**2006/AT/04**

# EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

# ADMINISTRATIVE TRIBUNAL

***Appellant v EBRD (Respondent)***

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## DECISION ON REMEDY AND JUDGMENT

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**HEARING held at EBRD, London Headquarters, on 26 February, 5 March and 7 March 2007.**

**APPELLANT (in attendance) assisted by Charles Ciumei, Counsel, Ceri Lawrence and Stephen Gummer, Solicitors, and Elizabeth Hoare, Trainee Solicitor.**

**RESPONDENT (in attendance through Sheila Bates, Client Manager, Finance and Risk Management) assisted by John Cavanagh QC and Matthew Harvey, Counsel, Office of the General Counsel.**

**ADMINISTRATIVE TRIBUNAL**
**President:**
**Professor Roy Lewis**
**Assessors:**
**Frank Ryan, Manager, Business Information Centre**
**Dilek Macit, Director, Consultancy Services Unit**
**Secretariat:**
**Cecilia Russell and Lucie Newman.**

**Pursuant to section 6.01 of the Grievance and Appeals Procedures ("the GAP") the President of the Tribunal consulted the Assessors during the hearing and in conference on 3 April 2007.**

## DECISION ON REMEDY

**THE WITHOUT PREJUDICE/VICTIMISATION ISSUE**

**(1) As regards the meeting between the Appellant and [Employee 15] on 19 February 2007:**

**(a) [Employee 15]'s comments at the meeting did not amount to the victimisation of the Appellant within the meaning of section 10.02 of the GAP.**

**(b) The without prejudice rule applies to the meeting.**

**(c) Evidence about the meeting is therefore inadmissible in connection with any issue concerning the Appellant's remedy.**

**REMEDY**

**(2) The Tribunal rejects the Appellant's request that it should exercise its power under section 9.03(b) of the GAP to make a non-binding recommendation to the President of the Bank for the incorporation of a detailed consultation procedure into the Staff Handbook.**

**(3) The Tribunal rejects the Appellant's request that it should exercise its power under section 9.04 of the GAP to order the Respondent to appoint him to [his requested] position [at the level] of Director.**

**(4) Pursuant to section 9.04 of the GAP, the Tribunal orders the Respondent to pay to the Appellant by no later than 25 April 2007 the sum of £50,800 gross.**

**(5) The gross sum is calculated as follows:**

**(a) The Respondent made a decision - to transfer the position of [Position 1, Part A] to [Office 2] and to reassign the Appellant to a position in [Group 2] in violation of the applicable procedure.**

**(b) Had the Respondent not acted in this way, the Appellant would have had a 40% chance of either remaining in his**

**original position or of being reassigned to a suitable alternative position.**

**(c) The Appellant's losses are assessed as follows:**

**£6,000 for loss of annual bonus in [Year X+16];**
**£5,000 for loss of annual bonus in [Year X+17];**
**£90,000 for loss of career prospects;**
**£6,000 for future loss of annual bonus;**
**£20,000 for injury to feelings.**

**The Appellant's total losses thus amount to £127,000.**

**(d) The gross sum payable is 40% of £127,000.**

**COSTS**

**(6) The Appellant's legal costs up to 12 February 2007, set out in the amended schedule of costs dated 22 February 2007, are "reasonable legal costs" within the meaning of section 9.06 of the GAP.**

**(7) Pursuant to section 9.06 of the GAP, the Respondent is ordered to reimburse the Appellant for all the legal costs set out in the amended schedule referred to in the previous paragraph.**

**(8) The question of costs from 13 February 2007 onwards will be dealt with in the way outlined in paragraphs 103-109 of the Judgment.**

**Professor Roy Lewis**
**President**
**Administrative Tribunal**
**4 April 2007**

## JUDGMENT

### SECTION 1 - INTRODUCTION

1. The Administrative Tribunal issued a Decision and Judgment dated 5 January 2007 on the Respondent's liability. In dispute was the Respondent's decision (a) to transfer the position of [Position 1, Part A] from [Office 1] to [Office 2], and (b) to reassign the Appellant from the position of [Position 1, Part A] and [Position 1, Part B] to the position of [Position 2] (retaining the title of [Position 1, Part A]) for [Group 2]. The Tribunal dismissed the Appellant's claims that the Respondent's decision was arbitrary within the meaning of section 4.04 of the GAP or discriminated against him in an improper manner within the meaning of the same section. However, it upheld his claims that the Respondent's decision was carried out in violation of the applicable procedure within the meaning of section 4.04 and that he had been demoted by virtue of this decision.

2. At the remedies hearing the Appellant gave evidence on his own behalf. Evidence on behalf of the Respondent was given by three witnesses, whose [relevant] job titles were those applicable at the material time: [Employee 7], [Group 2] Director; [Employee 23], Human Resources; and [Employee 15], Human Resources. All the witnesses had witness statements. In addition, a schedule of loss and a schedule of costs were produced on behalf of the Appellant.

3. In advance of the hearing the Tribunal was provided with an agreed bundle of documents. This was supplemented with extra papers during the course of the hearing.

## SECTION 2 – THE WITHOUT PREJUDICE/VICTIMISATION ISSUE

4. The remedies hearing was by definition intended to deal with remedies, together with costs. However, the Tribunal also had to respond to an allegation by the Appellant that he had been victimised by [Employee 15] and to the Respondent's contention that the alleged victimisation (which was denied) arose at a "without prejudice" meeting, evidence in relation to which was inadmissible. The without prejudice/victimisation issue complicated and lengthened the remedies hearing. It has had a similar impact on this Judgment.

### How the without prejudice/victimisation issue arose

5. The complications became apparent in the latter part of Friday 23 February 2007, which was the last working day before the remedies hearing on Monday 26 February. The timed sequence of emails with attached documentation was as follows:

   (1) At 16.14 a written submission on behalf of the Respondent was filed with the Administrative Tribunal. This was in accordance with the Tribunal's Directions of 25 January 2007 that the parties should produce their skeleton arguments on remedies and costs on or before 17.00 on 23 February.

   (2) At 17.42 the Appellant produced a document entitled: "third witness statement of [the Appellant]". His first witness statement had been produced for the hearing on liability. His second witness statement was signed and dated 8 February 2007 and was included in the agreed bundle of documents for the remedies hearing, together with the witness statements of [Employee 7] and [Employee 23]. The third witness statement dealt with matters discussed by the Appellant and [Employee 15] at a meeting that had taken place on Monday 19 February. Specifically, the Appellant alleged that [Employee 15] had told him that taking a case through the GAP was an exit strategy and that in [Employee 15]'s opinion nobody in the Bank would wish to work with the Appellant. The Appellant took these alleged comments to be a threat to terminate his employment.

   (3) At 18.02 Matthew Harvey on behalf of the Respondent emailed the Tribunal and the Assessors asking that the Appellant's third witness statement should not be read because it related to matters that were without prejudice.

(4) At 18.46 a written submission on behalf of the Appellant was produced. Attached to it was the Appellant's third witness statement. The submission referred to the Appellant's statement in some detail and asked that it be read.

6. The two Assessors read these documents in the order that they were received in their inboxes. It followed that they read the Appellant's third witness statement before they saw the Respondent's request that they should not read it. On returning from holiday on Sunday 25 February the Tribunal President read hard copies of the parties' submissions, which had been posted to him, including the Appellant's third witness statement, before he accessed his emails. He thus read the Appellant's statement before he saw the Respondent's request that it should not be read.

**The hearing on 26 February**

7. At the hearing on 26 February the legitimacy of the Appellant's third witness statement was disputed by the Respondent.

8. The Respondent denied that [Employee 15] had made any threat, and argued that the Appellant's third witness statement fell foul of the without prejudice principle and should therefore be ruled by the Tribunal to be inadmissible. A ruling on inadmissibility was the Respondent's first and preferred option. While reserving its right to argue that the statement was inadmissible, the Respondent nevertheless suggested by way of a second option that it should be given an opportunity to take instruction from [Employee 15], who would produce a witness statement, and that the remedies hearing should be relisted for a further two days.

9. It was argued on the Appellant' s behalf that his third witness statement was not contrary to any without prejudice rule, and that it was relevant to one of the evidential issues concerning remedy, namely, whether the Appellant's career prospects had been damaged. The Appellant added that, if an adjournment was now necessary, it was in any event doubtful whether the disputed issues on remedy could have been disposed of within single day. In response to a question from the Tribunal President, it was clarified that the Appellant was alleging that

[Employee 15]'s comments amounted to an unlawful threat of victimisation within the meaning of section 10.02 of the GAP.

10. Having listened very carefully to these arguments the Tribunal decided in all the circumstances, including the fact that the Appellant's witness statement had been read, to issue a direction along the lines of the second option proposed by the Respondent. Accordingly, the remedies hearing was re-listed for 5 and 7 March 2007 and, in the meantime, [Employee 15] was to produce a witness statement.

**Developments on 1 March**

11. On Thursday 1 March there were two further developments, which added to the procedural complexities.

12. First, the Appellant formally referred his allegation to the Office of the Chief Compliance Officer (OCCO). He complained that [Employee 15] had at the meeting of 19 February 2007 victimised him for pursuing his appeal under the GAP and he requested OCCO to carry out an investigation.

13. Second, the Respondent put in a written submission to the Tribunal on the without prejudice issue, which had attached to it [Employee 15]'s witness statement. The submission invited the Tribunal to make a ruling on the without prejudice issue at the outset of the hearing on 5 March 2007. Specifically, the Tribunal was invited to rule that evidence concerning the discussions at the meeting of 19 February was inadmissible and could not be relied upon by the parties or taken into account by the Tribunal in dealing with any issue concerning remedies.

**Communications from OCCO on 5 March**

14. At 8.52 on the morning of 5 March [Employee 20], Deputy Chief Compliance Officer, sent an email to the Appellant acknowledging receipt of his complaint. This email stated that OCCO took the Appellant's complaint as being an allegation that [Employee 15] had contravened section 10.02 of the GAP.

15. At 9.06 on 5 March [Employee 20] sent an email to the Administrative Tribunal, with copies to the parties. This email explained that the Appellant had made a complaint of

victimisation to OCCO, which would be subjected to a preliminary assessment, and asked the Tribunal for an up-date on the Appellant's appeal.

16. Although it had been made clear at the hearing on 26 February that the Appellant regarded [Employee 15]'s alleged comments at the meeting of 19 February as victimisation, [Employee 20]'s email was the first indication to the Respondent and to the Tribunal, that the Appellant had in fact made a formal complaint to OCCO.

**The decision on 5 March to hear the evidence**

17. The Respondent asked the Tribunal to decide at the outset of the hearing on 5 March that the evidence about the meeting of 19 February was inadmissible. It argued that the vital importance of the without prejudice rule was such that all the evidence concerning the meeting on 19 February was inadmissible. The Respondent also argued that, if the Tribunal declined to make a decision along these lines at the outset, the remedies hearing should be stayed, or partially stayed, in order to allow OCCO to conduct an investigation. Part of the justification for a stay, according to the Respondent, was that the Tribunal could make findings of fact that might have adverse implications for [Employee 15] in any subsequent disciplinary proceedings, whereas OCCO was the appropriate body to investigate such matters in the first instance.

18. The Appellant's position was that the Tribunal ought not to make a ruling at the outset on the without prejudice issue, and that, if it did, it should find that the without prejudice rule either did not apply or was not contravened in the circumstances. Further, the Appellant was opposed to the stay envisaged by the Respondent because of the likely delay that it would entail.

19. After carefully considering these arguments, the Tribunal decided that it would not rule that the evidence about the 19 February meeting was inadmissible without hearing the evidence, and further that it would not stay, or partially stay, the proceedings pending an investigation by OCCO. In reaching these conclusions the Tribunal agreed with the Respondent that the without prejudice rule was a matter of immense importance. However, the following considerations also weighed heavily:

(1) In advance of the commencement of the hearing the witness statements of both the Appellant and [Employee 15] had been read.

(2) The meeting of 19 February could have had a bearing on one of the disputed issues on remedy, namely, whether or not the Appellant's career prospects had been damaged.

(3) At the hearing on 26 February the Respondent had not suggested that the only course for the Tribunal was to rule that the evidence concerning the meeting of 19 February was inadmissible, although that was its preferred option. The Respondent itself had formulated the second option, namely, that instruction would be sought from [Employee 15], who would produce a witness statement, and that the remedies hearing would be listed for two days. Thus, albeit with strong misgivings, the Respondent had fully participated in the process whereby the Tribunal had been provided with and read [Employee 15]'s statement.

(4) At the hearing on 26 February the Respondent did not, as it might have done, applied for a stay of the proceedings before the Tribunal pending an investigation by OCCO into the Appellant's allegation of victimisation. An application of that kind could have been made, irrespective of whether or not the Appellant had at that time formally referred his complaint to OCCO.

(5) Delay, possibly substantial delay, was likely if the Tribunal proceedings were stayed while OCCO investigated followed by the resumption of proceedings after OCCO reported.

(6) The Tribunal was currently seized of the matter and the most expeditious and practical course was for it to complete the task in hand.

20. At the close of the hearing on 5 March the Tribunal President directed that a note be sent to [Employee 20], with copies to the parties, by way of a reply to his inquiry. The note informed him that the Tribunal was fully aware of the Appellant's complaint to OCCO; the remedies hearing had started and was continuing; and the Tribunal would be considering issues arising from the Appellant's and [Employee 15]'s witness statements.

**Tribunal's decision on the without prejudice/victimisation issue**

21. The without prejudice/victimisation issue now falls for determination in the light of the evidence.

*Findings of fact*

22. It is necessary in the first place to make findings of fact about what was said at the meeting of 19 February and the background to and context of this meeting. These findings are based on the written and oral evidence of the Appellant and [Employee 15]. In some but not all respects there was a conflict of evidence between the two. Witness credibility is therefore a consideration. It has to be said that the Tribunal did not find either of these individuals wholly satisfactory witnesses.

23. [Employee 15] gave clear and succinct answers to some questions, but in response to other questions he gave long and evasive answers that did not address the straightforward points that were being put to him. The Appellant not surprisingly appeared to be under a great deal of strain. He was vague in some of his answers, particularly about his knowledge and understanding of the background to and context of the meeting of 19 February. Indeed, he gave the impression of not fully understanding this background and context, either through naivety or because the strain he was under affected his understanding. Nevertheless, after considerable exposure to the Appellant as a witness in both the liability and remedy hearings, the Tribunal regards him as essentially truthful. If he maintains that a particular remark was said, it probably was said.

24. The Tribunal makes the following findings of fact:

    (1) Over a period of time there had been discussions involving the parties and their lawyers with a view to settling the Appellant's case.

    (2) On 14 February 2007 the parties' lawyers discussed possible settlement terms if the Appellant left the Bank's employment. The Appellant was aware of this discussion.

    (3) The lawyers on both sides agreed, or at the very least understood, that there would be a face to face meeting

between the Appellant and [Employee 15] without them being present.

(4) On Monday 19 February 2007 [Employee 15] called the Appellant to a meeting. He did not indicate the subject in advance, but the Appellant knew that only he and [Employee 15] would be in attendance.

(5) At the beginning of the meeting [Employee 15] stated that he had been advised by the Respondent's lawyers to say that the meeting was "without prejudice".

(6) The discussion at the meeting covered the following topics:

(a) The Appellant's proposal, which was set out in his second witness statement and his schedule of loss, for the Bank to offer him [his requested] position [at the level] of Director.

(b) Whether the Bank had any other position to offer him.

(c) The Appellant's schedule of loss.

(d) The amount that the Appellant would want if he were to leave the Bank.

(e) The Appellant's entitlements upon leaving the Bank with reference to the Staff Handbook's provisions on redundancy.

(7) During the course of this discussion [Employee 15] made certain comments. These included remarks upon the following lines: he described the Appellant's schedule of loss as either "amusing" or "amazing"; he said that "the Tribunal route" was "an exit strategy" and that in his view "nobody would wish to work with someone who had sued the Bank"; he said he was trying to "mediate", although he acknowledged that he represented the Bank and knew the views of the lawyers and [Employee 7].

*Summary of the parties' main submissions*

25. The Respondent's main submissions were as follows:

(1) It was a central tenet of all legal practice, including international administrative law, that without prejudice discussions were confidential and should not be disclosed to the judicial body.

(2) [Employee 15]'s version of events was to be preferred to that of the Appellant. However, whether the Tribunal accepted the Appellant's or [Employee 15]'s version of events, the meeting of 19 February was without prejudice.

(3) If without prejudice material was admissible under the GAP, or the successor structure, it would fundamentally undermine the ability of both the Bank and its employees to resolve disputes. In the absence of the without prejudice principle, neither side would be willing to negotiate and every dispute would have to be processed formally.

(4) The Appellant ought not to be allowed to introduce such material through a process of litigation by ambush, as had occurred in this case, or at all.

26. The Appellant's main submissions were as follows:

(1) It was not self-evident that the without prejudice rule applied to proceedings before the GAP.

(2) If such a principle did apply in general, the meeting of 19 February was not covered by it. The without prejudice rule was not absolute. It could not be used as a cloak for threatening the Appellant with the termination of his employment.

(3) The Respondent should not be allowed to argue in open evidence that there had been no damage to the Appellant's career prospects when in reality he had been threatened with the termination of his employment.

(4) The threat had been made by [Employee 15] who played an important role in annual salary and bonus allocations and in the appointment and promotion of senior managers.

*The applicable legal principles concerning without prejudice discussions*

27. One would expect that any national legal system, whether operating under the common or civil law, would have a rule about without prejudice discussions. A without prejudice rule means that the parties' written and oral communications made for the purpose of seeking to settle a dispute may not normally be admitted in evidence before a judicial body. The justification for the rule is that the parties should be free to try to settle a dispute without fear that matters written or said in negotiations would be used in evidence thereafter. Without a general rule along these lines, negotiations with a view to settlement of disputes would be very severely hampered. However, the rule is not absolute. In exceptional circumstances, it may be appropriate for a judicial body to scrutinise the content of the parties' communications in order to determine whether one of the parties had sought to use the without prejudice rule as a cover for impermissible conduct.

28. Similar general principles apply under international administrative law. In this field, the status of the administrative tribunals and the procedures that lead up to them are akin to legal procedures and courts rather than domestic grievance procedures. This is because the staff employed by international institutions are generally precluded from complaining to the national courts by virtue of the international immunity accorded to these institutions. Turning specifically to the EBRD, this analysis applies to the GAP and to this Administrative Tribunal, which are substitutes for legal proceedings and of recourse to a national court.

29. The without prejudice rule operates for the benefit of both the Bank and its employees in that it permits free discussion and negotiation with a view to settling disputes that might otherwise culminate in formal, sometimes lengthy and not inexpensive proceedings under the GAP. There have indeed been a number of cases over the last few years where litigation before the Administrative Tribunal has settled, a process that was no doubt facilitated by the without prejudice rule. A similar without prejudice rule will undoubtedly apply to the EBRD's new structure, including proceedings before the Grievance Committee and the new Administrative Tribunal.

30. However, just as the without prejudice rule in a national system of law may be subject to certain exceptions, so also may

exceptions apply to the rule under international administrative law. Within the EBRD one such area of exception arises from section 10.02 of the GAP. This provides that appellants and witnesses shall not in any way be penalised or discriminated against in consequence of their involvement in the appeal process. Further, if it is established that adverse action has been taken against an individual in retaliation for involvement in the appeal process, this will be a ground for disciplinary action.

31. Section 10.02 is an essential guarantee of the integrity, fairness, and independence of the Bank's system of appeal. It follows that, if a senior officer of the Bank penalises an individual for having invoked or participated in the appeal process, the Bank cannot rely on the without prejudice rule to cover up this victimisation.

*The Tribunal's conclusions concerning the meeting of 19 February*

32. The Tribunal reaches its conclusions in the light of its factual findings, its understanding of the applicable legal principles, and after carefully considering the written and oral submissions made by both counsel.

33. The meeting of 19 February 2007 took place against the background and in the context of recent discussions on 14 February among the parties' lawyers on terms of settlement if the Appellant left the Bank's employment. The meeting began with [Employee 15] indicating that it was without prejudice. During the course of the meeting the discussion covered the Appellant's proposal for the Bank to offer him [his requested] position [at the level] of Director; whether the Bank had any other position to offer him; the Appellant's schedule of loss; the amount that the Appellant would want if he were to leave the Bank; and the Appellant's entitlements upon leaving the Bank. As part of this conversation, and also in the context of the preceding discussion between the lawyers, [Employee 15]'s comments included words to the effect that in his opinion taking a case under the GAP was an exit strategy and that nobody would now want to work with the Appellant.

34. These comments may not have been diplomatic or strictly necessary. However, given the background to and context of the meeting and the topics in fact discussed at the meeting, they cannot be equated with [Employee 15] penalising the Appellant or discriminating against him, or attempting to do so, because

he had brought proceedings under the GAP. They were just part of an ongoing negotiation process, albeit one that ended in failure. As far as the Tribunal is concerned, there was no breach of section 10.02 by [Employee 15][1].

35. The Tribunal concludes as follows. Given that there was no breach of section 10.02 of the GAP, the without prejudice rule applies to the meeting of 19 February 2007. It follows that evidence about this meeting is inadmissible in relation to any issue concerning the Appellant's remedy. Specifically, when the Tribunal comes to consider the question of whether or not the Appellant suffered damage to his career prospects, it will do so without any regard to what was said at the meeting of 19 February.

36. Finally, in view of the interest of OCCO in this matter, this Decision and Judgment will be sent to OCCO at the same time as being sent to the parties.

**SECTION 3 - REMEDIES**

37. The main provision in the GAP that must be applied is section 9.04. This is headed "prescription of remedial measures" and reads as follows:

> **If the Tribunal concludes that the appeal is well-founded, it shall prescribe measures to be taken by the Bank to rectify the administrative decision complained of and to correct the adverse effects of that decision on the appellant. The measures may include the payment of a sum of money, not to exceed three times the current (or if the employment has been terminated, the final) annual salary, that the Tribunal finds is due to the appellant and/or actions such as a pay increase, promotion, transfer, or reinstatement of employment.**

38. Reference is also made to section 9.05. This section is headed "compensation in lieu of remedial measures". It provides that the Tribunal shall fix an amount to be paid by the Bank as

[1] OCCO is of course free to reach its own conclusion on this question, which may or may not coincide with that of the Tribunal.

compensation should the Bank not implement a corrective measure other than the payment of money.

39. The other relevant measure is section 9.03(b). So far as is material, this provides:

> **The Tribunal, in its Report on an appeal or in a separate communication, may make non-binding recommendations or suggestions for the consideration of the President of the Bank on any matter that has come to the attention of the Tribunal in the course of the appeal.**

40. The "Report" is the same as the "Judgment" in the present document.

41. There were several heads to the Appellant's remedial claim. Each will now be dealt with in turn.

**Non-binding recommendation**

42. The Appellant requested the Tribunal to exercise its power under section 9.03(b) of the GAP by making a non-binding recommendation for consideration by the President of the Bank. Specifically, the Appellant asked the Tribunal to recommend that a detailed consultation procedure be drafted and included within section 3 of the Staff Handbook.

43. The Respondent opposed the Appellant's request. It pointed out that the Tribunal in its liability decision had already provided guidance on the minimum content of the consultation duty in section 3.73 of Staff Handbook. Beyond that, the exact nature in which consultation should be carried out would vary from case to case. The Respondent added that in general senior management and Human Resource should be left to initiate any changes to the Staff Handbook.

44. The Tribunal's guidance on the minimum content of the consultation duty is set out at paragraph 105 of the liability decision in the following terms:

> **Save for the need to consult prior to making the decision and to take the wishes of the employee into account, the**

**substantive content of the consultation duty is not expressly spelt out in the Handbook. But it is there by necessary implication. The minimum content of the consultation duty in section 3.7.3 is as follows. Consultation prior to a decision involves an explanation to the employee of what is being proposed, an opportunity for the employee to digest this information and to express his or her views on the subject, and the genuine consideration of those views by the Bank. If the employee expresses a reluctance to be moved, the subject of the consultation must also include a consideration with the employee of possible alternatives to the proposed reassignment. This is especially so where - as in the present case - the Bank does not purport to be demoting the employee for disciplinary or performance reasons.**

45. In the light of this guidance, the Tribunal considers that it is unnecessary to make a non-binding recommendation to the Bank President.

**The Appellant's request for a new appointment**

46. The Appellant accepted that he could not be reinstated to his previous position due to the lapse of time and the developments that had occurred since 1 September [Year X+15] when he was reassigned to his current position in [Group 2]. Instead he sought an order from the Tribunal that he be appointed to a director-level position within [Group 2], in particular to a [particular] position [he had proposed]. The envisaged post involved acting on occasion as a deputy to [Employee 7]. In addition, he claimed compensation under section 9.05 of the GAP if the Tribunal made the requested order and the Respondent failed to implement it.

47. The Respondent opposed the proposed order on a variety of grounds. One of these grounds was that it would not be appropriate for the Tribunal to create a new senior post. Another was that it would in any event be impracticable since [Employee 7] did not want or need a deputy.

48. The Tribunal's conclusion is as follows. The Tribunal has the power to make the order requested by the Appellant. According to section 9.04 of the GAP, if the Tribunal concludes that an appeal is well-founded, it must prescribe measures to be taken

by the Bank to rectify the administrative decision complained of and to correct the adverse effects of that decision on the Appellant. The measures may include, among other things, a promotion. One of the principal adverse affects of the Respondent's decision requiring correction in this case is that the Appellant was demoted. One way of correcting this would be to promote him up to a level comparable to his previous post of [Position 1, Part A].

49. However, the Tribunal declines to make the order requested by the Appellant on grounds of practicality. In the light of [Employee 7]'s evidence to the Tribunal that he did not want or need a deputy, the order would be neither practical nor enforceable. It follows that it is unnecessary for the Tribunal to deal with the Appellant's claim for compensation under section 9.05 of the GAP.

50. It was of course open to the Respondent to suggest alternative ways, apart from the directorship proposed by the Appellant, for correcting his demotion, which was one of the principal adverse effects on the Appellant of its decision to reassign him. The Respondent made no such suggestions. This prompted counsel for the Appellant to comment that the Respondent did not in practice fully accept the Tribunal's decision that the Appellant had been demoted. The Tribunal agrees that it is significant that the Respondent failed to suggest any way in which the Appellant's demotion might be corrected. It will treat this failure as a relevant consideration when it deals with the head of loss concerning damage to the Appellant's career prospects.

**Compensation**

*The appropriate general method of assessment*

51. Section 9.04 of the GAP provides that the Tribunal may award the payment of a sum of money (not to exceed three times the current annual salary) that the Tribunal finds is due to the Appellant. The stated purpose of this payment is "to rectify the administrative decision complained of and to correct the adverse effects of that decision on the Appellant".

52. The logic of a formulation focusing on the rectification of the offending decision and correcting its adverse effects on the Appellant is that any monetary sums awarded by the Tribunal should be broadly compensatory. In other words, the aim of

section 9.04 is to compensate the Appellant, not to punish the Respondent.

53. As noted above, the liability hearing concerned the Respondent's decision (a) to transfer the position of [Position 1, Part A] from [Office 1] to [Office 2], and (b) to reassign the Appellant from the position of [Position 1, Part A] and [Position 1, Part B] to the position of [Position 2] (retaining the title of [Position 1, Part A]) for [Group 2]. The Tribunal upheld the Appellant's claim that the Respondent's decision was carried out in violation of the applicable procedure within the meaning of section 4.04 of the GAP. It held further that the Appellant was demoted by virtue of the Respondent's decision.

54. The unlawful violation of the applicable procedure arose from the Respondent's failure to consult with the Appellant prior to making its decision. It arguably follows that his loss is subject to the likelihood, had he been properly consulted, of the Appellant remaining in his original post, or of being reassigned to an alternative suitable post that did not involve a demotion. This general approach to calculating compensation was advocated by counsel for the Respondent, and, in answer to a question from the Tribunal President, conceded by counsel for the Appellant. Predictably, counsel disagreed over the quantification of the likelihood: the Respondent suggesting that it was nil, or next to nil, and the Appellant suggesting that it was closer to 100%. Leaving the issue of quantification on one side, there was common ground between the parties over the general method of calculating compensation.

55. The Tribunal accepts that the general method advanced by the Respondent is correct in the circumstances of the present case. The Tribunal will therefore calculate the compensation due to the Appellant by deciding the following three questions: (a) the likelihood expressed as a percentage chance that, had the Appellant been properly consulted, he would not have been transferred out of his old position or would have been found a suitable alternative post not involving a demotion; (b) the losses expressed in terms of money suffered by the Appellant as a result of the Respondent making its decision in breach of its duty to consult; and (c) the amount of compensation payable by the Respondent to the Appellant after applying the percentage likelihood to the Appellant's loss.

56. However, in one important respect, the Tribunal rejects the approach advocated by the Respondent. This is the question of how compensation should take account of the Appellant's demotion.

57. The Tribunal's approach to this issue was signalled in general terms at paragraph 88 of its decision on liability:

> **The final question concerns the significance, if any, of the Appellant's demotion. The Tribunal accepts the Respondent's submission that, in the circumstances of this case, a demotion on the part of the Appellant did not mean that the Respondent's decision was arbitrary, or discriminatory, or was carried out in breach of the applicable procedure. However, if the Tribunal concludes for other reasons that the Respondent's decision should be characterised in one of these ways, then the demotion would have a bearing on the Appellant's loss. In other words, if there is liability on the part of the Respondent, the demotion goes to the Appellant's remedy.**

58. The Respondent was most reluctant to accept this logic. According to the Respondent, the Appellant's demotion should be effectively ignored for the purposes of calculating compensation. This proposition was put on the basis that the Respondent's only actionable unlawful act was a failure to consult and, as found by the Tribunal, the Respondent had the power to demote the Appellant in any event.

59. The Tribunal considers that the approach suggested by the Respondent to compensating for the demotion, or rather not compensating for it, is wrong. It is contrary to the letter and spirit of section 9.04 of the GAP. Under section 9.04, the Tribunal "shall" prescribe measures, including the award of a sum of money, to rectify the administrative decision complained of and to correct the adverse effects of that decision on the Appellant. One of the principal adverse effects of the Respondent's decision on the Appellant was that it in fact led to his demotion. If, as in the present case, a sum of money is the principal or only remedy, it must necessarily compensate for the demotion in order to correct the adverse effect of the Respondent's decision on the Appellant.

60. Once again, the Tribunal will return to this issue when it considers the head of loss concerning damage to the Appellant's career prospects.

*The percentage likelihood*

61. As noted above, the Respondent submitted that had proper consultation occurred the chances of the Appellant staying in his previous post was virtually nil. It contended further that there was no chance at all that any alternative post other than the one to which the Appellant was reassigned could have been offered. Both these submissions were said to be based on the evidence of the Respondent's witnesses. In contrast, it was submitted on behalf of the Appellant that, had proper consultation occurred, his chances of staying in his original position were closer to 100% than nil, or alternatively there was a very substantial chance that an appropriate alternative post would have been found for him.

62. The Tribunal's decision on liability included a number of conclusions, based on the Tribunal's evaluation of the evidence, that are relevant to this issue.

63. While holding that the Respondent's decision was not "arbitrary" within the meaning of section 4.04 of the GAP, at paragraph 100 of the liability decision the Tribunal commented:

> **The transfer of the [Position 1, Part A] post to [Office 2] before an overall plan for the reorganisation of the senior management of [Team 1] had been worked out may be viewed as premature...**

64. The way in which the Respondent failed to consult with the Appellant was also relevant, as will be clear from the following passage at paragraphs 110-111 of the Tribunal's decision on liability:

> **On the basis of what occurred at the meetings of 3 and 18 May, the Tribunal's conclusion is that the Respondent failed to consult in accordance with section 3.7.3 [of the Staff Handbook] in advance of the decision being made. It cannot be said that these two meetings involved a careful explanation to the Appellant of what was being proposed, an opportunity for him to digest this explanation before expressing his views on the subject,**

**and the genuine consideration of those views by the Respondent. Furthermore, given the Appellant's known practical inability to transfer to [Office 2] and his reluctance to be reassigned to [Position 2], which he expressed on 18 May, there was a failure on the part of the Respondent to explore with the Appellant possible alternatives to the proposed reassignment. This is not to suggest that a viable alternative would necessarily have emerged from a process of consultation, but the fact was the Respondent failed to discuss alternatives prior to the decision [being] made**

**It is noteworthy that the Respondent continued to fail to discuss possible alternatives to the [Position 2] reassignment with the Appellant in the meetings and email correspondence after 18 May [Year X+15]. In his email of 10 June the Appellant raised the question of whether possible alternative opportunities at [Office 1] involving managerial responsibilities might arise. On 15 June [Employee 8] specifically advised [Employee 9] not to respond to the Appellant's email and to press ahead with a 1 September implementation date. [Employee 9] acted on this advice.**

65. At paragraph 116 of the liability decision, under the heading of "breach not a mere technicality", the Tribunal concluded that the failure to consult could have had practical consequences:

**Finally, the breach of the applicable procedure in this case cannot be dismissed as a mere technicality that could have had no practical consequences. Had the Respondent properly consulted with the Appellant, one cannot say for certain what the outcome might have been. This is underlined by the facts that the Appellant's former [Position 1, Part A] position was left vacant from 1 September [Year X+15] onwards and that no decisions about the broader reorganisation of [Team 1] were made until February [Year X+16].**

66. The Tribunal's conclusion takes into account not only these cited passages but also the witness evidence and submissions heard at the remedies hearing. The Tribunal considers that there was a real chance, had the Respondent properly consulted the Appellant, that he would have stayed in his original position or would have been transferred to a suitable alternative position without involving his demotion. Reducing this chance to a precise percentage figure is by its nature arbitrary, but that is

what must now be done. The Tribunal concludes that, had the Appellant been properly consulted, he would have had a 40% chance of either staying in his original position or of being reassigned to a suitable alternative position.

*The Appellant's loss*

67. There was a large gap between the parties when it came to calculating the Appellant's past and future losses, together with a sum for injury to feelings. The Appellant claimed compensation totalling £273,000. The Respondent submitted that the Appellant maximum loss was between £500 and £1,500.

(1) Annual salary increase and bonus in [Year X+16] and [Year X+17]

68. The Appellant's first head of loss was for the years [Year X+16] and [Year X+17] in respect of (a) annual salary increase and (b) annual bonus. It was submitted on his behalf that he received less than he otherwise would have done because of the downward pressure on his salary stemming from his demotion. If, as the Respondent contended, the Appellant was relatively well paid, then it followed logically – on the Appellant's case – that his demotion would make him appear even more relatively well paid and thus exercise a progressive downward pressure on his annual salary increase and annual bonus. For [Year X+16] the Appellant claimed a 3% increase in salary (together with the Bank's pension contribution on the additional amount) and a bonus of a further 10.2 %, plus interest. For [Year X+17], the Appellant's claim was modified to take account of the actual figures for [Year X+17] that became available on the final day of the remedies hearing. The Appellant did not forego his claim in respect of the [Year X+17] salary increase but focussed mainly on the [Year X+17] bonus, in relation to which he claimed a further percentage increase of up to 5% of the amount in fact awarded.

69. The Respondent denied that there was any downward pressure on the annual salary increase or bonus flowing from the Appellant's demotion. It sought to demonstrate this by reference to the fact that in [Year X+16] and [Year X+17] both the salary increase and bonus awards, during the period when the Appellant was in [Group 2], were higher than in [Year X+15] when he was located in the [Group 1]. The Respondent emphasised that the biggest single factor was individual performance. However, in relation to [Year X+16] the Respondent acknowledged that the Appellant's bonus might

have been slightly depressed not by the demotion but because of the learning curve involved in taking up a new position.

70. The Tribunal's starting point is the available statistical information concerning the Appellant's annual salary increases and annual bonus awards. This is set out in the following table:

| Year | Salary(£) | % | Bonus | % |
|---|---|---|---|---|
| [Year X+9] | 93,000 | 3.2 | 10,000 | 11 |
| [Year X+10] | 95,093 | 2.25 | 10,000 | 10.75 |
| [Year X+11] | 99,000 | 4.1 | 15,000 | 15.77 |
| [Year X+12] | 100,000 | 1 | 14,000 | 14.14 |
| [Year X+13] | 101,000 | 1 | 12,000 | 12 |
| [Year X+14] | 102,500 | 1.48 | 12,000 | 11.88 |
| [Year X+15] | 102,500 | 0 | 5,000 | 4.87 |
| [Year X+16] | 104,450 | 1.9 | 6,500 | 6.3 |
| ]Year X+17] | 107,450 | 2.9 | 7,400 | 7.1 |

71. This table only relates to the salary and bonus of the Appellant and makes no comparison with others. However, for one year only the Tribunal was supplied with comparative data. In [Year X+16] in [Department 1] as a whole the average [Position 1, Part A] annual salary increase was 3.95% and the average bonus was 20.91%. For [employees at Level A in Department 1] the average salary increase was 4.81% and the average bonus was 15.59%. Within the [Group 2] as a whole, and without distinguishing between different grades of employees, in [Year X+16] the average salary increase and bonus award was respectively 4.7% and 14.8%.

72. For reasons that were explained in evidence by the Respondent's witnesses as well as by the Appellant, [Year X+15] was an abnormally poor salary increase year for senior employees based at [Office 1]. Disregarding [Year X+15], the table setting out the Appellant's annual salary increases does not support his case that his demotion exerted a downward pressure on his annual salary increase in [Year X+16] and [Year X+17]. In both of those years the annual salary increase was actually higher than his equivalent salary increase in [Year X+12], [Year X+13], and [Year X+14]. It true that the Appellant's annual salary for [Year X+16] was lower than many of his peers. However, the Tribunal accepts the Respondent's submission that this was explained by the Appellant's relative seniority and market position rather than by the effect of his demotion. In the light of this analysis,

the Tribunal rejects the Appellant's claim for loss of salary increase in [Year X+16] and [Year X+17].

73. The annual bonus increase is in a different category. The statistical evidence shows that the Appellant's annual bonus was much less than that awarded to his peers in [Year X+16], the one year for which comparisons with other employees are available. More tellingly still, it shows that his bonus for [Year X+16] and [Year X+17] was much lower than the bonus he received in every year from [Year X+9] to [Year X+14]. This gives substance to the Appellant's claim that his demotion exerted a downward pressure on his bonus, notwithstanding the importance of individual performance in the criteria for awarding bonus.

74. In the light of these considerations, the Tribunal accepts the Appellant's argument that his demotion exerted a downward pressure on his annual bonus in [Year X+16] and [Year X+17]. The Tribunal finds that the Appellant's loss of annual bonus was £6,000 in [Year X+16] and £5,000 in [Year X+17], giving a total loss of £11,000 over the two years in question.

(2) Damage to career prospects

75. The Appellant claimed £107,500, approximating to a year's salary for loss of career prospects. He sought to justify this claim by arguing that his demotion had a severe adverse effect on his career. Specifically, it stymied his likely next move within the Bank, for example, becoming a director for a smaller team than the [Team 1] or for one of a number of smaller countries or for a functional task reporting directly to a Group Director. He would now be perceived as having been forced to take a downward step into [a] back office function, whilst at the same time being stripped of his duties as [Position 1, Part A]. It was also argued on the Appellant's behalf that he would be handicapped in the external labour market where his reassignment would be viewed in a similar light.

76. The Respondent submitted that the Appellant had suffered no damage at all under this head. There was no indication that he would have been promoted had he stayed in his original position, which he had occupied for 10 years prior to his reassignment. The Appellant had not applied for posts involving promotion either before or after his reassignment. His insistence that he had to be based at [Office 1] was a self-

imposed curb on his promotion prospects. Further, the Respondent argued that, if anything, the reassignment to [Group 2] had enhanced such chances of promotion as he had because it broadened his experience. Finally, the Respondent challenged the Appellant's claim concerning his external marketability, given his age, his relatively high salary, and his lack of experience of actually working in [Country 1].

77. In reaching its conclusion on this head of loss the Tribunal has paid particular regard to the following matters:

(1) The Appellant had not sought promotion in the Bank or applied for jobs outside the Bank.

(2) He had been preoccupied with pursuing his grievance since August [Year X+15]. He could not therefore be expected to seek promotion or apply for jobs in the external labour market since then.

(3) The fact that the Appellant spent some 18 months pursuing a grievance, which the Tribunal eventually upheld, was likely to have complicated his working relationships with senior colleagues. That in turn would be unlikely to assist either his future career prospects in the Bank or the perception of his worth in the external labour market.

(4) The Appellant's reassignment involved a demotion. Notwithstanding any advantages of gaining a broader experience, the suggestion that the reassignment involved a net career benefit was unsustainable. The Tribunal specifically rejects the Respondent's submission, and [Employee 23]'s evidence on which it was based, that the Appellant's reassignment was to be seen as an enhancement of his future career prospects.

(5) Rather the Tribunal accepts the Appellant's submission that he would now be perceived as having been forced to take a downward step into [a] pure back office function, whilst at the same time being stripped of his duties as [Position 1, Part A]. This perception would be likely to damage his career prospects within the Bank and handicap him in the external labour market.

(6) The Tribunal's liability decision of 5 January 2007 held that the Appellant had been demoted by virtue of

the Respondent's decision to reassign him. One might have expected that the Respondent would have taken the opportunity to make suggestions as to how its decision could be rectified and specifically how one of its principal adverse effects on the Appellant - his demotion - could be corrected. Yet the Respondent did not make any suggestion along these lines before or during the remedies hearing. It was as if the Appellant's demotion had had little or nothing to do with the Respondent. The Respondent's witnesses appeared to be reluctant to acknowledge the Appellant's demotion, let alone suggest action to correct it. That in itself was indicative of damage to his career prospects.

78. In the light of these considerations the Tribunal concludes that the Respondent caused the Appellant to suffer substantial damage to his career prospects within the Bank and in the external labour market. The assessment of this loss does not lend itself to a precise arithmetical quantification. There is therefore an element of arbitrariness about it. However, with section 9.04 of the GAP in mind, it is incumbent on the Tribunal to indicate a global sum consistent with the aim of correcting the adverse effect of the Appellant's demotion on his career prospects.

79. In all the circumstances of this case, the Tribunal determines that the Appellant's loss under the head of future career prospects is £90,000. This figure approximates very roughly with 10 months' salary.

(3) Future loss of earnings

80. The Appellant claimed for future loss of earnings for 5 years (or 4 years if [Year X+17] is excluded) in respect of (a) his annual salary increase and (b) his annual bonus. The amount claimed in each case was in excess of £50,000. The Respondent contested this head of claim in its entirety.

81. As regards the annual salary, the Tribunal has already rejected the Appellant's claim for lost annual salary increase in [Year X+16] and [Year X+17] for the reasons explained at paragraph 72 above. If an award of money in respect of past loss of annual salary is not justified, there can be no basis for awarding a sum

to compensate for future loss in 2008-2011. The Appellant's claim for future loss of annual salary is therefore rejected.

82. As regards the annual bonus, the Tribunal has concluded that the Appellant's demotion exerted a downward pressure on his annual bonus in [Year X+16] and [Year X+17] (see paragraph 73 above). Projecting this trend into the future is subject to major difficulties such as the importance of individual performance in assessing bonus and uncertainty over the size of the bonus pool in any future year. The Tribunal will therefore make a modest assessment of the Appellant's loss of bonus for the period 2008-2011. It assesses this loss as £6,000.

(4) Injury to feelings

83. The Appellant claims the sum of £20,000 for injury to feelings. He sought to justify this amount by reference to a variety of factors, including the following: stress and anxiety as a direct result of the Bank's decision to demote him in breach of the applicable procedure; shock and disbelief on being told on 8 June [Year X+15] that a decision to reassign him had been made and that he had 48 hours to accept the [Position 2] role or move to [Office 2]; exacerbation of that shock by the Bank's continuing refusal to consult him in any meaningful way; public humiliation caused by the announcement of his reassignment since it was clear to everyone, except the Respondent, that he had been demoted; added humiliation stemming from the fact that the Appellant was a long service employee, who had built up a good professional reputation; on-going stress and strain due to having to work in a demoted position; further stress and strain caused by pursuing his grievance, which had at every stage been resisted by the Respondent; and anxiety arising from having to pay very substantial legal costs in connection with the grievance without any guarantee of reimbursement.

84. The Respondent suggested that an appropriate figure for the Appellant's injury to feelings was £500. This was on the basis that the Appellant did not suffer any significant injury to feelings as a result of the Respondent's failure to consult with him. Further, the Respondent argued that the Appellant's demotion should be disregarded altogether because the Bank was in any event entitled to demote him, which broke the chain of causation between the inadequate consultation and any injury to feelings.

85. The Tribunal considers that, irrespective of the demotion, the Appellant suffered injury to feelings as a result of the way in which the Bank failed properly to consult with him. Further, the Tribunal considers that it is also appropriate to award compensation to reflect the Appellant's injury to feelings in respect of his demotion. The demotion is therefore not only relevant to the damage to the Appellant's career prospects but also to the extent of the injury to his feelings. In general, the Tribunal accepts the Appellant's case on injury to feelings, including the amount claimed. It therefore agrees with the Appellant that his loss under this head should be assessed as £20,000.

*The Tribunal's conclusions on the amount of compensation*

86. The Tribunal's conclusions on compensation are as follows:

(1) Compensation is the only appropriate remedy in the circumstances of this case. It is the measure through which - in the language of section 9.04 of the GAP – the Respondent will be required to rectify the administrative decision complained of and to correct the adverse effects of that decision on the Appellant.

(2) The Respondent made its decision - to transfer the position of [Position 1, Part A] to [Office 2] and to reassign the Appellant to a position in [Group 2], which entailed his demotion - in violation of the applicable procedure.

(3) Had the Respondent not acted in this way, the Appellant would have had a 40% chance of either remaining in his original position or of being reassigned to a suitable alternative position.

(4) The Appellant suffered the following losses as a result of the Respondent's decision:

£6,000 for loss of annual bonus in [Year X+16];
£5,000 for loss of annual bonus in [Year X+17];
£90,000 for loss of career prospects;
£6,000 for future loss of annual bonus;
20,000 for injury to feelings.

The Appellant's total losses thus amounted to £127,000.

(5) Pursuant to section 9.04 of the GAP, the Tribunal will order the Respondent to pay to the Appellant 40% of £127,000,

that is, the Respondent will have to pay to the Appellant the sum of £50,800.

(6) Finally, it must be emphasised that the sum of £50,800 is gross. At the end of the remedies hearing it was pointed out by the Respondent that whatever gross figure the Tribunal might award to the Appellant by way of compensation would have to be netted, in accordance with the Bank's Tax Regulation, prior to payment. The Tribunal considers that that must be correct in relation to appropriate heads of loss.

*Interest*

87. The Appellant claimed interest on certain of his heads of claim to reflect the lapse of time since the loss was sustained. The Respondent did not challenge the principle of interest, although it did question the amount claimed.

88. Interest is not expressly referred to in section 9.04 of the GAP. During the remedies hearing the Tribunal President indicated that he was aware that the practice in the World Bank Administrative Tribunal was not to award interest as such but rather, where appropriate, to assess loss so as to include an element to compensate for delays that might have occurred. He indicated further that he would follow a similar practice in the present case.

89. Accordingly, where the head of loss is appropriate for this purpose, the Tribunal's quantification of loss, includes a modest element to compensate the Appellant for the lapse of time since incurring the loss.

## SECTION 4 – COSTS

### Relevant provisions in the GAP

90. The provisions in the GAP governing costs are sections 9.06, which deals with awards of costs against the Bank, and section 9.07, which deals with costs against appellants.

91. Section 9.06 provides:

**If it upholds an appeal, in whole or in part, the Tribunal may rule that the Bank should reimburse the appellant for any expenses, including reasonable legal costs, the appellant has incurred in presenting the appeal. Even though an appeal has not succeeded, the Tribunal may recommend that the Bank pay all or some of the appellant's costs. It shall do this only if it considers that the nature or merits of the appeal justify this and that the arguments and evidence presented by the appellant's lawyer contributed materially to the Tribunal's understanding of the issue.**

92. Section 9.07 provides:

**If the Tribunal concludes that the bringing or conducting [of[ an appeal was frivolous or vexatious, it may award costs against the Appellant.**

93. Also relevant is section 6.03, under which the Tribunal may grant an appellant permission for assistance by an external lawyer in accordance with stated criteria. These include the following: "if, in the opinion of the Tribunal, the appeal involves complex or important issues, or …the lack of external legal representation could adversely affect the fairness of the proceedings". In the present case, by a decision of 10 January [Year X+16], the Tribunal granted the Appellant legal assistance on these grounds.

**The Appellant's costs up to 12 February 2007**

94. An amended schedule of costs dated 22 February 2007 was produced on behalf of the Appellant to the Tribunal and the Respondent on 23 February. This set out the Appellant's costs up to 12 February 2007, which the Tribunal takes to have included the liability hearing. The schedule indicated total billed fees to 12 February 2007 of £145,758 (inclusive of VAT) plus total unbilled fees to 12 February (exclusive of counsel's fees) of £6,196-50 (exclusive of VAT).

*Clarification of the issues*

95. The hearing on 26 February clarified certain issues in respect of costs. First, the Respondent confirmed that it was not challenging the reasonableness of the actual amounts specified

in the amended schedule of costs. Second, the disputed issue between the parties was one of apportionment. The Appellant wanted all of his costs to be paid by the Respondent, whereas the Respondent wanted a ruling from the Tribunal that a substantial proportion of the Appellant's costs would not be reimbursed by the Respondent. Third, acknowledging that the Tribunal was very likely to make an award in respect of at least some of the Appellant's costs, the Respondent agreed to make an interim payment of costs to the Appellant of 20% of the costs set out in the Appellant's amended schedule of costs.

*Summary of the parties' main arguments*

96. The Respondent argued that while the Appellant was entitled to some of his costs, a substantial apportionment was appropriate. In oral submissions the Respondent suggested specifically that it ought not to be required by the Tribunal to reimburse up to half of the Appellant's costs. This figure was justified, according to the Respondent, because the Appellant's main claim that he had been penalised because of his role in the pension issue, which took up a large amount of the time in the liability hearing, was a hopeless case that had been dismissed by the Tribunal. In addition, the Tribunal had also dismissed the Appellant's claim that the Respondent's decision was arbitrary. Finally, the Respondent argued that the wording of section 9.06 empowered the Tribunal not to award all of an appellant's reasonable legal costs in an appropriate case even where the claim had been upheld in whole or in part.

97. The Appellant argued against apportionment and in favour of an order from the Tribunal awarding the Appellant all his reasonable costs set out in the amended schedule of costs. Indeed, the Appellant's first argument was that the wording of section 9.06 did not permit apportionment where an appellant was successful in whole or in part. In the alternative, if the award of all reasonable costs was not mandatory under section 9.06, then the Appellant argued that in the circumstances of this case the Tribunal should in any event award the Appellant all his reasonable costs. The allegation of discrimination on grounds of the Appellant's involvement in the pension issue was not, according to the Appellant, a hopeless case. Had it been hopeless, the Respondent would have applied to have had it struck out. Further, it had never been the "main" part of the Appellant's case. The claim that the Respondent had not been consulted and had been demoted were equally important, and the Appellant had won on both of those points. The Appellant argued that, in granting the Appellant permission for legal

assistance, the Tribunal had recognised the complexity and by implication the expensive nature of the case, as had the Bank by instructing a leading member of the employment law bar. Finally, the Appellant argued that the denial of the Appellant's reasonable legal costs would send out an extremely negative message to the Bank's staff.

*The Tribunal's conclusions*

98. The Tribunal concludes in the first place that the Appellant's costs up to 12 February 2007, as set out in his amended schedule, are "reasonable legal costs" within the meaning of section 9.06 of the GAP.

99. As regards the disputed interpretation of section 9.06, the Tribunal considers that even where a case has been upheld in whole or in part it is not mandatory for the Tribunal to award an appellant all his or her reasonable legal costs. This is because the word used to define the Tribunal's power is "may" rather than "must". However, for reasons that will now be explained, the Tribunal takes the view that there has to be a good and persuasive reason not to award an appellant, whose claim has been upheld in whole or in part, all of his or her reasonable legal costs. This is particularly the case where an appellant has been upheld with respect to one or more major planks of an appeal.

100. The Tribunal justifies this approach as follows. First, the implicit policy of section 9.06 of the GAP, read in conjunction with section 6.03, is that there should be "equality of arms" between appellants and the Bank. This means that the Bank should not have any advantage in Tribunal proceedings simply by virtue of its inevitably greater resources compared with those of individual appellants. Second, equality of arms is, in appropriate cases, achieved through the Tribunal giving the appellant permission to have external legal assistance and exercising the power, if an appeal is upheld in whole or in part, to order the Bank to reimburse an appellant for any expenses, including reasonable legal costs. It is to be noted that even when an appeal has not succeeded, section 9.06 allows the Tribunal in defined circumstances to make a recommendation that the Bank should pay all or some of an appellant's legal costs. Third, In the light of the policy underpinning section 9.06, there has to be a good and persuasive reason not to award appellants, who have succeeded in major parts of their claims, all their reasonable legal costs.

101. In the circumstances of the present case, the Tribunal notes the following facts and matters, which point in the direction of awarding the Appellant all his reasonable legal costs:

(1) From the outset the Appellant's complaint that he had been demoted was central to his grievance, see for example his email of 10 June [Year X+15] at page 140 of the liability bundle. Equally central was his complaint that the Respondent had failed to consult him properly. The claim in respect of discrimination because of the pension issue was also a very important part of the grievance.

(2) In terms of the time taken during the liability hearing, the three biggest issues were the demotion, the consultation process, and the discrimination (pension) issue. The question of whether the Respondent's decision was arbitrary occupied relatively little time.

(3) The Appellant' claims in respect of his demotion and the lack of proper consultation succeeded. The discrimination (pension) claim was dismissed by the Tribunal. However, the Appellant had not acted improperly or dishonestly or vexatiously in making this claim.

(4) The complexity of the present case was recognised by the Tribunal in its decision to permit the Appellant legal assistance. Not surprisingly, the Bank for its part saw fit to instruct one of the foremost members of the employment law bar.

(5) The proceedings on liability in this case were protracted. The Respondent contended that they would have been shorter had the Appellant not pursued the discrimination (pension) issue. That is true. But it is equally true that the proceedings would have been shorter still, or would not have arisen in the first place, had the Bank not argued that it had properly consulted the Appellant and had not demoted him.

102. Bearing in mind the policy implicit in section 9.06 and the particular considerations appertaining to this case, the Tribunal is not persuaded by the Respondent's submission on costs. It can see no good or persuasive reason why the Appellant, who has succeeded in major parts of his claim, should not be

awarded all his reasonable legal costs incurred up to 12 February 2007. Pursuant to section 9.06 of the GAP it will therefore order the Respondent to pay to the Appellant all his reasonable legal costs as set out in the amended schedule of costs.

**The Appellant's costs up to 7 March 2007**

103. An additional schedule of costs dated 13 March 2007 was produced on behalf of the Appellant. This set out the Appellant's costs in respect of unbilled time for the period 13 February 2007 to 7 March 2007, which the Tribunal takes to have included the remedy hearing. The schedule indicated total unbilled fees up to 7 March (a) in respect of Beachcoft LLP of £19,545-50 (exclusive of VAT) plus disbursements of £63-85, and (b) in respect of counsel of £15,686-26 (inclusive of VAT).

104. Correspondence ensued between the parties concerning the reasonableness and other aspects of the costs set out in the additional schedule. See the Respondent's email of 16 March 2007, the Appellant's letter of 22 March, the Respondent's email of 23 March, the Appellant's email of the same date, and the Respondent's email of 23 March.

105. After carefully perusing this correspondence the Tribunal concludes that there is no sustainable challenge to the costs set out in the additional costs schedule, as clarified in the Appellant's letter of 22 March, as regards the number of hours expended and the actual amounts of money to be billed. For the avoidance of doubt, the Tribunal rejects objections raised by the Respondent about the reasonableness of the Appellant's costs on grounds such as whether it was justifiable to involve a partner or whether the costs attributable to Appellant's counsel were proportionate compared with the liability hearing.

106. However, the Tribunal reaches this conclusion without prejudice to (a) the question of the apportionment, if any, of the Appellant's costs for the relevant period, and (b) any application from the Respondent for a wasted costs order.

107. There are two ways of dealing with the question of apportionment, if any. First, on the initiative of the Tribunal, the parties could be invited to make written submissions on the question of whether all of the Appellant's reasonable legal costs

in respect of the remedies hearing should be reimbursed by the Respondent or whether a proportion of them should be reimbursed. Any such submissions would have to be made in the light of the test laid down by the Tribunal at paragraphs 99-100 above. Needless to say, the making of written submissions would in itself involve additional legal costs. Second, and in the alternative, the parties could agree to leave the question of apportionment, if any, to the discretion of the Tribunal without themselves making any further submissions.

108. At the remedy hearing the Respondent indicated that, subject to the Tribunal's decision on the without prejudice/victimisation issue, it might in respect of that issue make an application for a wasted costs order. The Tribunal understood that to mean that the Respondent might wish to make an application under section 9.07 of the GAP to recoup some of its costs from the Appellant on the basis that the latter's conduct of the appeal had been frivolous or vexatious. At the time of writing it is not known whether the Respondent will pursue an application under section 9.07.

109. The Tribunal Secretariat will contact the parties within a week of the issuance of this Decision and Judgment with a view to consulting them over any necessary Directions on the outstanding issues of costs.

**Professor Roy Lewis**
**President**
**Administrative Tribunal**
**4 April 2007**