

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

**Case No. 2020/AT/04**

**Appellant**

**vs.**

**European Bank for Reconstruction  
And Development**

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**DECISION**

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

Michael Wolf, Chair  
Giuditta Cordero-Moss  
Maria Vicien Milburn

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**April 14, 2020**

## **I. Introduction**

1. Appellant is a Principal in her Department and has been a staff member of the European Bank for Reconstruction and Development (“EBRD” or “Bank”) since 2006.
2. Appellant is appealing an Administrative Review Decision by the President of the Bank (the “PARD”) relating to her performance appraisal for 2018.
3. As a remedy, Appellant requests that certain language be removed from her 2018 performance appraisal. She additionally requests compensation for moral damages.

## **II. Procedural Background**

4. Appellant met with her line manager and Team Director on 8 February 2019 to discuss her performance for the year 2018. A formal report with a performance rating of “performing below requirements” was issued shortly thereafter.
5. On 5 April 2019, Appellant requested that the Bank’s Managing Director for Human Resources (“MDHR”) review her performance rating and appraisal. As relief, Appellant sought: (a) an upgrade of the rating; (b) a corresponding increase in performance-based compensation and other “legal and administrative consequences;” and (c) removal of specified comments by the line manager in the rating.
6. The MDHR concluded that Appellant’s rating should be upgraded because of “procedural shortcomings.” The rating was changed to “performing as required.” The MDHR also increased Appellant’s compensation to a level consistent with the upgraded rating. The MDHR declined to delete comments made by the line manager in the performance appraisal that Appellant had contested (the “impugned comments”).
7. Appellant submitted a formal request for administrative review to the Bank’s President (the “RARD”) on 5 July 2019. She requested that, in light of the change in rating, the impugned comments by the line manager should be deleted from the appraisal and that some of Appellant’s own comments in response to the previous rating also be deleted. The request was forwarded to the Administrative Review Committee (“ARC”), which issued a recommendation on 29 October 2019. The ARC recommended that Appellant’s request for further relief be rejected.
8. Upon review of the ARC recommendation, the President of the Bank issued his PARD on 27 November 2019. He concurred with the ARC recommendation and affirmed the decision by the MDHR. He additionally deleted Appellant’s own comments in the appraisal that she had requested be removed.
9. Appellant filed her appeal with this Tribunal on 26 February 2020.
10. The Bank’s response to the Statement of Appeal was filed 2 April 2020.

11. Appellant has requested that she be given an “opportunity ... to be interviewed” by the Tribunal. The Bank opposed an oral hearing.

### **III. Factual Background**

12. In October 2017, Appellant was working on a Team that was dissolved as part of a reorganization.
13. Following the reorganization, an opening arose in Appellant’s Department for the position of Associate Director. She and one other staff member were interviewed for the position. The other staff member was selected, and Appellant became a Principal in her new Department. The new Associate Director became Appellant’s line manager.
14. For her 2018 performance appraisal, Appellant was given a rating of “performing below requirements.” In a subsequent meeting with her line manager and Department Director, Appellant was informed that this rating was given because of her failure to meet two requirements of her Competencies: “managing complexity” and “collaboration.” Appellant was told that some of her strengths, such as thoroughness and attention to detail, were sometimes taken to excess and thereby became weaknesses in her work.

#### **A. The MDHR Decision**

15. In requesting that the MDHR review her performance appraisal, Appellant contended that the appraisal (a) evidenced bias by her line manager, (b) contained errors of fact and (c) drew “plainly wrong conclusions from the facts.”
16. On 9 May 2019, the MDHR issued a decision in which she noted the general principle that a performance appraisal should be retained unless there was an abuse of discretion. She opined that an abuse of discretion occurs when a decision is arbitrary such that there is “no reasonable and observable basis for the assessment of the Staff Member’s performance.”
17. With respect to Appellant’s appraisal, the MDHR found “no evidence of any bias, errors of fact, wrong conclusions or malicious intent” and no “evidence of harassment and discrimination.” The MDHR further observed that “the line manager has been providing you with feedback on your communication style and attitude where she found those to be of concern...”
18. Notwithstanding the MDHR’s conclusion that the line manager did not abuse discretion in issuing Appellant’s performance appraisal, she also concluded that “there are some procedural shortcomings in the process undertaken by your line manager in respect to your 2018 performance assessment. Notably, there is an absence of line manager’s comments at the time of the mid-year review on the mid-year appraisal form and therefore it is not possible to ascertain what feedback and assessment was communicated to you in respect to your performance at the time. In addition, assessment comments at

the year-end review do not clearly reflect specific concerns or remedial needs in respect to your performance and meeting objectives.”

19. The MDHR concluded that Appellant’s performance rating should be raised to “performing as required” and that corresponding compensation adjustments should be made. The MDHR declined to accept Appellant’s proposed remedy of deleting critical comments that were made by the line manager in the appraisal. “I decided not to change the language of the assessment as I found it to be balanced, acknowledging your achievements, using positive language whilst also reflecting of areas to focus on as mentioned to you by your line manager during the year.”

## **B. The RARD**

20. Appellant commenced the formal administrative review process with her RARD, which was submitted to the Bank’s President. Appellant acknowledged that she was satisfied with the MDHR’s changes to her performance rating and compensation, but she contended that “if there is no ‘compelling evidence’ to prove my Performance Appraisal and the corresponding Overall Rating, it should also be construed that there is no such evidence as to support my line manager’s views about my performance.”
21. Appellant requested in her RARD that the following comments by her line manager be deleted from the appraisal:

We also had several conversations around her particular strengths and touched upon how she can maximise these strengths to her benefit. We also discussed resources available to her in the Bank if she wanted to continue building on her soft skills.

During the performance evaluation conversation, conducted by [the Department Director] and myself, we discussed the development opportunities in “how” she delivers her objectives and some circular patterns we have observed. We see an opportunity for development in these areas and would like to support her in improving her competencies (How). [The Director] and I have identified her strengths; how they sometimes get in the way of how she delivers and areas for professional development. We [are] looking forward to supporting her in the new year. We have discussed and agreed we would touch on these points for performance setting next.

22. In addition to the aforementioned relief, Appellant also asked that her own comments at the end of the appraisal be “removed as no longer applicable since the Overall Rating was upgraded.” She additionally requested deletion of comments made by the MDHR in her decision of 9 May 2019.

### **C. The ARC Decision**

23. Appellant's RARD was referred to the ARC. The ARC initially concluded that the MDHR decision was not an "administrative decision" subject to its review. Moreover, the MDHR decision was not subject to review because "it is a beneficial or favourable decision which does not adversely alter or breach the staff member's contract of employment." ARC Report at ¶14. The ARC proceeded, however, to address the merits of Appellant's request that certain impugned comments in the appraisal be deleted.

24. The ARC noted that performance assessments are matters of managerial discretion subject to limited review:

Assessment of performance ... will not be overruled in a review ... unless there is no reasonable and observable basis for the assessment of the staff member's performance. The ARC may not substitute its view of the discretionary decisions of management unless the decision is arbitrary, discriminatory, improperly motivated or carried out in violation of a fair procedure. It is not the role of the ARC to undertake a "microscopic review" of the staff member's performance and to substitute its own judgment about the staff member's performance for the judgment of the line manager. [ARC Report at ¶35.]

25. Upon review of multiple communications between Appellant and her line manager, the ARC found that Appellant's "problematic tone" provided a reasonable and observable basis for the line manager's comments in the appraisal. The ARC found Appellant's statements in several of the emails to have been "offhand," "disrespectful," "censorious," "disdainful" and "impolite." ARC Report at ¶37, 38.

26. The ARC's ultimate conclusion was that "there was a rational and supportable basis for the impugned comments, they were not capricious or improperly motivated and thus the decision to delete them was reasonable."

27. The ARC did not address whether Appellant's own comments in the performance appraisal should be removed in light of the change to her rating.

### **D. The PARD**

28. After receipt of the ARC Report and Recommendations, the Bank President decided to accept the MDHR's decision to change Appellant's rating and the ARC's recommendation that the "impugned comments" by the line manager not be deleted from the performance appraisal.

29. The President however accepted Appellant's request that her own comments be removed from the appraisal. Deeming that decision inadequate, Appellant appealed the PARD to this Administrative Tribunal.

### **III. Appellant's Position**

30. The following are the principal arguments asserted by Appellant in her appeal.
31. Appellant challenges the PARD for four main reasons:
  - a. “[T]here has never been a continuous engagement between me and my line manager on the performance related issues and work management during the performance period of 2018.” Appeal at p. 16.
  - b. The PARD misconstrues the line manager’s comments about Appellant’s behavioral competencies.
  - c. The PARD did not consider evidence of bias and malicious intent.
  - d. The line manager’s comments were not “made on a reasonable and/or observable basis.”
32. “The line manager proved to be very skilful [sic] at misrepresenting the truth....” Appeal at 20.
33. “[T]here is no evidence of any structured or continuous discussions between me and my line manager with regards to issues on my performance....” Appeal at 20.
34. The MDHR properly increased the rating having found that there was no compelling evidence to support the rating of performing below requirements.
35. There is no reason to now retain the line manager’s comments that formed the basis for the erroneous initial rating.

### **IV. The Bank's Position**

36. The following are the principal arguments asserted by the Bank in its response to the appeal.
37. The facts of the case have been exhaustively presented making an oral hearing unnecessary.
38. Pursuant to Section 3.03 of the Directive on the Appeals Process, the Administrative Tribunal has a limited scope of review over performance appraisals. It must uphold an appraisal decision unless it was arbitrary, discriminatory or in violation of applicable procedure.

39. An appraisal decision that has a reasonable and observable basis is not arbitrary. The ARC found that there were several problematic communications by Appellant that made the impugned comments in the appraisal reasonable and observable.
40. Appellant accuses her line manager of bias and of wanting to harm Appellant's career. Appellant did not offer evidence to support these accusations.
41. Although Appellant asserts she was not warned of her line manager's concerns about behavioral problems, there is evidence in the record that the line manager met with Appellant in June 2018 and explicitly discussed these issues.
42. The fact that the rating for 2018 was revised "does not mean that the performance of the Appellant cannot be improved and that any critical wording must be deleted from the Report." Response at ¶4.8.
43. Because there was a reasonable and observable basis for the impugned comments, there is no basis for their removal from the performance appraisal.
44. Appellant has not met her burden of proving that faulty decision-making caused her injury. She is therefore not entitled to moral damages.

**V. The Tribunal's Conclusions**

45. The Tribunal grants Appellant's request for anonymity.
46. Pursuant to Section IV, Paragraph 7,02 of the Directive on the Appeals Process ("AP Directive"), oral arguments or hearings are to be held before the Tribunal only in "exceptional cases." Having reviewed the record, the Tribunal finds that oral argument is not necessary for a fair, impartial and thorough consideration of this case. Appellant's request to be interviewed is denied.
47. As the ARC correctly pointed out, performance appraisals fall within the purview of managerial discretion. As such, they are subject to limited review. This Tribunal is not empowered to second-guess the merits of a decision discussing the quality of a staff member's work. The Tribunal instead reviews such decisions solely to ensure that the relevant managers have not abused their discretion:

When the Administrative Decision complained of is a Decision of a Discretionary Nature, the Tribunal shall uphold the Appeal only if it finds that the decision was arbitrary, or discriminated in an improper manner against the Staff Member or the class of staff members to which the Staff Member belongs, or was carried out in violation of the applicable procedure. [Directive on the Appeals Process, Section IV, Paragraph 3.03(b).]

See also EBRDAT Case No. 2019/AT/08 at ¶70; EBRDAT Case No. 2019/AT/06 at 18; *S. v. WTO*, ILOAT Judgment No. 3868 (2010).

48. In this case, the rating that Appellant originally contested has been withdrawn and replaced with a rating acceptable to Appellant. The only remaining point of contention is the commentary used to support the rating. Appellant seeks removal of two paragraphs from the appraisal.
49. Appellant argues that the impugned comments are the result of her line manager's bias and desire to damage Appellant's career. Apart from her own assertions to this effect, the Tribunal does not find evidentiary support for these accusations.
50. As one example of the defect in Appellant's bias argument, the Tribunal notes emails exchanged 16 May 2018. Appellant asked the line manager: "Please can you confirm therefore that no projects ... were assigned to either [colleague 1] or [colleague 2] – with specific advisor cc'ed/asked to assist them on that project." The line manager responded: "... I am not sure I understand the question." Appellant's appeal now argues "as is clear from this answer, [the line manager] was pretending she does not understand my question, although it was very straightforward.... This was so obvious my line manager has something to hide...." The Tribunal does not interpret the line manager's communications as being duplicitous or otherwise objectionable. Appellant's question was indeed not entirely clear. Appellant could have clarified her question but elected instead to engage in further debate. This colloquy is not an evidentiary peg on which to hang an accusation of bias or malice. The Tribunal finds similar defects in other examples of bias and malice alleged by Appellant.
51. Upon review of the record of the contentious relationship between Appellant and her line manager and given Appellant's own contribution to the discord, the Tribunal rejects the argument that the appraisal was tainted by bias or malice.
52. Appellant additionally protests that her manager did not give her "continuous or structured engagement" that would put her on notice of the line manager's dissatisfaction with her "soft skills." Chapter 4.16 of the Staff Handbook in effect at the relevant time stated as follows:

The formal performance appraisal process is intended to assess the performance of all eligible staff during the previous year, both against a number of specified criteria and in overall terms. It is also intended to facilitate a structured and focused discussion between employees and their line managers about performance and related matters and memorialise their views and comments.

In other words, a "structured" conversation regarding performance is expected at the time of the "formal performance appraisal." Prior to that time, conversations or communications between line manager and subordinate need not be as structured or formal as Appellant contends. A staff member who is to be criticized in an annual performance appraisal should have fair warning prior to that appraisal (e.g., in a mid-year review) so that corrections can be made. However, the kinds of warnings required can be informal and should be tailored to each factual situation. It is sufficient if the line



manager provides oral or written communications that reasonably put a staff member on alert of the performance areas needing improvement.

53. In reviewing the record, the Tribunal finds that the line manager had sufficiently communicated with Appellant well in advance of the final rating that she was dissatisfied with Appellant's lack of collegiality and her propensity for arguing over details. These communications satisfied the due process requirement of fair warning.
54. Appellant also contends that the refusal to remove the impugned comments was an abuse of discretion in light of the MDHR's decision to rescind the original rating. That decision was based, in part, on the fact that the comments in the appraisal did not support the rating of "performing below requirements." Appellant insists the comments no longer serve a purpose in light of the rescission of the rating. The Bank's position is that, even if the comments were inadequate to support the original rating, they are still appropriate for a rating of "performing as required." The Bank contends that the line manager must be able to provide constructive criticism designed to improve performance.
55. As a general principle, the Tribunal agrees with the Bank that any staff member may be given a performance appraisal with critical comments, no matter how high the rating. Assuming they act in good faith and based on observable facts, supervisors are permitted to document competencies needing improvement. The revised rating of "performing as required" did not immunize Appellant from criticism in the appraisal.
56. Appellant seeks removal of two different paragraphs from her performance appraisal. The first paragraph states:

We also had several conversations around her particular strengths and touched upon how she can maximise these strengths to her benefit. We also discussed resources available to her in the Bank if she wanted to continue building on her soft skills.

This comment is not intrinsically negative. The Tribunal also finds this comment to have been accurate. The line manager documented her dissatisfaction with Appellant's tendency toward combativeness and lack of collegiality. It is not the Tribunal's function to re-word or eliminate such assessments of a staff member's skills unless they are unreasonable or not based on observable facts. Neither defect arises with this comment, and it therefore was properly retained.

57. The second paragraph contested by Appellant states:

During the performance evaluation conversation, conducted by [the Department Director] and myself, we discussed the development opportunities in "how" she delivers her objectives and some circular patterns we have observed. We see an opportunity for development in these areas and would like to support her in improving her competencies (How). [The Director] and I have identified her strengths; how they sometimes get in the way of how she delivers and areas for

professional development. We [are] looking forward to supporting her in the new year. We have discussed and agreed we would touch on these points for performance setting next.

This paragraph is different from the first one in that it is clearly negative about past performance. However, the measure of its appropriateness is still whether it is reasonable and based on observable facts.

58. The above paragraph relates in part to Appellant’s so-called “soft skills” – the ways in which she communicates or interacts with colleagues. The line manager met with Appellant in early June 2018 (long before the performance appraisal) to discuss their mutual dissatisfactions. Almost immediately thereafter, the line manager documented those dissatisfactions in a memorandum to Appellant. In particular, the line manager felt that Appellant’s tone in her communications and discourse was inappropriate and that she was “spending too much time on details that are not moving the conversation forward.”
59. Appellant disputes the credibility of the line manager’s observations, but the Tribunal shares the ARC’s interpretation of Appellant’s shortcomings. As the ARC Report observed:

It is important to emphasise that the impugned comments do not bring the staff member’s professional competence or abilities into question. The problem essentially identified is that her strong character and insensitivity impact on her professional relationships and may impede her career progression. The impugned comments, in the final analysis, are a fairly mild criticism posed in diplomatic language. The staff member’s overly hurt and defensive response only adds to their validity.

60. As long as factually supported, a line manager’s comments relating to a staff member’s lack of collegiality are appropriate in a performance appraisal. Cf. *Lewin v. IBRD*, WBAT Dec. No. 152 at ¶15 (1996). The Tribunal finds that the line manager’s assessment of Appellant’s skills and shortcomings, as reflected in the above two paragraphs of the appraisal, was based on observable facts, was not unreasonable and was offered in good faith.

## VI. Decision

61. The appeal is denied. No remedy is awarded.

For the Administrative Tribunal



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Michael Wolf