THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Case No. 2024/AT/13

Appellant

vs.

European Bank for Reconstruction and Development

DECISION

By the Administrative Tribunal comprised of

Chris de Cooker (President)

Maria Vicien-Milburn

Thomas Laker

Marielle Cohen-Branche

Joan Powers

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24 October 2024

I. Introduction

1. The Appellant joined the EBRD in 2007 and, upon becoming a staff member in 2008, was eligible for the benefits available to locally hired staff[1], including the mortgage subsidy. In the present Appeal, the Appellant is challenging the decision of the Bank's President not to accept the recommendations of the ARC in its Report and Recommendations Case 72/2023-2 concerning her situation.

2. This Decision is issued concurrently with a decision involving a set of appeals brought by twelve other Headquarters-based locally hired staff members to contest the Bank's decision to change the reference rate used for the calculation of the mortgage subsidy provided by the Bank to eligible employees, which they allege had a significant and adverse financial impact on them. As authorised by Section IV, paragraph 7.03 of the Directive on the Appeals Process, these twelve appeals were joined by the Tribunal with the consent of each appellant, as the factual circumstances and legal issues at stake are largely identical. However, the Appellant in the case at hand did not consent to joinder, given her specific personal circumstances. Therefore, this Decision is being issued concurrently with the Tribunal's decision in the joined cases (EBRDAT 2024/AT/02-12 and 14).

3. The Bank provides a monthly mortgage subsidy to assist eligible staff members like the Appellant with the payment of principal and/or interest on mortgage loans secured on their principal residence at their place of employment. The amount of the mortgage subsidy is determined by deducting the first two percent from a "reference interest rate" and applying the resulting rate to the remaining capital sum in a staff member's mortgage (subject to a cap). As provided in the Staff Handbook, the "reference interest rate" used by the Bank for the calculation of the subsidy for staff members assigned to work at the Bank's headquarters in London must be a "rate for a variable-rate mortgage as published by a major home loan provider selected by the Bank; […] capped at 10 percent".

[1] As used herein, the term "locally hired" refers to staff holding so-called "local positions" as defined in the Bank's Procedure on Entering Employment, Section 1.2. Prior to the introduction of the Flex Allowance in 2012, the Appellant was eligible for the mortgage subsidy although she did not have a mortgage at the time.

II. The Facts

4. By way of background, the mortgage subsidy was part of the compensation package offered by the Bank to staff going back to the 1990's. In this regard, the EBRD had followed a common practice within the financial community at the time to provide a mortgage subsidy to employees to offset the high cost of housing in London. However, given that the subsidy was only beneficial to staff who had purchased a property and had a mortgage, the Bank reviewed and revised its benefit package in 2011-12 and introduced a so-called "flex allowance" for all new staff, which also replaced the mortgage subsidy for existing staff who opted to receive the flex allowance, which is defined in the Staff Handbook as "the monthly flex allowance payable to eligible Staff Members pursuant to the Directive on General Compensation" ("Flex Allowance"). Unlike the specifically targeted mortgage subsidy, the Flex Allowance, which is based on a percentage of a staff member's gross base salary, may be used for a variety of purposes, including commuting, housing, and childcare.

5. Nevertheless, the Bank considered that the mortgage subsidy could not lawfully be unilaterally abolished for existing staff who, at the time, were eligible for the subsidy. Such staff were given a one-time irrevocable choice to either (i) opt to receive the new Flex Allowance going forward, or (ii) remain under the existing arrangements, including eligibility for the mortgage subsidy. HR undertook a communications campaign, including a general presentation for staff as well as the possibility of one-on-one sessions with affected staff to answer questions and model best outcomes based on their individual financial situations.

6. The choice to move to the new Flex Allowance was voluntary. All staff were required to sign a Declaration Statement stating whether they wished to become eligible to receive the Flex Allowance as of 1 October 2012. Staff declared that they understood the decision to be a one-time, irreversible decision, and that the impact of the changes in the future may be different to the impact at the time (i.e., in 2012).

7. The Appellant did not affirmatively opt for the Flex Allowance by the prescribed deadline. According to her testimony before the ARC, she misunderstood that transitioning to eligibility for the Flex Allowance required staff to make an affirmative choice to do so; the default for not choosing Flex was to remain as a pre-2012 Non-Flex Staff Member, as set out in Section 20 of the Directive on General Compensation. The Appellant has explained that she was pregnant at the time with her second child,

and was under considerable workplace stress; these factors made it difficult for her to focus on the benefits changes underway. Moreover, although she was a relatively new staff member, no one from HR ever approached her to explain the change or assist her in understanding her options.

8. After the introduction of Flex in October 2012, the Appellant reviewed her payslip and realised that the amount had not been adjusted to include the Flex Allowance. When she understood that she had erroneously assumed that Flex was the default option and that she was still considered by the Bank as a pre-2012 Non-Flex Staff Member, she approached the HR official with responsibility for compensation and benefits to request that she be allowed to revoke her (mistaken) decision and opt for Flex. At the time, she did not have a mortgage; as a result, the only benefit she received as a locally hired pre-2012 Non-Flex Staff Member was the gym subsidy. She emailed HR on November 13, 2012 with the following explanation of her situation:

> In summer this year I reviewed the proposed benefit package and concluded that the proposed flex scheme was the best option for me. However, I was not able to submit my declaration to HR meeting the July 30th deadline. This is because the timing of the declaration submission coincided with a very demanding period at work, together with very difficult early months of my pregnancy when I was not feeling well. I assumed that since the newly proposed flex benefit policy is clearly more beneficial for the staff on the local contracts, the transfer was going to be done automatically.

9. On 7 December 2012, the HR representative, after consulting his colleagues, confirmed that her request could not be accepted. He reiterated the importance of employees needing to understand the changes and be aware of the requirement to make their choice known by 30 July; to that end, HR had purposely conducted an extensive communication plan. He also noted that whether the changes were beneficial to a staff member would depend on their individual circumstances, and there were many locally hired staff for whom the new Flex Allowance would not be more beneficial, given future expected changes in mortgage rates. He advised that she could take her request to the Managing Director, Human Resources and Organisational Development ("MDHROD") if she wished, but she did not pursue this.

10. It was not until July 2016, four years after the introduction of the Flex Allowance, that the Appellant got a mortgage and became eligible for the mortgage subsidy that is part

of the "grandfathered" benefits available to pre-2012 Non-Flex Staff Members, along with the gym subsidy.

11. According to a 2020 review of benefits available to staff who had not opted for the Flex Allowance (who are referred to in Section 20 of the Directive on General Compensation as "pre-2012 Non-Flex Staff Members"), as of October 2012, 274 staff had opted to remain as pre-2012 Non-Flex Staff Members, split between 157 with expatriate status and 117 locally hired staff. As of May 2020, there were 168 pre-2012 Non-Flex Staff Members remaining, split between 96 expatriate staff and 72 locally hired staff. Of those Non-Flex staff, 68 were still claiming the mortgage subsidy as of May 2020. Under the Bank's rules, the mortgage subsidy is discontinued when the mortgage is fully repaid.

12. The amount of the subsidy has been determined by a reference interest rate, always defined as "the rate for a variable-rate mortgage as published by a major home loan provider selected by the Bank, . . . in each case, capped at 10%." This criterion has not been changed, and identical wording remains in Section IV, paragraph 20.3(i)(A) of the currently applicable Directive on General Compensation.

13. Until 2009, the Bank used a rate published by Halifax. In February 2009, the Executive Committee ("Excom") approved a shift from Halifax to Barclays Standard Variable Rate ("SVR"). The Halifax rate was considered no longer appropriate as, due to a series of mergers, Halifax was no longer an independent (i.e., wholly non-government-owned) bank, and did not offer its SVR to new customers. The change to Barclays was explained in the memorandum circulated to Excom as follows:

> The only remaining large, independent mortgage providers are Barclays/Woolwich, HSBC, Alliance & Leicester/Abbey. The UK Government has no stake in the above Banks. Of these Banks, only Barclays/Woolwich does offer their standard variable rate to new and current customers. All other standard variable rates are only available to existing customers and therefore Barclays/Woolwich standard variable rate seems to be the most appropriate "Reference Interest Rate" available today.

The Barclays SVR was used as the reference rate from 2009 until early 2017.

14. In March 2017, the Bank switched from reliance on Barclays SVR to its Follow on Tracker Rate ("FTR"), which was a different product offered by Barclays.[2] In its pleadings, the Bank has acknowledged the absence of "any explicit indicators or evidence explaining why the Bank changed from one rate to another." The Bank was unable to locate any records concerning who had authorised this switch or the reasons for the change, and no remaining staff could provide this information or had institutional memory of these matters.

15. The affected pre-2012 Non-Flex staff were not explicitly notified of the switch of reference rates at the time; an email from HR on 9 March 2017 informed them that "the variable mortgage rate, published by Barclays PLC, [had] recently changed from 4.99% to 3.74%. In this regard, with effect from 1 March 2017, please note that the interest rate applied to the mortgage subsidy will decrease accordingly." None of the Appellants questioned or challenged the change in the interest rate or the resulting impact on their mortgage subsidies at the time.

16. Thereafter, the Bank utilised Barclays FTR as the reference interest rate until November 2022, except during the Covid 19 pandemic between March 2020 and March 2021, when the Bank decided to maintain a fixed "reference interest rate" at the level of 4.24%, regardless of the rate changes published by Barclays. As of 1 April 2020, although Barclays had reduced the FTR to 3.59%, the higher rate maintained by the Bank during the exceptional circumstances of the pandemic crisis provided additional financial support to staff.

17. In 2020, a working group at the Bank reviewed the benefits available to pre-2012 Non-Flex Staff Members and proposed several adjustments. The outcome was that the eligible capital sum ("cap") was increased, and the reduction from the applicable reference interest rate ("collar") used in the calculation of the mortgage subsidy was reduced from 3% to 2%.[3] The reduction of the mortgage subsidy collar was approved

[2] The Tribunal understands that variable rates such as the SVR oscillate at the lenders' sole discretion and usually, but not necessarily, are influenced by the Bank of England's rate. This is different from the variable tracker rates, such as the FTR, which track the rate above the Bank of England's rates and more in tandem with changes in the latter.

[3] At the time of the 2020 review of Non-Flex benefits, the Working Group offered, as a possible additional suggestion, that an additional amount as a percentage of salary be given to Non-Flex staff for the same additional purposes as were included for the Flex Allowance from 1 April 2019, i.e., for green travel and house maintenance. The reason given was that "non flex staff do not get any allowance for these." However, this suggestion was never finalised or approved.

on 27 January 2021 by the EBRD Board of Directors as part of the annual Compensation and Benefits proposals, as per BDS20-206 (Rev 1).

18. In November 2022, the Bank again switched the reference rate, shifting from Barclays FTR back to the SVR; at the time, the SVR rate was 6.74% and the FTR rate was 5.74%. Shortly thereafter, both rates were adjusted by Barclays, such that the FTR was higher than the SVR (7.49% vs. 6.99%), given that Barclays had reduced the SVR to help borrowers with the cost-of-living crisis. As a result of the switch back to the SVR, the amounts of the mortgage subsidy received by the Appellant decreased. The SVR and FTR were aligned in December 2022, and thereafter the SVR remained lower than the FTR.

19. In January 2023, various pre-2012 Non-Flex Staff Members who received the mortgage subsidy noticed in their payslips that the amount of their mortgage subsidies had decreased significantly. In order to determine the reasons for this, they undertook an audit of the historical practice concerning the reference interest rate applied. The audit concluded that there had been a pattern of switching to less favourable rates, as well as deficiencies and lack of transparency by the Bank in its communications to staff regarding the selection of the reference rate.

20. Between March and June 2023, there were no changes in the applicable reference rate.

21. In June 2023, Barclays discontinued the SVR and suggested that the Bank use the FTR. Staff members were informed via email and through information on the AskHR Portal that the reference rate would be decreased from 7.49% to 7.00% with effect from 1 June 2023.

III. Procedural History

22. On 28 February 2023, based on the findings of the audit (see above), several pre-2012 Non-Flex Staff Members, including the Appellant, requested a review of "the mortgage subsidy benefit and HR practices around the application of various rates and communication of the same" by the MDHROD, seeking compensation of alleged losses for the period from March 2017 to November 2022. Their requests claimed that, since 2017, the Bank had made errors in their mortgage subsidy calculations and demonstrated inconsistency in approach to reference rates, as well as a lack of transparent communication.

23. On 28 March 2023, the MDHROD issued her decision rejecting the requests for review, finding that the Bank had complied with the relevant provisions of the Staff Handbook, specifically the Directive on General Compensation.[4] Accordingly, she considered that the Appellant, like the other complainants, had been paid the mortgage subsidy benefit pursuant to its intent and in line with the applicable legal requirements. Nevertheless, the MDHROD concluded that each complainant should receive a one-time payment of GBP 1,500 as an acknowledgement of insufficient notification regarding the changes to the applicable reference rate, noting that the Bank "could have implemented a better communication approach".

24. On 26 May 2023, the Appellant submitted her Request for Review of an Administrative Decision ("RRAD") to the Bank President, who referred the matter to the Administrative Review Committee ("ARC"). The ARC considered the appeals of the Non-Flex complainants jointly, except for two individual complainants, including the Appellant, whom the ARC determined had factual circumstances that justified an individual assessment. The ARC obtained further information through Directions to the parties and conducted interviews of persons named by both sides, including the Appellant.

25. On 7 February 2024, the ARC issued its Report and Recommendations to the President with respect to eleven complainants. The ARC concluded that the Bank's decision to change the reference interest rate in March 2017 was an unlawful act of administrative discretion and recommended that it be retroactively rescinded, and that each complainant be granted compensation for the monetary losses incurred between March 2017 and November 2022, in addition to three months' net salary for moral damages. The ARC also recommended each should be allowed to move to the Flex Package once their mortgage was paid off.

26. On 19 February 2024, the ARC issued an individual Report and Recommendations in relation to the Appellant (see paragraphs 35-36 *infra*).

[4] Section IV, paragraph 20.3(i) of the Directive on General Compensation defines the "reference interest rate" for HQ-based staff as "the rate for a variable-rate mortgage as published by a major home loan provider selection by the Bank; […] in each case, capped at 10 percent." The Procedure on General Compensation, Section IV, paragraph 17(i) requires that "[w]henever the relevant applicable reference interest rate changes, the Bank shall make a corresponding adjustment in the amount of each eligible Staff Member's mortgage **subsidy and shall notify each affected eligible Staff Member of the adjustment." [Emphasis added.]**

27. On 23 February 2024, the ARC issued its individual Report and Recommendations in relation to the other individual complainant.

28. With respect to each of the complainants, the ARC concluded that the Bank's decision to change the reference interest rate in March 2017 was an unlawful act of administrative discretion. It recommended that the decision be retroactively rescinded and each respective complainant be granted compensation for the monetary losses incurred between March 2017 and November 2022, as well as three months' net salary for moral damages. The ARC also recommended that the Appellant should be allowed to move to the Flex Package.

29. On 18 March 2024, the President issued her final Decision in relation to the Appellant, rejecting the findings and recommendations of the ARC and explaining her reasons for upholding the MDHROD's administrative decision (see paragraph 45 *infra*).

30. The Appellant filed her Statement of Appeal with the Tribunal on 10 June 2024 (docketed as Appeal 2024/AT/13), indicating that she did not wish to be joined with the other appellants.

31. The admissibility of the Appeal has been challenged in part by the Bank.

32. The Appellant has requested anonymity, as permitted under Section IV, paragraph 9.03(c) of the Directive on the Appeals Process, to which the Bank does not object.

33. Neither party requested oral hearings or the production of documents.

34. The Tribunal directed the Bank to produce certain documents, which were duly provided on 21 August 2024, namely, (i) a memorandum dated 6 February 2009 sent to ExCom seeking approval of the switch from the Halifax SVR to the Barclays SVR as the reference rate for calculating the mortgage subsidy, and (ii) a 2020 presentation of adjustments to Non-Flex benefits for pre-2012 Non-Flex Staff Members, which had been prepared by a Working Group. The two documents were provided to the Appellant as well as the appellants in the joined cases, who were given an opportunity to submit their observations thereon to the Tribunal. These observations were received by the Tribunal on 30 August 2024 and were notified to the Bank.

IV. Consideration by the ARC

35. In its Report and Recommendations in Case 72/2023-2, the ARC concluded that the decision to switch reference rates from the SVR to the FTR in March 2017 was an

unlawful exercise of administrative discretion and recommended that it be rescinded.

The ARC Report contained the following findings of fact:

1. The Staff Members are all based at London Headquarters ("HQ") and beneficiaries of the "mortgage subsidy".
2. The mortgage subsidy is a mechanism through which the Bank assists eligible staff members for the payment of mortgages on their residence near their place of employment.
3. The amount of the mortgage subsidy is determined by deducting the first 2 percent from a "reference interest rate" and applying the resulting rate to the remaining capital sum in a staff member's mortgage (subject to a cap).
4. In 2011, the Bank conducted a comprehensive review of the benefit arrangements and a Staff Working Group comprising of a broad group of staff members was set up to review the (then) existing arrangements.
5. The Staff Working Group was chaired by the Director for Human Resources and consisted of 12 members (jointly agreed with Human Resources and the Staff Council), representing a mix of staff members from across the Bank (from Headquarters and the Resident Offices, eligible and not eligible for overtime pay, full-time and part-time staff, single staff and staff with dependents, expatriates and locally hired staff, as well as staff with different levels of responsibility), with four members being also members of the Staff Council.
6. In 2012, the Bank reviewed its benefits package and offered its staff the possibility to choose between the new "flex" regime or to stay under "Non-flex" benefits to *inter alia*, keep their mortgage subsidy.
7. This review was preceded by a "communications campaign" organized by the Bank, consisting of "one on one" conversation between HR and staff members and, at least, 1 presentation in the HQ auditorium, on 24th May 2012.
8. However, in the 2244th May presentation, only three slides (out of 38) were relevant to the locally hired staff's decision.
9. Staff members who have decided to stay on Non-Flex kept a series of grandfathered benefits (including, notably, the mortgage subsidy) and chose not to receive instead the "flex allowance" (an allowance that can be used for specific purposes only and corresponds to a set percentage of a staff member's gross base salary).
10. "Flex package" is applicable to all staff members recruited after 2012.

11. Staff members who have decided to remain on “Non-flex benefits” were not allowed to switch to the Flex package as the Bank considered it a “one-time irrevocable decision”.

12. Until 2009, the Bank was using the rates for a variable-rate mortgage published by Halifax for the provision of the "reference interest rate".

13. In February 2009, the Bank decided to move to the variable rate published by another major home loan provider: Barclays/Woolwich and followed the practice to apply the Barclays Standard Variable Rate ("**SVR**") until March 2017 when the Barclays Follow on Tracker Rate ("**FTR**") became the "reference interest rate".

14. While the Bank, in its communication to the Staff Members dated 9 March 2017, did not formally make reference to the SVR or FTR, the resulting change in the interest rate used for the calculation of the subsidy (from 4.99% to 3.74%) was notified to the Staff Members.

15. There was a historical precedent (at least since 2009) of calculating the mortgage subsidy based on the approved reference rate: Barclays Standard Variable Rate and staff members decisions in 2012 were informed by this existing practice.

16. Staff members did not know about the switch made in 2017 until the audit took place in January 2023.

17. At the time of said switch, the Bank did not receive from the Staff Members any formal challenge or request for clarification about the notification and communication provided.

18. Discrepancies between the rates published by HR and the actual paid rate were identified in the following periods:

    - 30/11/2017- HR published rate: 0.99% when the actual rate paid was 0,97%;

    - 31/08/2018-HR published rate : 1.24% when the actual rate paid was 1,22%;

    - 30/04/2022- HR published rate 2.74% when the actual rate paid was 2,24%.

19. The Bank followed the FTR until November 2022 with the exception of the period between March 2020 and March 2021 when, due to the pandemic took a decision for the benefit of staff by applying the "reference interest rate" as if it was fixed at the level of 4.24%.

20. The level of the Barclays FTR during this time was 3.59% as of 1 April 2020.

21. In November 2022, the Bank reverted to the SVR.

22. When the Bank operated this change, the SVR rate was 6.74 and the FTR rate 5.74.

23. No specific communication was sent directly to the Staff Members about this change, but the information about the rate change was published on and made accessible through the Bank's AskHR portal.

24. This was done following insistent queries made by staff to HR about the historical reference rates and where said information could be consulted.

25. Since December 2022 the SVR and FTR published by Barclays remained aligned, and in June 2023, the Bank was informed by Barclays that the SVR was discontinued and suggested using the "follow on rate".

26. The Bank has decided to apply the Barclays FTR as of July 2023.

27. Any changes in the interest rates that occur prior to the payroll deadline are applied from the 1st calendar day of the same month, and any changes that occur after the payroll deadline are captured in the following month and applied from the 1st calendar day of the following month.

28. Following the requests for review of the case at hand, MDHROD has decided that a notification process would be set up in the future to prompt the Staff Members to consult the page dedicated to "Non-Flex Benefit – Mortgage Subsidy (HQ Staff)" on the AskHR Portal.

29. From 01 March 2023 until 01 June 2023, no changes were made to the applicable reference interest rate and corresponding adjustments to the mortgage subsidy when the Staff Members were informed of the change of the applicable rate taking effect from 1 June 2023.

30. By email from HR Operations - Payroll, dated 20 June 2023, and via updating the information on the AskHR Portal Staff Members were informed about the increase of the reference interest rate from 7.49 to 7.99, with effect from 1 June 2023.

31. There was no formal communication to Eligible Staff of changes to the mortgage subsidy payments by the established method (e-mail) between 2017 and 2023.

32. As of January 2022 there are 84 expats and 60 locally-hired staff members in the Non-Flex package and in receipt of the mortgage subsidy.

33. Over the years, the benefits gap between Non-Flex locally hired and Flex employees has continued to grow: positive changes to Flex allowances were not replicated for Non-Flex locally hired packages, in fact, since 2012, the Flex allowance has been increased from 10% to 12%, while benefits received by locally hired Non-Flex staff have continued to be eroded.

34. The increased mortgage subsidy cap of £ 218,000 in 2019 benefited only two out of 13 Applicants.

35. The average outstanding mortgage balance for the Non-Flex group at that time was £ 135,000.

36. Under Non-Flex, when a staff member pays off their mortgage, the mortgage benefit ends, whereas FLEX staff receives the Flex allowance regardless of whether or not they have a mortgage.

37. Staff members in Non-Flex have only received an increase of 20 GBP per annum in their Gym subsidy.

36. With respect to the specific case of the Appellant, the ARC made the following additional factual findings:

38. [Appellant] joined the Bank in 2007 as a consultant and then got a permanent position in the agri-business team as an Associate, she is currently an Associate Director and Senior Banker.

39. In 2012, when the review of the bank's benefits package took place, she had a 2 year old son and was three months pregnant.

40. At the same time, she was having severe morning sickness, working long hours as an operations leader and handling different transactions.

41. She faced work-related issues with her former manager and the Ombudsman was involved.

42. She missed the deadline to make the choice between remaining on Non-Flex and switch to Flex package and, as default option, the Bank placed her on Non-Flex.

43. She reached out to HR in October 2012 the following payroll month but, since the deadline had elapsed she was not allowed to move to Flex package.

44. [Appellant] stated that given both her workload, severe morning sickness and fact that she did not have a mortgage at the time of the introduction of the Flex package she understood that she would be automatically transferred to Flex as she was not a mortgage recipient therefore was not claiming a mortgage subsidy.

45. When she moved from a contractual position to a permanent one she did not have the induction in which HR explains the benefits package.

46. In 2012, she did not have a mortgage and consequently, she was not paid the mortgage subsidy until 2016.

47. She only got a mortgage in June 2016.

48. Between 2012 and 2016 she only received the Gym subsidy and, as a consequence, was deprived of around 17.000GBP.

49. Due [sic] the above mentioned switch made by the Bank in 2017 she has suffered a reduction in her mortgage subsidy of around 63%, from 325,03 GBP per month to 120,87 GBP.

50. Between March 2017 and November 2022 she estimates her loss in 10.462,45 GBP.

37. The ARC recommended that the Appellant be allowed to move to the Flex Allowance "due to the specific circumstances in which she found herself, at the time the option had to be made." However, this recommendation was not accepted by the Bank's President in her decision of 18 March 2024 rejecting the ARC's recommendations as to the Appellant.

38. With respect to the scope of its review, the ARC considered that it was authorised to review the Bank's practice since March 2017, given that the complainants were not made aware of the switch in the reference interest rate from the SVR to the FTR in 2017 and only became fully aware of the impact, significance and consequences of the switch through an audit conducted in January 2023. The ARC found that the 9 March 2017 email sent by HR to staff was misleading and did not fulfil the Bank's duty to inform staff of the switch from the SVR to the FTR, noting that the Bank did not provide any underlying reasons for the change.

39. With respect to the applicable legal framework and, in particular, the exercise of discretionary authority by the Bank, the ARC recognised that staff members are not entitled to a certain variable rate, nor is the Bank obliged to monitor the difference in variable rates or to apply the most favourable one. However, the ARC Report stated that "what is at stake in this case is not the Bank's authority to review benefits and entitlements and update them, what is at stake is how the Bank has handled those benefits and entitlements and how it impacted a certainly category of staff members who remained on Non-Flex."

40. The ARC further observed that the Bank had admitted that no governance structure was in place at the time the decision was taken and, therefore, the decision-maker could not be properly identified. Moreover, no proper rationale was given to justify the change, nor was there any evidence of a governance structure that may have imposed or justified that decision. On the contrary, the available evidence showed that staff members had incurred significant losses and that this change had had an adverse effect on their borrowing power and income.

41. The ARC therefore recommended, by way of remedies, that (i) the March 2017 switch decision be retroactively rescinded and the Appellant should be granted compensation for monetary losses she incurred between March 2017 and November 2022; (ii) she should be paid three months' net salary as compensation for moral damages; and (iii) she should be allowed to move to the Flex Package.

V. The President's Decision

45. In her final Decision of 18 March 2024, the President considered that the ARC's conclusions and recommendations with respect to the Appellant were flawed and/or deficient, and set out the reasons for her views. The Decision reads as follows:

> **Decision by the President in relation to the Report and Recommendation of the Administrative Review Committee dated 19 February 2024**
>
> 1. I refer to the Report and Recommendation by the Administrative Review Committee (the "**ARC**") dated 19 February 2024 (the "**Report**") in the matter of your Request for Review in Case No. ARC72/2023.
>
> 2. I have considered the findings and conclusions of the Report in relation to your request for review (the "**Request for Review**") challenging the decision of 28 March 2023 of the Managing Director, Human Resources & Organisational Development (the "**MDHROD**") which confirmed that the Bank, between 2017 and 2023, had in good faith applied variable mortgage rates with respect to the mortgage subsidy for non-flex staff members in line with the requirements of the Staff Handbook. I set out below my reasoned decision taking into account the Report and the ARC's recommendations.
>
> 3. The ARC concludes in the Report that the Bank's decision to change the reference interest rate communicated to you by email dated 9 March 2017 (the "**March 2017 Decision**") was unlawful. I have carefully considered the ARC's Report and I find that the ARC's conclusions and recommendations are flawed or deficient and I do not agree with them for the following reasons.
>
> 4. First, regarding the scope of its review, the ARC concluded that the timeline for challenging the March 2017 Decision should be considered as starting only in January 2023 when you received the results of a study you had commissioned on the evolution of the mortgage subsidy. I consider that such conclusion by the ARC is incorrect for the following reasons:
>
>   (a) it is a well-established general principle of international administrative law that time limits are an objective matter of fact and a complaint filed out of time should not be entertained. Any conclusion to the contrary would impair the necessary stability of the parties' legal relations and would undermine the principle of legal certainty. In this regard, the EBRD

Administrative Tribunal underlined the importance procedures and time limits in international administrative law *"because the administration works and acts in the public interest and if anyone having sufficient interest is of the opinion that the administration acted illegally, he or she should act quickly and imperatively within the time limit so that the matter is brought as soon as possible before a grievance system and finds the appropriate answer so that the regular work of the administration is not disrupted. […] This is a principle transcending the administrative law systems of national or international organizations and has become a general principle of administrative law, as an expression of inherent characteristics of administrative law*." (EBRDAT 2017/AT/03, paragraph 4.10);

(b) while the Report takes the view that the Bank did not, in 2017, fulfil its "duty to inform" you by not communicating expressly on the switch from one Barclays variable rate to the other (Report, p.9), it is not disputed that the applicable internal law as set out in the Staff Handbook does not impose any obligation for the Bank to specifically communicate on the rate used as reference rate for as long as it is a "variable-rate mortgage as published by a major home loan provider selected by the Bank" (Directive on General Compensation, Section IV, paragraph 20.3). Also, it is consistent with international administrative law that, while the principle of good faith demands that international organisations treat their staff with due consideration, staff members also have a duty to inform themselves; that is they are expected to know their rights and responsibilities or to raise queries or request clarifications when there is any doubt. In the present case, you did not take any action and did not make any specific query when the March 2017 Decision was communicated to you;

(c) contrary to what the Report states, the (one and only) February 2009 historical precedent when the Bank informed staff members about the move from one "major home loan provider" (Halifax) to another (Barclays/Woolwich) cannot be considered as a relevant precedent constituting an administrative practice binding the Bank since the Bank in March 2017 (and in November 2022) continued to use the rates published by the same major home loan provider (Barclays) (Report, p.9);

(d) while the Report underlines that international organisations "have a duty to inform their staff of any change in the internal policies that may affect their benefits and entitlements" (Report, p.10), the Bank did not change any such "internal polic[y]" in March 2017 (or in November 2022);

(e) as a consequence, I consider that the approach taken in the Report and leading the ARC to extend the scope of its review to the March 2017 Decision is at odds with the principle of legal certainty, is based on an

erroneous interpretation or application of the facts, does not fully take into account the applicable time limits provisions of the internal law and puts an undue burden on the Bank with no consideration of staff members' duty to inform themselves when in doubt about a decision taken by the Bank.

5. With regard to the merits of the Request for Review, I concur with the position set out by the MDHROD and note that:

   (a) the Directive on General Compensation, Section IV, paragraph 20.3 provides that the "reference interest rate" applicable for non-flex staff members based in Headquarters shall be "the rate for a variable-rate mortgage as published by a major home loan provider selected by the Bank". The applicable internal law contains no further specification that would mandate the Bank to follow specific procedural requirements or consider additional factors, including favourability of the variable rates, or that would suggest that staff members may be entitled to a specific variable rate;

   (b) while the Bank is bound to follow the internal law and apply its provisions in good faith, I disagree with the Report when it considers that by switching from one variable rate mortgage (as published by a major home loan provider) to another the Bank in practice altered, as maintained by the ARC, an acquired right, that is, an essential element of the employment relationship (Report, p.15). In this respect, and whilst I accept that the mortgage subsidy is an important element of 'grandfathered' benefits that non-flex staff members remained on in 2012, I consider that implementing a specific provision of the internal law consistent with its terms does not, as the ARC maintains, equate to amending or altering the substance of an acquired right;

   (c) the Report generally overlooks the fact that it is the Bank's discretionary authority to determine the appropriate variable rate to serve as the reference interest rate as long as the Bank applies a variable rate of a major loan provider selected by the Bank. Whilst an organisation's discretion is not unfettered, it is for a complainant to demonstrate that a decision by the organisation was not taken in good faith or was taken for an improper purpose. In this respect, and while you contend in your Request for Review that the Bank decided to "actively reduce the mortgage benefit", I note the following:

      - The ARC does not analyse whether the burden of proof requirements to establish that the Bank did not act in good faith or acted with an improper purpose have been met. Pursuant to such requirements, if a complainant alleges that a decision was not taken in good faith or was taken for an improper purpose, the complainant bears the burden of establishing the lack of good faith or improper purpose. In the present

case, whilst the ARC concludes that the March 2017 Decision was an unlawful exercise of discretion, it does so on the basis of the absence of any explicit indicators or evidence about why the Bank changed from one rate to the other in March 2017. In my assessment, the absence of such explicit indicators or evidence can, *prima facie*, be explained by the passage of time since 2017 and does not, in itself, constitute evidence that the Bank did not act in good faith or acted with an improper purpose.

- The ARC seems to overlook certain facts evidencing the Bank's favourable approach with respect to the reference rate. For example, the ARC does not consider the fact that you did not include in your Request for Review any reference to the Bank's approach between March 2020 and March 2021 when, for a full year, the Bank decided to freeze the rate at a level much more favourable than the then market level. Additionally, the Report does not refer to the fact that the November 2022 rate change had no impact on your financial situation since the two rates maintained by Barclays remained aligned until June 2023 when Barclays decided to publish a single rate only.

6. Further, I find that the Report presents an incomplete and imbalanced consideration of the facts, with facts being disregarded or being given disproportionate weight. For example:

   (a) The ARC appears to make conclusions that the March 2017 Decision directly had an impact on subsequent withdrawals made by some of you from your respective Money Purchase Plan ("**MPP**") funds (Report, p.18). However, the record does not in fact serve to establish a direct link between said withdrawals and the alleged "material reduction" in the mortgage subsidy payments.

   (b) The ARC also infers that the distinction between staff members on the flex package and staff members on the 'grandfathered' non-flex package is "*discriminatory*". Discrimination means there is an unlawful difference in treatment. However, as pre-2012 staff members, you were given a fair choice in 2012 between opting for the flex package or remaining on the existing non-flex benefit arrangements. These packages operate on different bases but there is nothing unlawful in that difference, nor did the ARC identify what such unlawfulness is or may be. By equating different treatment (for those who opted for the flex package and those who remained on the non-flex package) with unlawfulness, I consider that the ARC fell into error.

   (c) The ARC has disregarded in its considerations the fact that the Bank has already acknowledged certain shortfalls in its communication and has implemented a notification process, advising eligible staff members of the applicable reference interest rate changes through a dedicated page

"*Non-Flex Benefit – Mortgage Subsidy (HQ Staff)*" on the AskHR Portal, as well as awarding a one-off payment in good faith of GBP 1,500 to all eligible staff members.

7. With respect to the recommended remedies:

   (a) For the reasons set out above, I disagree with the ARC's conclusion that you should be compensated for monetary losses between March 2017 and November 2022.

   (b) For the same reasons, I reject the ARC's recommended award of "*moral damages*" for emotional distress, anxiety and frustration. In this respect, I note that the Report does not appear to take into account principles of international administrative law pursuant to which not only does a complainant bear the burden of proving an injury or loss but also that there must be a causal link with the unlawful conduct of the defendant organisation. Further, the award by the ARC of moral damages based on a multiple of monthly salaries (which vary between you) is unsupported and unexplained as any injury or damage allegedly suffered is not linked to the level of your respective incomes.

   (c) I also do not accept the ARC's view that you should be given the opportunity to move to the flex package. I note that this was not part of the remedies you were seeking and is outside the scope of the ARC's review. I also note that while the ARC recognises that you did not made your decision regarding opting into flex on time, the Report misconstrues the circumstances surrounding your choice and subsequent financial impact by stating that "*the Bank opted to place [you] on Non-Flex benefits, which turned out to have a significant financial impact on [your] situation since, between 2012 and 2016 she was deprived of any benefit*" and "*the Bank took a decision (on [your] behalf) that was, financially, more detrimental*" (Report, page 12). In this respect, I remind you that the process stipulated that failure to communicate a decision by the prescribed deadline would result in the continuation of existing benefits arrangements. Thus, the assertion that the Bank opted on your behalf to place you on the non-flex package, resulting in significant financial repercussions, is factually inaccurate. I also do not find that your particular circumstances in 2012 warrant an exception to deviate from the established deadline requirement, and I understand this determination aligns with the position previously taken by the Bank when you raised this matter in October 2012. In any event, I reiterate the fact that you were given a reasonable period of time to evaluate your circumstances and take an informed decision in 2012 about the package that would better suit your relevant personal circumstances.

8. I have considered the extensive record in this matter and I find that you were treated fairly and the Bank acted in good faith and in accordance with Bank internal legal framework.

9. I do not find that there is any evidence for the claim that the Bank abused its discretion by changing the reference interest rate in November 2022 or in March 2017. I further consider that a reasonable process was followed, that the procedural shortfalls identified in the Bank's communication have been addressed, and the claims for retroactive payment of the alleged financial losses or payment of moral damages are unsubstantiated.

10. For the reasons set out above, I have decided to confirm the Administrative Decision and that no remedies should be awarded.

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

VI. The Appellant's position

46. In the current Appeal, the Appellant is challenging the President's Decision on the following grounds:

- First, the President erred in determining that the March 2017 decision was outside the scope of the ARC's review. In the Appellant's view, there were multiple justifiable bases for the ARC to find that the 2017 decision was within its scope of review— the decision itself was misleading and concealed information of decisive importance that staff could not have known about; the Bank failed in its duty to inform staff and to provide reasons for the decision, so as to enable staff to make informed decisions and be able to contest unfavourable decisions; the 2017 decision is interrelated with the November 2022 decision; and the c*ontra preferentum* doctrine applies.

- Second, the President erred in her findings on the merits. In the Appellant's view, the President relied primarily on a literal interpretation, in favour of the Bank, of the relevant provisions of the Staff Handbook, which do not contain any procedural requirements (or protections) and as such allow the Bank almost total discretion in the implementation of its provisions. The President thus failed to consider the legitimate expectation of staff, based on historical practice, that there would be some form of stability and predictability in the Bank's approach to administering the mortgage subsidy.

- Third, the Appellant questions the President's position that the absence of reasons about why the Bank switched rates absolves the Bank of responsibility. In her view, in the absence of a rationale, the only available conclusion is that the decision to change the rate was either done deliberately, in order for the Bank to make some savings, or that it was done arbitrarily by whim or negligence. In her view, either scenario results in an abuse of discretion, lack of good faith, and improper purpose.

- Finally, with respect to the President's decision on remedies, the Appellant considers that the President was incorrect to dismiss the ARC's recommendation for compensation for the losses incurred since 2017 and for moral damages, as well as in her refusal to allow the Appellant to move to Flex.

47. By way of relief, the Appellant is seeking the following remedies from the Tribunal:

(i) Compensation for the monetary loss incurred since 2017, as itemised in her Request for Review and by the ARC in its findings of fact. The Bank should pay interest on the same amount, which should be set at 8% in line with the market practice and statutory rate in the UK; and

(ii) Moral damages in the amount of GBP 10,000; and

(iii) That the Bank be ordered to allow her to move to the Flex package.

VII. The Respondent's position

48. The Bank offers five principal arguments in its 9 July 2024 Response to the Appellant's Statement of Appeal:

(i) The scope of review should be limited to the change of rate implemented in November 2022, and the claims regarding the interest rate change in March 2017 should be dismissed by the Tribunal as untimely. The Bank maintains that the Appellant knew or should have known about the applicable interest rate, as this information would have been available to her by consulting Barclays published rates and, on this basis, she was in a position to question whether the applied rate was consistent with the Staff Handbook in March 2017. In the Bank's view, the Appellant had the necessary information to bring a timely challenge but did not do so.

(ii) The President's Decision complied with the Bank's internal law and was not tainted by abuse of discretion. The decisions to change the reference rate in November 2022 and March 2017 were taken in compliance with the applicable legal framework, which gives the Bank discretionary authority to determine the appropriate variable rate to serve as the reference interest rate, provided that the Bank selects a variable rate published by a major mortgage lender. Nor did the decisions alter any acquired rights of staff as an essential element of the contractual relationship. The Bank denies that it breached its duty of care by placing staff in financial difficulty, pointing out that its decision to maintain a higher rate during the Covid pandemic was not taken into account by the ARC.

(iii) The Bank contends that there is no evidence for the Appellant's assertion that the administration of the mortgage subsidy indirectly discriminated against the predominantly lower-income female cohort of the grandfathered Non-Flex staff, pointing out that the policy itself is neutral on its face and the Appellant has not established any inappropriate or unjustified differentiation.

(iv) The Bank acknowledges that it could have implemented a better communications strategy regarding the basis for and calculation of the mortgage subsidy. It submits, however, that such imperfect communication was neither malicious nor the result of an abuse of authority, and did not constitute an abuse of process. The Bank further points out that, in light of the concerns raised by the Appellant and other complainants, it has taken steps to address its communication practice to address these concerns, and the Appellant has already been awarded GBP 1,500 in good faith.

(v) With respect to the Appellant's request to be allowed to opt into "Flex", the Bank maintains that this claim is outside of the scope of review by the Tribunal. It notes that the Appellant knowingly made an irrevocable choice in 2012 not to move into Flex, and opted to remain in the existing package, with the attendant risks of variable rate fluctuations affecting the amount of the mortgage subsidy.

VIII. The Tribunal's evaluation

Preliminary matters

Anonymity

49. The Tribunal recalls its previous observations 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 practice 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.

Oral hearings

50. Noting that neither party has requested oral hearings, and bearing in mind Section IV, paragraph 7.02(a) of the Directive on 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*.

Jurisdiction *ratione temporis*

51. A threshold issue before the Tribunal is the admissibility of the Appellant's claims challenging the legality of the decision taken by the Bank in March 2017 to switch from the SVR to the FTR as the reference interest rate.

52. In the Bank's view, the scope of review should be limited to the change implemented in November 2022 and should not include the decision in March 2017 to change the reference rate because it is no longer timely for review. The Bank maintains that the Appellant was in a position to know or find out about the change at the time by examining the AskHR portal, and the Bank did not conceal this information from them. As the Bank only followed the available published rates, these rates would or could have been known by staff by checking Barclays' website. The Appellant could have asked about or challenged the calculation of her mortgage subsidy at the time, but she did not do so. According to the Bank, she cannot credibly maintain that she was unaware of this condition of employment before January 2023, as she could have queried the calculation of her mortgage subsidy if she considered that the rate applied

by the Bank was inconsistent with the publicly available variable rate published by Barclays.

53. The Appellant contends that she had not been properly notified about the changes made by the Bank to the reference rate and only understood fully what had transpired as a result of the 2023 audit by similarly affected Non-Flex staff. Because the Bank failed to disclose or communicate the 2017 switch between different reference rates to the affected staff members, she did not know and could not have known about this at the time and was therefore not in a position to challenge the decision. In this regard, she points out that the 9 March 2017 communication from HR stated that "the variable mortgage rate published by Barclays PLC has recently changed from 3.99% to 3.74%." However, this statement was in fact misleading, as there had been no decrease in the interest rates during the first quarter of 2017; rather, the reduction was due to the switch from SVR to FTR, which was not notified to any of the affected eligible staff members. The Appellant thus contends that "[w]ithout having transparent disclosure of the change in the reference rate, including in particular the reasons for the change, [she] was unable to exercise her right to formally challenge the switch at that time." Accordingly, in her view, the 2017 decision to change from the SVR to the FTR is still timely for challenge.

54. Section IV, paragraph 4.03 of the Directive on the 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.

55. 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.

56. In a recent judgment (EBRDAT 2024/AT/01), the Tribunal rejected the Bank's argument that the Appellant's claim was untimely and therefore inadmissible. There,

as here, the crucial issue was the starting point as to when a legal challenge could have been brought by the Appellant, i.e., when was the staff member duly notified in writing of the decision in question.

57. In order to assess the threshold question of admissibility, the Tribunal has therefore examined the question as to whether and when the Appellant was put in a position to know or should have known how the Bank was exercising its discretionary authority with respect to the selection of the reference rate. In doing so, as in the previous case, the Tribunal recognises the importance of protecting the Appellant's right of access to the Tribunal.

58. Given the factual scenario set out above, the Tribunal considers that the information provided to staff in March 2017 did not meet the necessary standard of notification required by the Procedure on General Compensation, Section IV, paragraph 17(i).[5] It was not until January 2023 when the staff, upon reviewing their payslips and not understanding how the reductions in the mortgage subsidy reflected in those payslips had come about, that several of the pre-2012 Non-Flex staff undertook their own audit of the history of the Bank's selection of reference rates and requested a review by the MDHROD (see paragraphs 19 and 22 above). Only at that point was the Appellant, like the other Non-Flex staff, in a position to actually understand the sequence of events and administrative decisions that had resulted in the reduction of her mortgage subsidy. On this basis, the Tribunal concludes that the Appellant met the 40-day deadline specified in Section IV, paragraph 6.1(a) of the Directive on the Administrative Review Process with respect to her initiation of the process that has ultimately resulted in this Appeal.

The decision to switch the reference rate

59. The Bank points out that the relevant provision in the Directive on General Compensation gives it broad discretion to select the reference rate, so long as it is "a variable-rate mortgage as published by a major home loan provider selected by the Bank". The provision does not require the use of any particular rate, nor the most favourable rate for staff. The rule allows the Bank to change the reference rate at any

[5] See footnote 3.

time, so long as the selected rate meets the above definition. It does not require consultation with, or the approval of, the affected staff.

60. Nevertheless, the provisions in the Directive are not the only aspects to be considered in assessing the legality of a discretionary decision such as the switch from the SVR to the FTR in March 2017. The Tribunal has also taken note of the principle in Section IV, paragraph 3.03(b) of the Directive on the Appeals Process concerning its review of discretionary decisions:

> When the Administrative Decision complained of is a Decision of a Discretionary Nature, the Tribunal shall uphold the Appeal only if it finds that the decision was arbitrary, or discriminated in an improper manner against the Staff Member or the class of staff members to which the Staff Member belongs, or was carried out in violation of the applicable procedure.

61. With these criteria in mind, the Tribunal has considered whether the decision to switch the reference rate was a proper exercise of the Bank's discretion. In doing so, the Tribunal has taken account of the standards applied by other administrative tribunals in assessing whether a discretionary decision is arbitrary.

62. For example, the jurisprudence of the World Bank Administrative Tribunal ("WBAT") makes clear that the organisation's discretionary decision-making power, although broad, is not unfettered; there must be a "reasonable and observable basis" for the decision. See, e.g., HC, WBAT Decision No. 694 [2023], paras. 119-120, and HM, WBAT Decision No. 703 [2024], para. 90. As the WBAT stated in AK, WBAT Decision No. 408 [2009], para. 41:

> Decisions that are arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure, or lack a reasonable and observable basis, constitute an abuse of discretion, and therefore a violation of a staff member's contract of employment or terms of appointment. (Emphasis added.)

63. In this regard, the WBAT has also observed that the absence of a contemporaneous record as to the reasons for a discretionary reason, however minimal, impedes "the Tribunal's ability to conduct its independent and impartial judicial review of the decision at issue." HE, WBAT Decision No. 698 [2023], para. 123. In HE, the WBAT reiterated its previous jurisprudence on the importance of contemporaneous documentation in facilitating proper review of a discretionary decision and confirm

the absence of arbitrariness. Quoting its prior opinion in GI, WBAT Decision No. 660 [2021], para. 111, the WBAT stated:

> "The Tribunal cannot but reemphasize the importance of relevant contemporaneous documentation of the basis of managerial actions affecting a staff member. Contemporaneous documents are generally more reliable records of the decision making process and tend to be more valuable when a decision is challenged. . . . But by then the decision-makers may have left the institution or moved on to other departments. Even if they are still there, memories fade, and their belated explanations may be subject to reinterpretation in light of subsequent knowledge or facts. Therefore, later explanations cannot command the same weight as contemporaneous documentation. The Tribunal understands that it could be burdensome to require detailed documentation for every action of management. Still, **without any relevant contemporaneous documentation, however minimal, it is difficult to ascertain whether managerial discretion was exercised fairly and transparently**."
>
> The Tribunal has also stated, in DB, Decision No. 524 [2015], para. 103, that "[a] written record of the decision-making process, the underlying rationale and the consultation which has taken place (be it written exchanges or notes of oral exchanges) will not only assist any subsequent review, but also facilitates transparency and assists all parties in **ensuring that no abuse of discretion arises in the first place**." (HE, *supra*, paras. 120-121; emphases added.)

64. A similar formulation was expressed by the UN Appeals Tribunal in Kennedy, 2021-UNAT-1184, para. 63, i.e., that:

> [A]s with all exercises of discretion, it should not be "absurd, arbitrary or tainted by extraneous reasons or bias, which would otherwise be grounds for judicial review, if proven". [The UNAT found] no evidence the exercise of discretion was tainted by extraneous reasons or bias. However, as for the absurdity or **arbitrariness of the exercise of discretion**, we are unable to ascertain whether the Secretary-General considered all relevant factors when exercising the discretion on sanctions **given the sparse and incomplete rationale provided** in the [impugned disciplinary decision]. (Emphases added.)

65. The current Appeal calls upon the Tribunal to assess whether the March 2017 decision to switch from the SVR to the FTR as the reference rate meets the standards for discretionary decisions set out in Section IV, paragraph 3.03(b) of the Directive on the Appeals Process, including lack of arbitrariness. In this regard, the Tribunal observes that the Bank has been unable to provide any rationale to explain or justify the decision,

as there are apparently no contemporaneous records or institutional memory as to how or why it was taken. Moreover, the identity and scope of authority of the decision-maker are unknown. Given the absence of such information, the Tribunal cannot assess whether the decision was reasonable and objective, or whether the decision was taken by a duly authorised official. As a result, the Tribunal is unable to conclude that the exercise of discretion by the Bank was not arbitrary.

66. The Tribunal accepts that the absence of a rationale does not *ipso facto* show that the Bank deliberately acted in bd faith or against the interests of a group of locally hired staff, or that the Bank's switch to Barclays FTR did not satisfy the statutory requirement to select a "variable-rate mortgage as published by a major home loan provider". However, these observations are not tantamount to a conclusion that the decision was properly motivated and not arbitrary. In this regard, the Tribunal does not accept the Bank's contention that the Appellant failed to meet the burden of proving that the March 2017 decision was arbitrary. As the Appellant was not timely notified of the switch from the SVR to the FTR, much less the reasons why it was made, she should not be expected to bear the burden of proving that the Bank abused its discretion in doing so. For these reasons, the Tribunal concludes that the decision was unlawful and must be rescinded. As a consequence, its effects must be reversed.

67. Finally, the Tribunal has considered the issue raised by the Appellant that her personal circumstances be taken into account. She maintains that she was not fully informed in 2012 and did not make a "choice", as she was in a vulnerable position at the time. In her view, these circumstances were the basis for the ARC's recommendation that she be given the option to move to Flex.

68. The Tribunal confirms that she, like the appellants in the concurrent decision, is entitled to the aforementioned remedies ordered by the Tribunal. However, the Tribunal is not persuaded that her particular circumstances warrant further remedial measures, including the option to move to Flex. As the President's Decision pointed out, the Appellant was given a reasonable period of time to take an informed decision in 2012 about the package that would better suit her relevant personal circumstances. She did not attempt to seek the necessary clarifications before the deadline for exercising the option expired or bring a timely challenge thereafter when her request to HR that she be allowed to rescind her choice and move to Flex was denied. This issue is thus no longer timely for review.

Remedies

69. For these reasons, the Appellant is entitled to compensatory relief as if the rescinded decision had not been taken, as elaborated in paragraph 75 below.

70. The Tribunal does not consider that the Appellant's claim for moral damages in the amount of GBP 10,000 is well-founded, given that she has not substantiated that she suffered any harm, emotional or psychological distress that can be directly linked to the unlawful decision. The Bank has already acknowledged the insufficient notification and deficiencies in its notification process regarding the changes to the applicable reference interest rate, which was the justification for the payment of GBP 1,500 as set out in the MDHROD's communiqué of 28 March 2023. The Tribunal considers that, in these circumstances, rescission of the impugned March 2017 decision, as well as the associated financial relief ordered in the MDHROD's communiqué (see paragraph 23 above) provide sufficient redress to the Appellant.

71. In light of the above conclusion and the consequential remedies to be provided to the Appellant, it is not necessary for the Tribunal to address the allegations of discrimination between Non-Flex and Flex staff. With respect to the Appellant's request that the Tribunal order that she be allowed to move to the Flex Allowance, the Tribunal notes that it cannot order specific action regarding the irrevocable choice offered to staff in 2012 between the Non-Flex and the Flex benefits. The question of the legality or illegality of that choice is not part of the present proceedings. This is a policy matter for the Bank to decide.

IX. Costs

72. Section IV, paragraph 8.06(a) of the Directive on the Appeals Process provides:

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

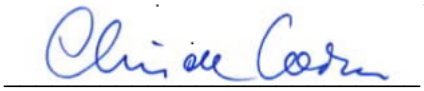
73. As the Appellant was not represented by counsel and has not requested the Tribunal to provide reimbursement, it is not necessary to consider whether the Respondent should bear the Appellant's legal costs.

X. Decision

74. The Tribunal rescinds the President's Decision as to the Appellant.

75. Accordingly, the Tribunal orders the Bank to compensate the Appellant as if the decision to switch the reference rate in March 2017 from the SVR to the FTR had not been taken and use of the SVR as the reference rate had been maintained. Specifically, this remedy calls for the payment of material damages to the Appellant equal to the difference between the mortgage subsidy that she actually received and what she would have received if the Bank's reliance on the SVR had not been discontinued in March 2017 and had continued until November 2022, other than during the period 1 March 2020 through 31 March 2021.

76. All other claims are rejected.



Chris de Cooker, President