

**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT  
ADMINISTRATIVE TRIBUNAL REPORT 2019**

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President of the Administrative Tribunal**

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## PART I INTRODUCTION

1. Under Section IV, 9.04(a) of the Appeals Process Directive dated 1 April 2019, the President of the Administrative Tribunal is required to submit an annual report addressed to the President of the Bank. The report is to be made available to the Board of Directors and staff of the Bank.

### *9.04 Annual Report*

*(a) The President of the Tribunal shall prepare an annual report indicating, in summary form, the Appeals brought before it in the past year, the decisions taken, and the actions of the Bank in implementing those decisions.*

*(b) Subject to paragraph 9.03 above, the report shall maintain the essential confidentiality of all parties involved in Appeals brought before the Tribunal. The report shall be addressed to the President and shall be made available to the Board of Directors as well as to staff members of the Bank.*

2. In accordance with Section IV, 9.03 (a) all case decisions are published in full (anonymised at the request of the Appellant) on the Bank's website in line with the Bank's commitment to enhancing good governance, openness, transparency and accountability. The link for ease of reference is <http://www.ebrd.com/who-we-are/corporate-governance/administrative-tribunal.html>.

3. The table in part II presents a schematic overview of each case submitted during 2019 – the request for an appeal, the decision and the actions carried out by the Bank. A more detailed summary of each case follows the table.

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## PART II REPORT ON APPEALS SUBMITTED IN 2019 AND ACTIONS OF THE BANK IN IMPLEMENTING THE DECISIONS

Case Reference	Composition of Tribunal as appointed by the President of the Administrative Tribunal	Request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken & confirmed by the Bank	Full summary in paras :
<b>2019/AT/01</b>	Chris de Cooker (Chair), Spyridon Flogaitis and Giuditta Cordero Moss	The Appellant requested that the Tribunal:  1) Set aside the PARD on admissibility due to non-adherence to legal time limits for the submission of an RRAD; 2) Award reasonable expenses and legal costs in preparing and presenting the Appeal; 3) Award moral damages.	The Tribunal decided that:  1) The PARD holding the Appellant's RRAD time-barred and therefore inadmissible be annulled; 2) Expenses were not to be awarded as not quantified or qualified in the Appeal. There were no legal costs as the Appellant was self-represented; 3) Moral damages were not to be awarded as the Tribunal considered the annulment of the impugned decision sufficient remedy.	The Appellant's RRAD was admitted under the Bank's Directive on the Administrative Review Process (ARP Directive). The administrative review has since been completed.	4-18
<b>2019/AT/02</b>  <b>2019/AT/03</b>  <b>2019/AT/04</b>  <b>2019/AT/05</b>	Mike Wolf (Chair), Spyridon Flogaitis and Giuditta Cordero Moss  Spyridon Flogaitis (Chair), Maria Vicien-Milburn and Giuditta Cordero Moss  Maria Vicien-Milburn (Chair), Chris de Cooker and Giuditta Cordero Moss  Chris de Cooker (Chair), Michael Wolf and Giuditta Cordero Moss	The four Appeals were based on similar sets of facts and on identical legal arguments. The Appellants (non-staff members) requested that the Tribunal:  1) Set aside the PARD on admissibility due to the Appellants' lack of standing; 2) Recognise that the Appellants were Staff Members of the EBRD; 3) Order the Respondent to pay severance payments; 4) Award reasonable legal costs incurred in presenting the Appeals.	The Appeals were decided by four distinct Panels. A preliminary hearing was held on 14 January 2020 to decide upon jurisdiction. The legal reasoning was identical for the four decisions. In each decision, one judge wrote a dissenting opinion.  The Tribunal decided that:  1) The Tribunal has jurisdiction to determine whether the Appellants qualify to file an appeal; 2) Fact-finding is necessary to determine whether the Appellants qualify to file an appeal; 3) The PARDs on inadmissibility be annulled; 4) The President is required to refer the Appellants' RRADs to the Administrative Review Committee (ARC); 5) Legal fees be awarded to the Appellants.	The Appellants RRADs were admitted under the ARP Directive. The administrative reviews are ongoing.	19-29

Case Reference	Composition of Tribunal as appointed by the President of the Administrative Tribunal	Request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken & confirmed by the Bank	Full summary in paras :
<b>2019/AT/06</b>	Giuditta Cordero-Moss (Chair), Spyridon Flogaitis and Chris de Cooker	The Appellant (non-staff member) requested that the Tribunal:  1) Set aside the PARD which rejected the Report & Recommendations of the ARC, according to which the Appellant was a de facto employee of the Bank and thus entitled to severance pay upon termination of the contract; 2) Order the Bank to pay a severance payment; 3) Order the Bank to pay expenses.	The Tribunal decided that:  1) Under exceptional circumstances, a de facto employment relationship may be established even though there is no formal contract to that extent between the Bank and the worker; 2) In the instant case, there was no basis to consider the Appellant a de facto Staff Member of the Bank; 3) The Appeal was dismissed.	None required.	30-44
<b>2019/AT/07</b>	Maria Vicien-Milburn (Chair), Mike Wolf and Giuditta Cordero-Moss	The Appeal has been suspended, on the Appellant's request, to permit evaluating a possible joinder with a subsequent Appeal, if such is filed. The subsequent Appeal (2020/AT/05) was filed in March 2020. The Appellant requested that both Appeals be suspended. The Tribunal are reviewing.			45
<b>2019/AT/08</b>	Chris de Cooker (Chair) Mike Wolf and Giuditta Cordero-Moss	The Appellant requested that the Tribunal:  1) Set aside a PARD which rejected the Report and Recommendations of the ARC; 2) Set aside the underlying MDHR decision as arbitrary; 3) Determine that the Appellant has been subject to an abuse of authority / unlawful behaviour and unfair / demeaning treatment; 4) Award material and moral damages.	The Tribunal decided that:  1) There had been an abuse of authority by the Team Director and consequently the MDHR's decision was itself an abuse of discretion as was based on OCCO, which had not dealt with an underlying issue; 2) Compensation for the harm caused to the Appellant be paid; 3) The parties were directed to meet to determine the appropriate amount of compensation. The Tribunal has maintained jurisdiction for the eventuality that no agreement is reached.	As directed by the Tribunal, the Bank is currently in discussions with the Appellant with a view to reaching an agreement on the amount of compensation for the harm caused.	46-56

Case Reference	Composition of Tribunal as appointed by the President of the Administrative Tribunal	Request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken & confirmed by the Bank	Full summary in paras :
<b>2019/AT/09</b>	Michael Wolf (Chair), Spyros Flogaitis and Giuditta Cordero-Moss	The Appellant requested the Tribunal to grant financial compensation for violation of the selection process relating to the Appellant's application for a Director position.	<p>The Tribunal found that the Appellant was given a fair and impartial consideration, and dismissed the Appeal.</p> <p>The Tribunal recommended that the Bank develop a procedure documenting the short-listing stage, which would include reasons as to why individual candidates have or have been short listed.</p>	Since the time of the decision appealed, the Bank has implemented a new Procedure on Filing Vacant Positions on 1 April 2019 and has introduced guidance to strengthen its recruitment functions, with a view to ensuring that selection processes are adequately documented. The Bank has also automated recording of interview feedback as part of the selection process.	57-66

**EBRDAT 2019/AT/01**

4. The Appellant filed on 22 April 2019 a Statement of Appeal against the PARD dated 25 January 2019 holding that the Appellant's 4 January 2019 RRAD was filed outside of the required time limits and therefore inadmissible. The RRAD regarded the Appellant's request for the Bank to recognise their medical illness as being service incurred.
5. The Appellant requested anonymity.
6. The final decision was issued on 17 June 2019 after a period of eight weeks.
7. The Appellant requested that the Tribunal, i.a.:
  - a. Set aside the PARD on non-admissibility due to non-adherence by the Appellant to legal time limits for the submission of a RRAD;
  - b. Award reasonable expenses and legal costs in preparing and presenting the Appeal;
  - c. Award moral damages.
8. In connection with their having reached the established yearly insurance limit for the reimbursement of costs related to the Appellant's medical condition, the Appellant was informed that the rate of reimbursement would be increased from 80% to 100% and the limit removed in case of medical expenses resulting from a service-incurred illness. The Appellant requested the Bank to inform the medical insurance provider, Cigna, that their illness was service related.
9. After a series of exchanges, Cigna advised the Appellant that they did not consider the Appellant's illness to be service incurred. A series of exchanges followed.
10. The Tribunal in considering the Appeal only took into account those facts relevant to the Appeal, which included correspondence between June 2018 and November 2018, from the Appellant, Cigna and the Bank's Human Resources Department ("HR") in order to respond to the Appellant's request.
11. On 4 January 2019, the Appellant submitted a RRAD to the President of the Bank, based upon the following facts:
  - a. The Appellant requested in an email dated 5 October 2018 to the MDHR that their medical condition be recognised as being work related;

- b. As of 2 November 2018, the MDHR had not responded with a decision, which allowed the Appellant, in accordance with Section 6.3(b) of the ARP Directive, to seek further review by the President as per Section 6.4;
- c. The Staff Legal Adviser had confirmed to the Appellant that the lack of decision of the MDHR on 2 November 2018 constituted a decision not to issue an administrative decision and could be challenged before the President within 40 business days, commencing on the next business day. The RRAD was therefore submitted within the applicable time limits.

12. The President replied maintaining the MDHR had responded appropriately on 23 October 2018 to the Appellant's request for a review of Cigna's decision not to recognise the medical condition as service incurred.

13. The issue was whether the MDHR's email of 23 October 2018 represented a specific decision with regard to the Appellant's request for a review of Cigna's decision, as the Bank alleged that any request for a RRAD should have been made by 18 December 2018, which the Appellant had failed to do.

14. The Tribunal in its consideration of the legality of the President of the Bank's decision to time-bar the RRAD found that the MDHR's email of 23 October 2018 could not be considered an administrative decision. The Tribunal also found it was the responsibility of HR to provide direct statements and answers to avoid confusion and misunderstandings.

15. The Tribunal, therefore, concluded that the time limit started to run on 5 November 2018, that the RRAD was therefore lodged within the legal time limits, and that the PARD be consequently annulled.

16. The Appellant requested the Tribunal to award moral damages, however the Tribunal considered the annulment of the impugned decision sufficient remedy and did not deem it necessary to award further damages.

17. The Appellant requested the Tribunal to award compensation of reasonable expenses, but none were quantified or qualified. There were no legal costs as the Appellant was self-represented.

18. Actions of the Bank in implementing the decision:

The Appellant's RRAD was admitted under the Bank's Directive on the Administrative Review Process. The President forwarded the matter for consideration by the Administrative Review Committee on 24 June 2019. The Administrative Review Committee considered the matter and issued its Report and Recommendation to the President on 30 October 2019. On 27 November 2019, the President took an Administrative Review Decision on the merits, bringing the administrative review process to an end.

**EBRDAT 2019/AT/02/03/04/05**

19. The Administrative Tribunal received four Statements of Appeal. Each Appeal differed in terms of dates and timing but in essence the sets of facts upon which the Appeals were based were similar. The legal arguments in the Appeals were identical. The Appellants had been working for the Bank under consultancy contracts. The contracts were entered into between the Appellants' private companies and an agency, which in turn had a contract with the Bank. Therefore, there was no direct contract between the Bank and the Appellants. All contracts clearly stated that they did not constitute employment agreements between the Appellants and the Bank. The contracts were regularly renewed for a varying number of years. When the contracts no longer were renewed, the Appellants claimed that they should be recognised as *de facto* staff members for purposes of receiving payment of the severance to which Staff Members are entitled upon termination of their employment relationship.

20. The Appellants lodged a RRAD with the President of Bank. The President concluded that he had no authority to review their request on the grounds that the Appellants could not be considered Staff Members of the EBRD and therefore could not avail themselves of the rights set out for staff members.

21. On 11 June 2019 each of the Appellants filed a Statement of Appeal requesting the Tribunal to, i.a.:

- a. Annul the PARD according to which the Appellants' RRADs were inadmissible;
- b. Refer their requests to the Chair of the ARC;
- c. Award reimbursement of legal fees.

22. The Appeals relied on the Administrative Tribunal's decision in AT/2018/02 and on other international Administrative Tribunals' decisions, according to which, under certain



circumstances, it is possible to consider someone as a staff member even though the formal requirements are not met.

23. On 8 July 2019, the Respondent submitted a Challenge to the Jurisdiction, to which the Appellants replied on 29 July 2019. The Tribunal invited Counsel for the parties to a preliminary hearing with regard to the jurisdictional dispute. The hearing was held on 14 January 2020. The decisions were rendered on 20 February 2020.

24. The Challenge to the Jurisdiction was primarily based on the arguments that:

- a. The President's communication to the Appellants that their RRADs were not admissible did not constitute an Administrative Decision;
- b. The Appellants were not staff members of the Bank.

25. The Challenge to the Jurisdiction relied on the wording of the contracts, of the Staff Handbook and of the Appeals Process Directive, as well as on part of the case law by other international Administrative Tribunals.

26. The Tribunal observed, consistent with its decisions in cases 2018/02 and 2019/06, and consistent with part of the case law from other international Administrative Tribunals, that, under exceptional circumstances, a person can be deemed to be a staff member even though the formal requirements are not met. Unless the existence or lack of existence of a de facto employment relationship is evident on the face of the appeal, a fact-finding process is necessary for the purpose of determining whether the person is a staff member and thus entitled to file an appeal. The Tribunal is not a fact-finding body, therefore the determination of the facts has to be made by the ARC. On the basis of the facts ascertained by the ARC, and if a new appeal is filed before the Tribunal, the Tribunal will be able to ascertain whether the Appellants were de facto employees and thus entitled to file appeals before the Tribunal.

27. In each of the Appeals, one judge disagreed with the majority's position and wrote a dissenting opinion. The dissenting opinions are consistent with part of the case law from other international Administrative Tribunals, and exclude that anyone could ever be deemed to be a de facto employee of the Bank. According to the minority, the only circumstances under which any one could be deemed to be a staff member, is when the formal requirements are met.

28. The Tribunal decided that:

- a. The Bank President's 26 March 2019 email had the function of an administrative decision and should be considered as a PARD;
- b. The PARD be annulled;
- c. The Tribunal has jurisdiction to consider whether the Appellants' were *de facto* employees and thus are entitled to file Appeals;
- d. The Bank is to permit the Appellants' RRADs to proceed, for the purpose ascertaining the facts around the alleged *de facto* employment relationship;
- e. The Appellants' counsel fees expended in opposition to the Bank's challenge on jurisdiction are to be reimbursed.

29. Actions of the Bank in implementing the decision:

The Appellants' RRADs were admitted under the Bank's Directive on the Administrative Review Process. The President forwarded the matters for consideration by the Administrative Review Committee on 28 February 2020. The administrative review process is ongoing.

**EBRDAT 2019/AT/06**

30. The Appeal dated 8 July 2019 sought the annulment of a PARD that had rejected the ARC Report and Recommendation (ARC40/2018) dated 14 March 2019. The ARC process had been carried out as a consequence of a previous decision by the Tribunal on jurisdiction between the parties on 14 September 2018 (2018/AT/02). In this latter mentioned decision on jurisdiction, the Tribunal had set aside a PARD according to which the Appellant's RRAD was inadmissible because the Appellant did not qualify as a staff member.

31. The Appellant had been working for the Bank under a consultancy contract. The contract was entered into between the Appellant's private company and an agency, which in turn had a contract with the Bank. Therefore, there was no direct contract between the Bank and the Appellant. The contract clearly stated that it did not constitute an employment agreement between the Appellant and the Bank. The contract was regularly renewed for a number of years. When the contract no longer was renewed, the Appellant claimed that they should be recognised as a *de facto* staff member for purposes of receiving payment of the severance to which staff members are entitled upon termination of their employment relationship

32. The ARC concluded in its Report & Recommendation ARC40/2018 that the Appellant was indeed a de facto employee of the Bank. The PARD, issued on 11 April 2019, did not accept the ARC Report & Recommendation.

33. The Appellant filed an Appeal against the PARD and requested, i.a.:

- a. The annulment of the PARD;
- b. The Tribunal to order the Respondent to pay a severance payment;
- c. The Tribunal to order reimbursement of reasonable legal costs incurred in presenting the Appeal.

34. The decision was finalised in three months.

35. The request for the annulment of the PARD was based, i.a., on the Appellant's argument that the PARD disagreed with the ARC's legal and factual conclusions, reargued the facts and was therefore arbitrary and should be put aside. The Tribunal concluded it did not consider the PARD to be arbitrary just because it deviated from the ARC Report, as regards the application of the law to the facts.

36. The Tribunal further pointed out that the Tribunal shall take into account the facts as ascertained by the ARC, but it shall independently evaluate the legal effects of these facts. The Tribunal recalled the sources of law that are applicable pursuant to Section 3.02 of the Appeals Process Directive, and commented on each of them.

37. The Tribunal commented in a particularly extensive way on its own previous case law, on case law from other Administrative Tribunals, on Administrative Practice and on generally recognised principles of international administrative law. The Tribunal observed that international case law is divided on the issue whether a person may be deemed to be a de facto employee even though the formal requirements for employment are not met. Consistent with its own decision 2018/AT/02, and with part of international case law, the Tribunal assumed that it cannot be excluded that a person may be a de facto employee. Consistent with the applicable sources of law, the Tribunal pointed out that such a finding may be made only under exceptional circumstances. In this context, the Tribunal highlighted the limits to its jurisdiction, and that it only has the power to evaluate whether the Bank abused its discretion – it does not have the power to review the Bank's exercise of its discretion. The Tribunal developed a series of criteria that can be used as guidelines to determine whether the use of

consultancy contracts may be deemed to be an abuse of discretion, and thus whether circumstances permit to consider a person as a *de facto* employee.

38. Based on the applicable criteria and the facts of the case, the Tribunal evaluated whether the Appellant's legal status was of an independent contractor or of a staff member of the Bank.

39. The Tribunal observed that the Appellant's contract compensated with a higher rate of pay the lack of protection and benefits that staff members are entitled to. The Tribunal also took into account the Bank's operative and strategic explanation for choosing to employ IT specialists as independent contractors, as opposed to employing them as staff members. The Tribunal also noted that the Appellant had been informally offered to convert their consultancy contract into an employment relationship, but had preferred not to do so, so as to continue benefitting of the consultancy contract's financial terms.

40. The Tribunal concluded that there was no basis to consider the Appellant a *de facto* staff member of the Bank.

41. The Tribunal did not deem it appropriate to order the Bank to pay legal fees for the Appeal in question (2018/AT/06).

42. The Appeal was therefore dismissed.

43. Two judges wrote concurring opinions, specifying, i.a., that the Appeal would have had to be dismissed under any legal reasoning.

44. Actions of the Bank in implementing the decision:  
No actions directed by the EBRDAT.

#### **EBRDAT 2019/AT/07**

45. Upon the Appellant's request, this Appeal was suspended to permit evaluating whether the Appeal shall be joined with another possible Appeal on a potentially related issue. The subsequent Appeal (2020/AT/05) was filed in March 2020. The Appellant requested that both Appeals be suspended. Comments with regard to the suspension have now been received from both parties and are under review by the Tribunal.

**EBRDAT 2019/AT/08**

46. The Appellant submitted a Statement of Appeal on 3 October 2019 requesting the Tribunal, i.a., to:

- a. Set aside a PARD dated 30 July 2019 which rejected the Report and Recommendations of the ARC (ARC39/2018 dated 1 July 2019);
- b. Quash the underlying MDHR decision as arbitrary;
- c. Determine that the Appellant has been subject to an abuse of authority / unlawful behavior and unfair / demeaning treatment;
- d. Award material and moral damages;
- e. Order the Bank to implement procedures in order to make the Bank's internal law compliant with general principles of international administrative law; and
- f. Award reasonable expenses and legal costs.

47. The decision was rendered on 18 February 2020 taking 3 months and 3 weeks.

48. The background to the case concerns the Appellant's 2015 performance appraisal and performance review discussions. Following intervention by the Team Director, the Appellant's performance rating was downgraded to 'meets some expectations'. Some contents were subsequently altered, and in July 2017 the overall performance rating of the appraisal was changed to 'meets expectations'. In the same month, the Appellant lodged a report, in accordance with the RWPs procedure, which was referred in August 2017 to OCCO, alleging improper behaviours by the Appellant's manager, which amounted to an abuse of authority and harassment. The Appellant was informed that only very limited information would be shared during the course of the investigation. On 6 February 2018 OCCO's investigative report was sent to the MDHR and on 27 February 2018 the Appellant was informed that the MDHR had advised that the alleged improper behaviour under investigation was not tantamount to misconduct and therefore the CCO was not in a position to impose any disciplinary measures against the Team Director.

49. Regarding the Appellant's challenge to the MDHR decision on OCCO's report, the Tribunal noted that its scope of review is limited to determining whether or not the discretionary powers of the Respondent during and after the investigation by the CCO were abused. In doing so, the Tribunal applies the law as it stands in accordance with the provisions of the staff member's contract of employment, the internal law of the Bank, and generally recognised principles of international administrative law. The Tribunal concluded

that the procedure was correctly followed with the result that Appellant was advised that the alleged improper behavior was not tantamount to misconduct but had been referred for managerial action.

50. Regarding the Appellant's request that the Tribunal determine that the Appellant was subject to an abuse of authority and unfair / demeaning treatment, the Tribunal referred to Article 3.03 of the Appeals Process Directive and the Bank's obligation to ensure a respectful workplace environment, which must avoid behaviour that constitutes or is perceived as harassment or bullying. The Tribunal observed that the formal process for resolution of harassment issues was carried out in accordance with the Conduct and Disciplinary Rules and Procedures (DIR/2019/12) (CDRPs) by OCCO.

51. The Tribunal observed the ARC report focused on the OCCO issues, but not on the underlying harassment issue. The Tribunal therefore independently assessed, based on the facts ascertained by the ARC, if the MDHR's interpretation of the harassment rule was erroneous or abused discretion. The Tribunal considered Rule 2 in the guidance notes of the Bank's Code of Conduct (Annex 13.1 of the Staff Handbook), the background to the Appeal and the consequences. The Tribunal recognized the delay to partially correcting the performance appraisal as harmful on the Appellant's health, however it did not share the ARC's conclusion that the delays were excessive and upheld the PARD decision on this point.

52. The Tribunal also upheld the PARD's rejection of the second recommendation by the ARC in respect of the Bank's *"failure to properly recognise the Appellant's rights to have in place a procedure for the processing of their complaint that sits outside of the Conduct and Disciplinary Rules and Procedures (CDRPs)"*.

53. The Tribunal, however, concluded that there had been an abuse of authority by the Team Director and consequently the MDHR's decision that the alleged improper behaviour was not tantamount to misconduct, was itself an abuse of discretion because it ignored or misinterpreted the Bank's law, resulting in harm to the Appellant for which compensation is due.

54. As the Appellant had not substantiated and quantified the harm, the parties were directed to meet to determine the appropriate amount of compensation. The Tribunal maintained jurisdiction for the eventuality that the Parties do not reach an agreement on the amount of compensation.

55. Regarding the request to award reasonable expenses and legal costs, the Tribunal noted that the Appellant was not represented. Therefore, no reimbursement of costs was awarded.

56. Actions of the Bank in implementing the decision:

As directed by the Tribunal, the Bank is currently in discussions with the Appellant with a view to reaching an agreement on the amount of compensation for the harm caused.

**EBRDAT 2019/AT/09**

57. This Appeal was filed on 23 December 2019. The Appellant requested anonymity, which the Tribunal granted.

58. The Tribunal's decision was rendered on 6 March 2020, after a period of ten weeks.

59. The Appellant, after several years in the Bank's employment, applied for a Director position that had become vacant. The Appellant was informed by an HR official that he would not be short-listed for the Director position and that there was a preferred candidate as indicated by the Vice President. Eventually, a selection was made and neither the Appellant nor the Vice President's preferred candidate was selected.

60. The Appellant sought an administrative review maintaining -

- a. The selection process was tainted by bias of the Appellant's line manager;
- b. The decision not to short-list the Appellant was based on information incorrectly and inconsistently assessed;
- c. The procedure for recruitment of staff in the HR Intranet policy document, which is binding, had not been adhered to; and
- d. The Bank failed to document the selection process.

61. The MDHR rejected the Appellant's complaint and it was referred to the ARC, which duly issued its report concluding there had been no violations of the Appellant's rights, but it made two recommendations with regard to documenting the relevant criteria for short-listing and a written record of why a candidate was or was not short-listed.

62. The Bank's President accepted the ARC's recommendations and issued its PARD on 21 October 2019, which the Appellant contested in their Statement of Appeal, requesting the

Tribunal grant financial compensation for violation of the selection process, in which the Appellant maintained their candidacy was not given a fair full and fair consideration.

63. In its response, the Bank argued that the decision not to short-list was based on the reasonable exercise of managerial discretion and it had given full and fair consideration to the Appellant's candidacy and that there was no evidence of bias by the Vice President.

64. The Tribunal in reaching its conclusions gave due consideration to the application of the Directive on the Appeals Process, EBRD regulations and the Staff Handbook. The Tribunal took into account the ARC's report and findings of fact. It concluded that the facts did not support unfairness or partiality and affirmed the PARD. The Tribunal dismissed the Appeal.

65. The Tribunal recommended that the Bank develop a procedure for documenting the reasons why individual candidates have or have not been short listed, which would allow future assessment of whether fair and impartial decisions have been made, should the need arise.

66. Actions of the Bank in implementing the decision:  
Since the time of the decision appealed, the Bank has implemented a new Procedure on Filing Vacant Positions on 1 April 2019 and has introduced guidance to strengthen its recruitment functions, with a view to ensuring that selection processes are adequately documented. The Bank has also automated recording of interview feedback as part of the selection process.



### **PART III INFORMATION REGARDING THE ADMINISTRATIVE TRIBUNAL, ITS COMPOSITION AND ITS ACTIVITY**

67. On 23 March 2006, the Board of Directors approved the *Review of the Grievance and Appeals Procedures (BDS06-039 final)*, and on 25 July 2006 it approved the implementation of the Appeals Procedures (BDS06-132 and BDS06-132(rev1)). The Appeals Procedures became effective on 3 December 2007 upon the appointment of the judges of the Administrative Tribunal. As of 1 April 2019, the Appeals Procedures were transposed into the new “directive” template and became the Appeals Process Directive (DIR/2019/14).

68. Section 2.02 of the Appeals Process Directive provides as follows:

- (a) The Tribunal shall consist of five members, all of whom shall be nationals of different member states of the Bank.*
- (b) The members shall be persons of high moral character and possess the qualifications required for appointment to high judicial office or be lawyers or arbitrators expert in the areas of employment relations, international civil service or the administration of international organisations.*
- (c) No member shall be a current or former staff member or officer or current or former member of the Board of Directors or the Board of Governors.*
- (d) The members of the Tribunal shall be appointed by the Board of Directors on recommendation of the President after consultation with the Vice President, Human Resources and Corporate Services & Chief Administrative Officer, the General Counsel and the Staff Council. The President may also appoint a selection committee to assist him to identify the recommended appointees. The members of the Tribunal shall serve for a term of three years (except for the first five members whose terms will be staggered as follows: three for two years and two for three years) and may be re-appointed. A member of the Tribunal may only be removed from office by the Board of Directors based on a recommendation of the President (in consultation with other members of the Tribunal) that the member in question is unsuited for further service.*

69. Appointments, re-appointments and resignations are submitted to the Board of Directors for approval – details of the documentation can be found in Annex 1.

70. Since the last Annual Report of the President of the Administrative Tribunal, dated 4 May 2019, there have been no changes to the composition of the Administrative Tribunal which is as follows:<sup>1</sup>

Professor Giuditta Cordero-Moss: appointed on 3 December 2007 with an end date of 2 December 2020

Professor Spyridon Flogaitis: December 2016 - ongoing (current appointment end date is 2 December 2022)

Michael Wolf: December 2016 - ongoing (current appointment end date is 2 December 2022)

Chris de Cooker: December 2018 - ongoing (current appointment end date is 2 December 2021)

Maria Vicien Milburn: December 2018 - ongoing (current appointment end date is 2 December 2021)

71. The Administrative Tribunal convened in May 2019 and again in October 2019.

In May 2019, the judges newly appointed in December 2018 were presented the Appeals Process Directive and introduced to officers of the Bank, including HR, OGC, Staff Council and the Staff Legal Advisor.

72. In October 2019, judges met to deliberate cases EBRDAT 2019/AT/02+03+04+05 and 06. With regard to 2019/AT/02+03+04+05, it was agreed to hold a preliminary hearing to deliberate jurisdiction, which took place in January 2020. The decisions were rendered on 20 February 2020. The decision for 2019/AT/06 was rendered on 4 October 2019.

73. In October 2019, HR published an interview with the President of the Administrative Tribunal. This initiative followed the request for a more informal understanding of the work of the Administrative Tribunal. The request had been presented at the BAAC meeting of 15 May 2019 by Members of the Board of Directors. The interview can be found in Annex 3 of this report.

74. Other than transposition into the new “directive” template, there have been no changes

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<sup>1</sup> The résumés of judges can be found in Annex 2.

to the Appeals Process Directive since it was last amended in 2018. The new version in the “directive” template issued in April 2019 contained some clarifications and editorial improvements. This Directive sets out the processes that shall be followed in an appeal against an Administrative Decision which allegedly is in breach of a Staff Member’s Terms and Conditions of Employment.

75. The Administrative Tribunal is assisted in its work by the AT Secretariat, who is appointed by the President of the Bank. The function of the AT Secretariat is documented in the Appeals Process Directive and Rules of Procedure.

## PART IV CONCLUSION

76. In the last three years the number of Appeals filed with the Tribunal, which has been very low in the first ten years of the AT existence, has steadily increased. In 2019, nine Appeals were filed, and as of 13 March 2020 five Appeals have already been filed for the current year. In addition, as compared to the past, Appeals seem to present more questions of a procedural character – regarding, for example, jurisdiction, admissibility or requests for joinder. Appeals, therefore, have become more numerous and more complicated.

77. In the course of the period in question, several issues were discussed within the Tribunal in plenum for the purpose of ensuring consistency of decisions in matters of general relevance. This led, among other things, to a proposal by the President of the Tribunal to OGC (submitted on 10 February 2020) to amend the Appeals Process Directive and the Rules of Procedure so as to permit that the Tribunal make decisions in plenum, as well as that it determine joinder of proceedings on its own initiative.

78. While the discussion of certain technical issues may be done using electronic means of communication, several judges have expressed the desire that more complicated issues be discussed in person. On this basis, the Tribunal convened in October 2019 to discuss the issue of jurisdiction on Appeals where the status of de facto employee is claimed. As the Tribunal did not reach a uniform position on this matter, an oral hearing on the issue was organised, which took place in January 2020.

79. On the basis of the foregoing, and in view of the increased number and complexity of the Appeals, the President of the Administrative Tribunal confirms the advisability that the judges periodically meet representatives of all stakeholders in the administrative review process, and that they periodically convene to discuss procedural matters and other issues, with a view to ensure competent exchange and a consistent practice. Accordingly, the President of the Administrative Tribunal considers that it would be beneficial for the Bank and the Administrative Tribunal that the judges convene twice a year in a two-day (maximum three-day) seminar. Administrative Tribunal seminars would be planned so as to also include meetings with representatives of the Bank, the Staff Council, the Ombudsman and the Administrative Review Committee for general discussion of any relevant systemic issues. The President of the Administrative Tribunal will discuss with the management a budget proposal to support this recommendation and enable the seminars to take place on a regular basis.

**ANNEX 1 BOARD DOCUMENTATION ON APPOINTMENTS AND RE-APPOINTMENTS OF JUDGES SERVING ON THE ADMINISTRATIVE TRIBUNAL DURING 2019**

09/11/2018 BDS18-212 [Appointment of three members of the Administrative Tribunal:](#)

Professor Cordero-Moss (3 December 2018 - 2 December 2020)

Christopher De Cooker and Maria Vicien-Milburn (3 December 2018 - 2 December 2021)

28/10/2019 BDS19-162 [Appointment of two members of the Administrative Tribunal:](#)

Michael Wolf and Professor Spyridon Flogaitis (3 December 2019 - 2 December 2022)

## ANNEX 2 CURRICULA VITAE OF JUDGES SERVING ON THE ADMINISTRATIVE TRIBUNAL DURING 2019

**Prof Giuditta Cordero Moss** (Norwegian), President of the EBRDAT, Dr. juris (Oslo), PhD (Moscow), is professor of International Commercial Law, Private International Law and International Commercial Arbitration at the University of Oslo. An originally Italian lawyer, she practiced as a corporate lawyer and acts now as arbitrator in international commercial and investment disputes. In her academic work and as an arbitrator, she deals among other things with questions of labour law, including questions of applicability of rules protecting the employee. She is, among other things, Vice Chairman of the Board of the Financial Supervisory Authority of Norway (since 2014), member of the Norwegian Tariff Board (since 2015), delegate for Norway at the UNCITRAL Working Group on Arbitration (since 2007).

**Mr Michael Wolf** (American) has been an arbitrator and mediator since 1995, specializing in labour, employment and pension benefit disputes. He currently serves as the Chair of the International Monetary Fund Grievance Committee and as Chair of the Board of Appeal for the Pan American Health Organization. He is also a member of the Administrative Tribunal for GAVI (formerly the Global Alliance for Vaccines and Immunization). He was previously Chair of the US Government Accountability Office Personnel Appeals Board and a member of the District of Columbia Employee Appeals Board. Prior to his service as an arbitrator, Mr. Wolf was in the private practice of law, specializing in labour, employment and securities litigation; he also served six years with the US Department of Justice supervising the prosecution of Nazi war criminals. He is the co-author of the book *Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities*.

**Prof Spyridon Flogaitis** (Greek) is Professor of Administrative Law at the Faculty of Law, University of Athens, Director of the European Public Law Organization, Athens, Greece and Honorary Fellow at Wolfson College, University of Cambridge. He currently is Vice-President of the European Space Agency's Appeals Board, a member of the European Organisation for the Exploitation of Meteorological Satellites' Appeals Board as well as a member of the European Centre for Medium-Range Weather Forecasts' Appeals Board. He is a former President of the United Nations Administrative Tribunal. Also, Prof. Flogaitis is Attorney at Law at the High Court and the Council of State, Greece and Academic Benchers of the Inner Temple, London. He has served three times as Minister of Interior or Alternate Minister of Foreign Affairs in electoral periods in his country.

**Mr Chris De Cooker** (Dutch) has more than forty years of direct experience in international administrative law. He was an academic for nine years at the University of Leiden, where he developed a special course on international administration. Between 1984 and 2011 (when he retired), Mr. De Cooker worked at the European Space Agency in a number of posts, including Head of Staff Regulations and Central Support Division and Head of International Relations Department. Since 2010, he has been a judge at a number of international arbitration and administrative tribunals. He is President of the NATO Administrative Tribunal and a judge at the Asian Development Bank Administrative Tribunal, the GAVI Appeals Tribunal and the OECD Administrative Tribunal. He is also Chair of the Appeal Board of the Global Fund, Chair of the BIPM Appeals Committee, and Mediator in ITER. He has been advising many international organisations, in particular on their respective internal justice systems.

**Ms Maria Vicien-Milburn** (Spanish and Argentinian) is an independent international arbitrator, specialist in public international law with extensive dispute resolution experience in arbitration, conciliation and negotiation. She is a member of the World Bank Sanctions Board and serves on the Independent Advisory Oversight Committee (IAOC) of the World Intellectual Property Organisation (WIPO). She has over 30 years' experience as a senior international civil servant at the United Nations. She was General Counsel of the United Nations Economic, Social and Cultural Organisation (UNESCO) between 2009 and 2014, and prior thereto Director of the General Legal Division, Office of the Legal Advisor of the United Nations. She served for 14 years as the Registrar of the United Nations Administrative Tribunal. She has also been engaged by the International Criminal Court on a short term assignment as a dispute resolution expert.

## **ANNEX 3 – TODAY ARTICLE - MEET PROFESSOR CORDERO-MOSS, PRESIDENT OF THE EBRDAT**

Posted in "Today" on 25/10/2019

*Professor Giuditta Cordero-Moss currently serves as President of the EBRD Administrative Tribunal (the "Tribunal"). The Tribunal forms an integral part of the Bank's internal dispute resolution system. Staff members have the right to appeal decisions that allegedly alter, in an adverse manner, or allegedly breach the terms and conditions of their employment with the Bank. The Tribunal decides disputes under the [Appeals Process](#) once a staff member has exhausted all appropriate channels for review under the [Administrative Review Process](#). If the Tribunal considers that an appeal is well founded, it can grant remedial measures and award financial compensation, including reasonable legal costs.*

*Following the recent publication of the Tribunal's [2018 Annual Report](#), Professor Cordero-Moss takes a moment to introduce herself and the work of the Tribunal.*

**First, for those of us unaware, what is the Tribunal, why is it required and what is its value to staff members of the Bank?**

The Tribunal is an independent judiciary body that decides disputes relating to employment or administrative matters between current or former staff members and the Bank. The Bank, like most intergovernmental organisations, enjoys a number of privileges and immunities, so to ensure staff members' fundamental right of access to justice is safeguarded, the Bank has established an internal dispute resolution system, of which the Tribunal serves as the forum of last resort.

**Is it unique for the EBRD to have its own Tribunal?**

Most intergovernmental organisations have an internal dispute resolution system comprising also an Administrative Tribunal. Many organisations have their own tribunal, such as the World Bank Administrative Tribunal, others have joined already existing tribunals, such as the Administrative Tribunal of the International Labour Organisation.

**Tell us about the current composition of the Tribunal. How are judges selected?**

The Tribunal consists of five judges, all nationals of different member states of the Bank. The current composition is: Myself, Professor Giuditta Cordero-Moss (Norwegian); Professor Spyridon Flogaitis (Greek); Chris de Cooker (Dutch); Michael Wolf (American); and Maria Vicien Milburn (Spanish and Argentinian). More about us can be found on the Tribunal's [website](#).

Judges are appointed by the Board of Directors following an open, competitive selection process. As required under the Bank's Appeals Process, they must be persons of high moral character and possess the qualifications required for appointment to high judicial office or be lawyers or arbitrators expert in the areas of employment relations, international civil service or the administration of international organisations.

**How long ago was the Tribunal established and why is it needed?**

The Tribunal in its current form was established in 2007 and has been hearing appeals for more than 11 years. It superseded the Appeals Committee which was established in 1992 and was the body designated to review employment disputes with the Bank.



### **What motivates you to serve on the Tribunal?**

The internal dispute resolution system of international organisations has considerable significance for the legal position of the organisations' staff members, their work situation, professional prospects and working environment. It also has significance for the management and functioning of the organisations. In addition, it has significance for the legitimacy of the international legal regime applicable to intergovernmental organisations, and the Tribunal has an important part to play as the forum of last resort for internal disputes.

### **What past experience do you bring to the Tribunal and how does it inform your views on cases?**

I have been a professor of law for the past couple of decades, and before that I was a practicing international lawyer for about a decade. I have been active in the field of international arbitration and litigation, in the field of international law and also labour law – both from the practical point of view, and as a scholar. It is quite useful to the legal reasoning to have practical experience within the intricate landscape of international legal relationships, as well as academic knowledge of which sources are applicable and how the different sources relate to each other. I should also mention that my experience as a chair of international arbitral tribunals contributes to an efficient case management. Also, my personal experience as an Italian lawyer who lives and works in Norway and worked a lot in the Russian Federation, as well as my engagement in various international organisations, contributes to the understanding of the international setting.

### **How do cases come before the Tribunal?**

If an existing or former staff member of the Bank wishes to submit a Statement of Appeal it is important they have first exhausted the process set out in the Administrative Review Process. The staff member then has a right to appeal against an "Administrative Decision" which allegedly alters in an adverse manner, or is in breach of the terms and conditions of employment applicable at the time the Administrative Decision was taken.

The next step would be for the staff member to submit a Statement of Appeal via the Tribunal Secretariat. The time limit to do this as well as the form of the Appeal is laid out in the [Appeals Process](#). As President of the Tribunal, I first review the submission to ensure it satisfies the various requirements set out in the Appeals Process and instruct the Secretariat to provide a copy of the Appeal to the Bank.

### **What types of cases come before the Tribunal?**

These can vary and during my time serving on the Tribunal have included, i.a. matters related to performance appraisals, pay awards, promotions, transfers and termination of employment. The Tribunal has also been asked to look at perceived injustices relating to the application of the Staff Rules and Regulations, tax and contractual circumstances.

### **Does management comply with the Tribunal's decisions?**

Yes. In the Annual Reports, we include input from management confirming that they have fully complied with any requirements to changes, improvements or monetary awards as recommended in decisions issued by the Tribunal.

### **What would you say to a staff member who asks whether they should trust in the Tribunal?**

The Tribunal is an independent judiciary body with the function of ensuring that the rights of staff members are not infringed by arbitrary or abusive conduct by the Bank. It consists of highly recognised and qualified professionals who are aware of the importance of the Tribunal's function, and take it very seriously. The Tribunal carefully applies all principles ensuring due process, including being impartial, giving both parties the possibility to be heard, applying the applicable law and giving reasons for its decisions.

#### **How do you measure the success or effectiveness of the Tribunal?**

The decisions rendered by the Tribunal may not be appealed. Their success is determined by the ability to solve the dispute at issue in a satisfactory way, and in a way that can give guidelines for future conduct in comparable situations. Regarding efficiency, a glance at the Tribunal's Annual Reports shows that the Tribunal renders its decisions within very short time frames. The Tribunal is aware of the importance of quickly resolving disputes in a working environment, and reacts quickly and by making use of modern means of communication to enhance efficient deliberations. However, the interest in deciding the disputes quickly has always to be balanced against the interest in permitting the parties to thoroughly present their case and enabling the Tribunal to take decisions on a sound basis.

*More information about the Tribunal can be found on the Tribunal's [website](#). Queries to or about the Tribunal may be directed to the Tribunal Secretariat at [ATSecretariat@ebrd.com](mailto:ATSecretariat@ebrd.com).*

*Questions about the Bank's Administrative Review or Appeals Processes may be directed to the [Staff Legal Adviser](#), who is available to provide independent legal advice to staff members. All communications between staff members and the Staff Legal Adviser are privileged and strictly confidential.*

*Questions about the Bank's internal dispute resolution system may be directed to the Employee Relations team at [HREmployeeRelations@ebrd.com](mailto:HREmployeeRelations@ebrd.com).*

**ANNEX 4 GLOSSARY OF TERMS**

Appeal	Statement of Appeal
APs	Appeals Process Directive
ARC	Administrative Review Committee
AT	Administrative Tribunal
CCO	Chief Compliance Officer
CDPRs	Conduct and Disciplinary Rules and Procedures
EBRD	European Bank for Reconstruction and Development
EBRDAT	EBRD Administrative Tribunal
HRBP	Human Resources Business Partner
ILOAT	Administrative Tribunal of the International Labour Organisation
IMF	International Monetary Fund
LM	Line Manager
MDHR	Managing Director Human Resources
OCCO	Office of the Chief Compliance Officer
OH	Occupational Health Service
PARD	President's Administrative Review Decision
RRAD	Request for review of an Administrative Decision
ROPs	Rules of Procedure
RWPs	Harassment Free and Respectful Workplace Procedures
Tribunal	EBRD Administrative Tribunal
VPHR	Vice President responsible for Human Resources
WBAT	World Bank Administrative Tribunal