as to when these decisions were notified to her, as required by para 6.1 regarding the negative leave balance of minus 10. Such an indication, in the “Carried forward” section of the ESS, appeared to her in April 2023, whereas it had not been visible before. The Appellant points out that it was only when she asked for clarification that she finally learned that this negative balance in the “Carried forward” section was supposed to be linked to the leave she had taken for her maternity.

56. The Appellant disputes the characterisation in the President's Decision of the HR communications preceding her request as “discussions” and “confirmations”; according to her, HR made actual decisions in 2023 having a detrimental impact on her leave balance when she was told she had exceeded her leave by 10 days (on 10 May 2023), then revised to 8 days in ESS to 8 days, then revised to 5 days (on 3 August 2023), then to 4.5 days (on 4 August 2023 and showing on ESS). The last revision to minus five days was communicated to her on 26 October 2023. Finally, the MDHROD pointed out that “this situation has been exacerbated by confusion over the type of unpaid leave you requested in July 2021; but this point has in any case been dealt with retroactively”. This point, according to the Appellant, indicates that HR made decisions in and around August 2023. In conclusion, the Appellant believes that HR altered their position and her corresponding entitlements in 2023, in a way that affected not only their actual balance but also her ability to understand it.

57. Remedy requested: reverse the President's Decision on admissibility and refer the case back to the President so that the appeal can be referred to the Administrative Review Committee (ARC) for an Administrative Review. Anonymity requested: to prevent her reputation or career prospects from being adversely affected by the lodging of this appeal.

#### **IV THE BANK'S POSITION**

58. In its Response, the Bank points out that it does not require oral hearings or the production of additional documents and recalls that the Appellant requests the Tribunal to refer the matter back to the President so that it may be reviewed on the substance.

59. The Bank contends that the President's Decision was lawful and taken in compliance with the Bank's ARC Directive, and that the Appeal is time-barred. According to the Bank, the reduction in Annual Leave entitlement is a straightforward matter, illustrated in Section IV, para

17(d) of the Procedure on Leave. This applies to all forms of unpaid leave, including all type of unpaid “Parental Leave”.

60. On the one hand, the Bank contends that, as set out in the President’s Decision, the reduction in the Appellant’s Annual Leave entitlement occurred in 2021, and its effects were known or ought to have been known at the time, such that the Appellant is out of time to do so now.

61. Even if the Appellant, once expressly notified in August 2021 that she had over-taken her Annual Leave balance by 4.5 days, sought clarification but never received a response, such a request was not received by HR. Should a clarification have been material in October 2021, the Appellant could have followed up during her next contacts with HR.

62. In addition, the Bank observes the Appellant should have known this consequence, since the rule according to which a staff member does not accrue Annual Leave while on unpaid leave is clearly set out not only in the applicable Directive and Procedure of the Staff Handbook but also on the Bank’s intranet staff guide pages. According to the Bank, the fact that staff members do not understand the application of their terms and conditions because they have not taken time to familiarise themselves with their rights and obligations, does not entitle them to additional rights or benefits.

63. As noted in the President’s Decision, the Bank also points out that its ESS system is synchronised to its SAP back-end people management system, which clearly reflects such negatives.

64. Nevertheless, even if such negatives appear when tested on the current iteration of the ESS system, the Bank acknowledges that it is not impossible that the system may not have clearly reflected such negatives in the past, given that they are indeed exceptional. Any such inaccuracy in the system would not, however, undermine the fact that the Appellant knew or should have known these rules when she requested unpaid leave. The Bank’s Response admits that there may have been confusion as to how this was reflected in the ESS system or scope for clearer communication; but, as the MDHROD pointed out in her response, HR correctly applied the Staff Handbook in this respect to the Appellant.

65. In any event, the Bank submits that HR’s decision in 2023 to retroactively reclassify the unpaid Parental Leave as Maternity Leave, with the positive effect of increasing the Appellant’s Annual Leave balance by five days, was a separate matter and did not give rise to new timelines

for review, and it did not affect the reduction of Annual Leave entitlement on account of the Appellant's 2021 unpaid leave.

66. On the other hand, the Bank contends that the Appellant does not directly address the legality of the pro-rating and reduction itself, nor more generally the terms and conditions of employment as a regulatory matter.

67. The Appellant limits herself to arguing against a particular application of such reduction, i.e., that the Bank acted unlawfully in reducing her Annual Leave balance into the negative on account of Section IV para 1(d) of the Procedure on Leave whereby leave "shall not be advanced to a Staff Member for Annual leave which is to be accrued in a Leave year following the current Leave year."

68. According to the Bank, "such reading of [this] paragraph does not stand up to any material scrutiny": it is intended to protect the Bank as an institution rather than Staff Members. According to the Bank's interpretation, Staff Members do not have a right to an advance of Annual Leave, namely, to use in advance Annual Leave that would be accrued in the next leave year. It does not prevent a negative Annual Leave balance that might occur in other circumstances, such as those of the Appellant. Staff Members are expected to account for such overtaken leave by their last day of employment, at which point, in accordance with Section IV para (c) of the Directive on Leave, they are required to reimburse the Bank in respect of any remaining negative leave balance.

69. The Bank explains that this approach permits a degree of flexibility, for example, in respect of holidays that bridge leave years and/or foreseen events towards the end of a given leave year. For this reason, the Bank confirms on its intranet that the Employee Self Service (ESS) system allows use in excess of 10 days of the annual quota. The Bank adds that a strict reading of such process would be broadly detrimental to Staff Members. For example, the Bank indicates that it would be obliged either to deny such request when such request would lead to a negative balance or would oblige Staff Members to buy Annual Leave days at such time to avoid a negative balance.

70. The Bank denies errors or miscommunication by colleagues in HR as having led the Appellant to the impression that a different treatment applied under the Bank's internal law. Even if the Bank admits that HR in July 2021 might have picked up on the Appellant's intent to subsequently utilise unpaid leave and might have explained the impact this would have had on her available Annual Leave days, their failure to do so on that point is not material. In any



event, even if a miscommunication in that respect has occurred, it would not be sufficient to supersede the application of the Bank's internal law, especially where the correct application was confirmed to the Appellant not long thereafter.

71. It is unclear to the Bank whether the Appellant is challenging any aspect of the classification of unpaid Parental Leave. According to the Bank, since the Appellant did not inform the Bank four weeks before the end of paid Maternity Leave to request unpaid Maternity Leave, it was not unreasonable to HR to understand the Appellant's request was for Unpaid Parental Leave for children under 18 years. The Appellant was under the impression that she had been granted unpaid Maternity Leave and requested five days of Annual Leave in late 2021, thinking these would be treated as paid return-to-work leave days in late 2021 to which a staff member is entitled after unpaid Maternity Leave, all with the effect of increasing her Annual Leave balance by five days.

72. In any event, in the Bank's view, this matter is outside the scope of review since the Appellant's request to retroactively reclassify her unpaid Parental Leave as unpaid Maternity Leave was fully granted by the Bank in 2023, such that the Appellant is no longer adversely affected. To the extent that the Appellant may be deemed to be challenging the effect of "losing" five Annual Leave days on account of the 2021 classification of her leave as unpaid Parental Leave, she is now out of time to do so.

## **V      EVALUATION BY THE TRIBUNAL**

73. The Statement of Appeal will be analysed with respect to three separate questions of law. The first two relate to admissibility *rationae materiae* and *rationae temporis*, and the third is the question of admissibility based on whether the Appellant has a cognisable interest in bringing such action.

### **1. GROUNDS FOR THE ADMISSIBILITY QUESTION *RATIONAE MATERIAE*: APPLICABLE LAW**

74. According to the general provisions and glossary of the Staff Handbook, an Administrative Decision is "a decision taken by the Bank in the context of the administration of the Bank's staff, which has direct legal consequences on the legal order and affects the rights

and obligations of one or more members of staff, and which complies with the provisions of the Directive on the Administrative Appeals Procedure”.

75. More specifically, with respect to the right to appeal, Directive - Appeals Process (DIR/2021/28), Section IV, para 2.01(b) provides as follows:

*“a Staff Member may only appeal an Administrative Decision which allegedly alters, in a material adverse manner, or allegedly is in breach of, their Terms and Conditions of Employment in force immediately before the Administrative Decision was taken”.*

76. The ARP Directive, specifically section IV, para 3(a), provides that the following Administrative Decisions are subject to review under the Directive:

- (i) *Individual Decisions; and*
- (ii) *Regulatory Decisions implementing Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors*

*which allegedly alter, in an adverse manner, or allegedly are in breach of, the terms and the conditions of employment of a Staff Member in force immediately before such Administrative Decision is taken.*

77. The ARP Directive, Section IV para 6.4.1(b) sets out the following:

*A request for review by the President must be submitted by the Staff Member within 40 days of the date when the response of the Managing Director , Human Resources and Organisational Development was notified to the Staff Member or, with respect to the Administrative Decisions falling under paragraph 6.1(c) above and which are subject to review in accordance with the Administrative Review Process set out in this Directive, within 40 days of the date when the Administrative Decision to which the request relates was notified to the Staff Member. If the Staff Member’s request involves multiple related Administrative Decisions which are each subject to review in accordance with the Administrative Review Process set out in this Directive, the time limits applicable to the latest Administrative Decision shall apply.*

78. In her decision, the President refers to the Tribunal's previous jurisprudence, which held that, where an Administrative Decision does not modify or violate the Bank's internal law, it is generally not subject to review (2018/AT/04). This may be true, but that ruling can, however, not be applied in the present case without major qualification, since the matters in dispute differ. In case 2018/AT/04 the Appellant essentially claimed that the rule (of paying 70% of

emoluments) was not correct. In the present case the Appellant challenges the application of the rules in force, which in her opinion, rightly or wrongly, modified or violated the terms of her contract. Such a challenge is a fundamental right which should in principle be sufficient to consider an appeal admissible.

79. This being said, the Tribunal notes that the Bank in its Response does not reiterate this argument.

80. To address this first legal question, the Tribunal also refers to the jurisprudence of the World Bank Administrative Tribunal (WBAT No. 691 “HB Appellant v IFC (preliminary objections [2023] paras 37-43, whether the Appellant alleges a violation of his rights”) which, held:

“The Tribunal shall hear any claim by which a member of the Bank Group's staff alleges a breach of his or her contract of employment or terms and conditions of employment. The terms “contract of employment” and “conditions of engagement” shall include all relevant rules and regulations in force at the time of the alleged breach, including the provisions of the Staff Retirement Plan. In the McKinney case, Decision N° 183 [1997], paras 13-17, the Tribunal stated: The Tribunal's jurisdiction in this case (under Article II (1) of the Tribunal's Statute) therefore depends on whether the Appellant has “alleged” a plausible claim of breach of contract [...]”

“To exercise its jurisdiction, the Tribunal finds it is sufficient that the Appellant has plausibly “alleged” the existence of circumstances justifying an examination of her allegations. It would be premature and inappropriate for the Tribunal, by declaring this application inadmissible on ground of jurisdiction *rationae materiae*, to deprive the Appellant of the opportunity to have access to the Tribunal. The fundamental question for the Tribunal's subject-matter jurisdiction is therefore whether the Appellant has alleged a plausible grievance of breach of her contract of employment, her terms of engagement or any other set of rights as a member of staff.”

81. In the present case, the Appellant raises two principal contentions. First, she contends that HR miscalculated her entitlement to Annual Leave and unpaid Maternity Leave. She maintains that: “The first cause of the negative balance was the wrong calculation by HR about my annual leave and unpaid maternity leave entitlement. The second cause of the negative

balance pertaining to the type of unpaid leave classification, was again HR's wrong decision to book for me unpaid parental leave instead of unpaid maternal leave."

82. In this regard, she claims that the Bank's decision to classify her unpaid leave as unpaid Parental Leave instead of unpaid Maternity Leave was in error. However, the Tribunal considers that this latter issue is not within the scope of its review, since her unpaid Parental Leave was retroactively reclassified as unpaid Maternity Leave (and thereby allowed her five working days of paid return-to-work leave). This reclassification was made by the Bank in 2023 and, as a result, the Appellant is no longer adversely affected.

83. Second, the Appellant alleges HR violated the EBRD Leave Procedure, Section IV, para 1, point (d), whereby "Annual Leave cannot be advanced to a Staff Member for Annual Leave that must be accrued in a leave year following the current leave year" in allowing her unknowingly to accumulate a negative Annual Leave balance. In other words, a Staff Member cannot take Annual Leave to which he/she is not entitled in a given leave year, and which should be compensated by leave accumulated in subsequent years. According to the Appellant, they should have indicated the possible solution, the most obvious being to extend her unpaid leave, and the system should have guided her or at least alerted her and not become negative without informing her of this consequence until long afterwards.

84. In its Response, the Bank maintains that this claim cannot succeed, and explains why the Appellant's reading of the prohibition on an employee taking paid leave in advance for the following year is unfounded. The Tribunal considers that the justification given by the Bank to refute the Appellant's strict reading of this prohibition focuses on the merits of such argument, not on its admissibility. The Tribunal finds that the Appellant has alleged a plausible grievance and concludes that it has jurisdiction in the matter on this basis.

## **2. GROUNDS FOR THE ADMISSIBILITY QUESTION OF *RATIONAE TEMPORIS*: APPLICABLE LAW**

85. The Bank contends that, as early as 2021, the Appellant knew or should have known of the consequences of taking unpaid leave and its effects on her entitlements, in particular the suspension of accruing Annual Leave, such that she could have timely challenged their legality if she had considered that they were vitiated by a substantive or procedural defect.

86. Section 4.03 of the Directive for Appeals Process provides as follows:

*(a) a Statement of Appeal must be submitted to the Tribunal within sixty days of the date of the Administrative Review Decision rendered in accordance with Section IV, paragraph 6.4.3 of the Directive on the Administrative Review Process.*

*(b) a Statement of Appeal may be submitted after the sixty-day period has elapsed, but only if the Tribunal is satisfied that there were justifiable grounds for the delay and that the refusal would cause substantial injustice to the Staff Member.*

87. The Tribunal has emphasised that all legal proceedings are subject to conditions of admissibility and jurisdiction. There is no denial of justice if an appeal does not meet these preconditions and, accordingly, the case is not judged on its merits.

88. The Bank avers that time limits are even a matter of public policy and, in this respect, cites ILOAT Judgment 3405 (Considerations 16 and 17) holding that time limits may exceptionally be set aside only in very limited circumstances:

*“As the Tribunal has repeatedly stated, for example in Judgments 602, 1106, 1466, 2722 and 2821, time limits are an objective matter of fact and it should not rule on the lawfulness of a decision which has become final, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties’ legal relations, which is the very justification for a time bar. In particular, the fact that a complainant may not have discovered the irregularity on which he or she purports to rely until after the expiry of the time limit is not in principle a reason to deem his or her complaint receivable (see, for example, Judgments 602, under 3, and 1466, under 5). It is true that the Tribunal’s case law as set forth in Judgments 1466, 2722 and 2821 allows exceptions to this rule where the complainant has been prevented by vis major from learning of the impugned decision in good time (see Judgment 21), or where the organization, by misleading the complainant or concealing some paper from him or her so as to do him or her harm, has deprived that person of the possibility of exercising his or her right of appeal, in breach of the principle of good faith (see Judgment 752). However, none of these conditions were met in this case”.*

89. Beyond this jurisprudence cited by the Bank, which is linked to the specific question of the time limit itself in the particular hypothesis where a final decision has already been taken and in which is always interpreted very restrictively, in the present case the crucial issue raised is the starting point as to when the Appellant could have brought a legal challenge in respect of her claims. In this regard, the formula used by the President in her Decision and then by the

Bank in its Response - that the Staff Member knew or ought to have known these effects as of 2021 - implies that these two points must be examined and discussed.

90. The Tribunal has therefore examined the question as to whether and when the Appellant knew or should have known that her accrued Annual Leave balance had been exhausted and was in fact negative. On the one hand, the Bank maintains that the documentation available to staff, in particular, the table in Section 17 of the Procedure on Leave (PRO/2023/4) concerning arrangements while on unpaid leave, states that no Annual Leave will accrue during periods of unpaid leave of any type. Moreover, the FAQs on the Bank's website concerning Maternity, Adoption and Surrogacy Leave (primary care giver), page 4, states: "You will accrue annual leave during your period of paid maternity/adoption/surrogacy leave, but not during any period of unpaid leave." The question is rather whether the employee should have known and understood the exact and concrete consequences of this rule for her situation, notwithstanding that a negative balance did not appear. In this way, the starting point can be assessed based on the principle of the rule presumed or actual by the holder of the right to the facts that allow him/her to act. It is therefore important to examine the information available to the Appellant in 2021 and which was offered to her, as to whether she could clearly have an actual knowledge of the negative consequences of taking unpaid Maternity Leave on her Annual Leave balance.

91. In this case, for receivability analysis, the Tribunal will consider the point at which the Appellant was in a position to know or should have known how the provisions governing the various types of leave available to staff would affect her own specific situation. In doing so, the Tribunal recognises the importance of protecting the Appellant's right of access to the Tribunal.

92. Obviously, the legitimate aim of time limits is to guarantee legal certainty and the proper administration of justice, but in practice the Tribunal must also consider the inherent imbalance between the parties to an employment contract, which means that access to the Tribunal must be examined in such a way that the determination of the starting point of the time limit does not constitute an obstacle to the right to a fair hearing.

93. The main question to be answered by the Tribunal as to whether the Appeal is time-barred is therefore whether, as long as the ESS system did not show a negative balance of Annual Leave (which possibility has been admitted by the Bank), the Appellant did not know and could not have known that her balance was negative and, on this basis, been in a position to question whether this was factually accurate and consistent with the rules. The Tribunal considers it was only in October 2023 that the Appellant was put in a position to actually understand the

existence of the negative leave balance and the reasons for it became fully known to her. Thus, it was only at this point that the time limit for formally raising the issue was triggered. Under these particular conditions, and contrary to what the Bank maintains, the Tribunal finds that this shortcoming is such as to postpone the date from which the Appellant knew or reasonably could have known and raised the issue through the applicable channels of review, and that the Appeal is thus timely.

### **3. GROUNDS FOR THE THIRD ADMISSIBILITY LEGAL QUESTION: WHETHER APPELLANT HAS A LEGAL INTEREST AT STAKE**

94. The final question for the Tribunal to address is whether and to what extent there would have been different legal and more favourable consequences for the Appellant if the criticised communication from HR had been clearer and, in the absence of such different and more favourable consequences, whether the Appellant's request to annul the President's Decision is inadmissible, given the lack of adverse effect on her.

95. The Appellant contends that HR ought to have guided her to a possible solution in the circumstances. In its Response, the Bank observes that, once a Staff Member has a negative Annual Leave balance, the only possible solutions are either to allow such negative balance to carry over into the next Leave Year, or to buy out such negative balances from the Bank, both of which ultimately having the same effect. Avoiding a negative balance in the first place is of course preferable.

96. The Bank's Response maintains as follows: *"In any event if a miscommunication in that respect has occurred, it would not be sufficient to supersede the application of the Bank's internal law"*. [Emphasis added.]

97. The Tribunal accepts the Bank's analysis in this regard. Accordingly, the Tribunal concludes the Appellant has no cognisable legal interest at stake, given that her leave entitlements would not have been more favourable. The Tribunal must therefore conclude that the Appeal is, for this reason, inadmissible.

98. Nevertheless, and while recognising that this would not have affected her entitlements under the rules, the Tribunal is of the view that the Appellant should have been clearly and proactively informed by the Bank and alerted as to the direct consequences on her entitlement to Annual Leave, and should have received answers more promptly, correctly and comprehensibly when she sought clarification. The Tribunal considers this lapse regrettable, as the matter might have been resolved at an earlier stage without the need for recourse to this Tribunal.

**VI     DECISION**

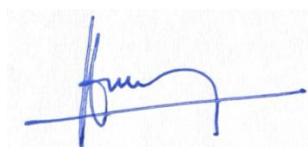
99. On the basis of the foregoing, the Tribunal finds that the Appellant's Statement of Appeal is inadmissible.

100. Nevertheless, the Tribunal has taken into account the excessive length of time taken by the Bank to provide the Appellant with a clear and comprehensible explanation as to how the rules would apply in practice to her specific circumstances. Moreover, the Appellant has suffered undue anxiety and uncertainty for which she must be compensated. As a result, the Tribunal awards the Appellant a payment of moral compensation in the amount of £2,000.

101. All other claims are dismissed.

**28 June 2024**

**For the EBRD Administrative Tribunal**



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**Marielle Cohen-Branche**

**Chair of the Panel**