

**IN THE APPEAL BEFORE THE
EBRD ADMINISTRATIVE TRIBUNAL**

A

v.

European Bank for Reconstruction and Development

Decision by the Administrative Tribunal

20 December 2016

1. Procedural history

1. On 15 November 2016 A (the “Appellant”) filed, under the Appeals Procedures established pursuant to Resolution No. 102 of the Board of Governors and Section 10 of the staff Regulations (the “Appeals Procedures”), a Staff Member’s Statement of Appeal (the “Statement of Appeal”) against the European Bank for Reconstruction and Development (the “Respondent”), challenging a President’s Administrative Review Decision dated 23 August 2016 (the “PARD”). On 13 December 2016 the Respondent filed a Response to the Statement of Appeal (the “Response”).
2. The PARD was rendered in relation to the grievance GC/18/2015, initiated by the Appellant with a Request for an Administrative Review Decision on 30 April 2015 (the “RARD”). Due to technical difficulties, there was a delay in the acceptance of jurisdiction by the Grievance Committee. The Grievance Committee issued a Report and Recommendation to the President on 2 August 2016 (the “Grievance Committee’s Report”). The President considered the Report and Recommendation and on 23 August 2016 rendered the PARD, accepting in part the recommendations made in Grievance Committee’s Report. The appeal in front of the Administrative Tribunal (the “Tribunal”) is the Appellant’s Statement of Appeal against the PARD.
3. Neither of the Parties requested an oral hearing. According to Rule 7.02 (a) of the Appeals Procedures, an oral hearing is to be held only in exceptional cases. The Tribunal decided that it was not necessary to hold an oral hearing.
4. The Tribunal examined the Parties’ submissions, the PARD and the Grievance Committee’s Report, with all attachments. On the basis of this examination and of internal deliberations, the Tribunal renders this decision.

2. The dispute

5. The factual background of the dispute goes back to a decision taken by the President (the “Original Decision”) on 12 December 2014 and communicated to the staff members on 17 December 2014. The Original Decision applied to individual staff members an organizational chart and classification into bands, that was contained in a People Management Framework (the “PMF”).
6. The PMF is based on generic job descriptions (the “Job Descriptions”) designed on the basis of the objective characteristics that a particular role requires, not on subjective qualities of the staff member who occupies a position. The PMF divided the Job Descriptions into bands. The placing

into bands was meant to give visibility to career paths. The PMF was thus an instrument for career planning, and not a tool for salary setting. The salary of individual staff members would ultimately be affected by that staff member's career development, but the PMF did not have any direct or automatic effect on salaries.

7. Of interest here is that the PMF provided for, inter alia, two distinct Job Descriptions: Office Manager ("OM") and Senior Administrative Officer ("SAO"). The former was in band 5, the latter in band 4. There is a large overlap between the tasks of these two roles. The main reason for the distinction into two roles lies in the size of the office in which the position is to be found. Where the office has a larger number of staff and a larger budget, the PMF defined the role as OM and placed it in band 5. For smaller offices, the PMF defined the role as SAO and placed it in band 4.
8. The Original Decision, that applied the PMF to individual staff members, confirmed the placement of the Appellant in the role of SAO (band 4), which corresponded to the Appellant's position prior to the Original Decision. In the RARD, the Appellant questioned the rationality of the Original Decision, among others on the ground that in some offices the Original Decision confirmed the person occupying the relevant position in their prior role of OM (band 5) notwithstanding that those offices did not meet the quantitative criteria prescribed by the PMF, and described in para 7 above, for justifying the role of OM (band 5).
9. The Grievance Committee Report found that the PMF was a legitimate exercise of the President's discretion to determine how to organize the staff of the Respondent. The Grievance Committee recalled, with reference to the Tribunal's case law and the Grievance Procedures, that exercise of this discretion may be reviewed only to the extent the discretion is abused. An abuse of discretion can be shown where action has been taken through unlawful discrimination, arbitrarily, or in breach of the contract of employment. The Grievance Committee found that the President's discretion was properly exercised when it adopted the PMF. In particular, the Grievance Committee found that the PMF distinction between overlapping roles on the basis of criteria such as the number of staff and the size of the budget is not an abuse of discretion, as the criteria are reasonable and objective.
10. The Grievance Committee Report found that the Original Decision, that applied the PMF to individual staff members, did not apply the PMF in an even-handed manner. In particular, the Original Decision discriminated in an improper manner against the Appellant when it confirmed the role of OM (band 5) to some staff members who occupied a position in offices that did not meet the quantitative criteria that according to the PMF justify the role of OM (Band 5). The Grievance Committee emphasized that being placed in band 4, as opposed to band 5, limits the possibility to earn a higher level of compensation and to move upwards in band 5. In

this context, the Grievance Committee found that assigning the two similar roles to different bands was arbitrary.

11. The Grievance Committee Report recommended that the Job Descriptions for SAO and OM be reviewed to arrive at a result that is based on objective, rational business considerations evenly applied across all offices. The Grievance Committee affirmed that, once the arbitrariness in relation to the two job descriptions was remedied, the designation of the SAO for the Appellant's office may be confirmed, with the limitations inherent to that role.
12. The Grievance Committee also recommended that the Appellant be compensated for the difference in earnings that may have been caused by the discriminatory Original Decision.
13. The Grievance Committee found that there was no basis to grant compensation of moral damages in relation to the Original Decision, but recommended that the Appellant be granted 3.000 GBP as moral damages in relation to the delay with which the RARD was handled.
14. Following the Grievance Committee's Report, the President launched a review of the Job Descriptions (the "Job Description Review"), including the job descriptions for OM (at the time of evaluation "Associate, Office manager") and SAO (at the time of evaluation "Analyst, Office Manager"). As a result of the Job Description Review, both roles were placed in band 5.
15. The PARD informed the Appellant that the President accepted some of the recommendations in the Grievance Committee's Report. In particular, the Appellant was placed in band 5 as of 1 September 2016, but was confirmed in the role of SAO (Analyst, Office Manager).
16. Moreover, the PARD acknowledged that the Appellant should be compensated for the difference in earnings due to the Original Decision having placed the Appellant in band 4. The PARD adjusted the Appellant's salary with effect from 1 April 2016, i.e. from the date on which the Respondent had adjusted the staff' salaries on the basis of a benchmarking exercise.
17. The PARD did not recognize that the Appellant was entitled to moral damages for the delay with which the RARD was handled, but considered this delay to be regrettable. Therefore, the PARD granted an ex gratia payment of 3.000 GBP.
18. In the Statement of Appeal, the Appellant challenged the PARD in two respects: (i) The Appellant alleged that, by maintaining the distinction between OM (Associate, Office Manager) and SAO (Analyst, Office Manager), the PARD maintained the unlawful discrimination against the Appellant; and (ii) The Appellant requested that compensation for the

difference in earnings should be due as from the date of the Original Decision. In addition, the Appellant requested payment of interests on the compensation, as well as reimbursement of moral damages and of legal costs.

19. In the Response, the Respondent argued that the Appellant's requests for remedy should be rejected.
20. The Parties' respective arguments are summarized below.

3. Summary of the Appellants' position and requests for remedy

21. The first ground upon which the Appellant challenges the PARD is that the PARD is arbitrary and capricious. The Appellant alleges that the PARD, on the one hand, accepts the Grievance Committee's recommendation that the distinction in bands had been applied in a discriminatory way, and, on the other hand, maintains the same distinction by not changing the Appellant's title.
22. The Appellant provides evidence that, even after the Job Description Review, there is a large overlap between the Job Descriptions for OM (Associate, Office Manager) and for SAO (Analyst, Office Manager). The Appellant recognizes that the PARD has properly upgraded him to band 5, but requests that also the title be changed.
23. The second ground upon which the Appellant challenges the PARD is that the PARD accorded compensation for the difference in earnings as from 1 April 2016. The Appellant argues that compensation is due from the date of the Original Decision.
24. The Appellant rejects that it is appropriate to calculate compensation from the date of the salary adjustment that was made upon the benchmarking exercise mentioned in the PARD. It is true that salaries were adjusted on 1 April 2016 as a consequence of the benchmarking exercise, but the Appellant argues that there were tools for benchmarking also prior to that date. The Appellant argues that the Respondent uses against the Appellant the delay in handling the RARD that was described in para 2 above. If the RARD had been decided timely, a remedy would have been ordered prior to 1 April 2016. In the opinion of the Appellant, this means that compensation shall be calculated as from the date of the Original Decision.
25. The Appellant refers to the PARD's rejection that the Appellant was entitled to moral damages as a consequence of the delay with which the RARD was handled, a rejection that was nevertheless accompanied by the award of a payment of 3.000 GBP to the Appellant. The Appellant affirms

that he has suffered moral damages, and that these were exacerbated by the mentioned delay. On this basis, the Appellant requests, in addition to the amount of 3.000 GBP already paid in connection with the delay, moral damages at least in the amount awarded to a staff member who was awarded moral damages in the Tribunal's decision EBRDAT 2016/AT/02 (5.000 GBP).

26. Finally, the Appellant requests that interest be added to the compensation referred to in para 24. The Appellant also requests payment of reasonable legal fees.

4. Summary of the Respondent's position

27. The Respondent points out that the facts in the present case are substantially identical to the facts in the case EBRDAT 2016/AT/02, and requests the Tribunal to decide the case in the same way. In particular, the Respondent requests that the Tribunal follows the determination in EBRDAT 2016/AT/02 that the Original Decision was not discriminatory, and that the PMF was not a tool for salary setting.
28. In the opinion of the Respondent, the PARD is not discriminatory, but based on objective, rational business considerations. Furthermore, the Appellant and the class of staff members to which the Appellant belongs have been properly allocated to the relevant roles in an even-handed manner. While there is an overlapping between the Job Descriptions for OM (Associate, Office Manager) and for SAO (Analyst, Office Manager), the distinction into two different roles is legitimate because it reflects a principle of scale. The Respondent argues that the role in larger offices assumes previous experience in similar roles and has a higher degree of responsibility and accountability.
29. The Respondent points out that differentiating between larger offices and smaller offices is necessarily discretionary, but submits that the Respondent has not abused its discretion. In particular, the Job Description Review has refined the criteria in favour of administrative staff in smaller offices. Moreover, the Job Description Review has allocated both roles to band 5, thus eliminating possible concerns about discriminatory restrictions of potential career development.
30. The Respondent recognizes that there is a restricted number of smaller offices (five) where the position is occupied by an OM notwithstanding the quantitative criteria in the Job Description Review. The Respondent argues that this is not unlawful, as it is due to "legacy arrangements", i.e. to grandfathering of job titles that already were used prior to the PMF. Furthermore, there are factual circumstances that justify this allocation: two of the smaller offices are rapidly growing and will soon meet the

quantitative criteria for a OM title; the OMs in the remaining three smaller offices have occupied that position for a considerably long time. The Respondent argues that this allocation in contradiction with the quantitative criteria in the PMF is exceptional and justifiable on the basis of factual circumstances. The Respondent also argues that this exceptional allocation is temporary – because the positions will be assigned to the Job Description SAO (Analyst, Office Manager) when the present OMs leave their positions.

31. Regarding the Appellant's request that compensation for the discriminatory Original Decision be calculated as from the date of the Original Decision, the Respondent argues that there was no correlation between the PMF, that was implemented by the Original Decision, and staff members' salaries. The Respondent alleges that no staff member's salary was adjusted as a consequence of the implementation of the PMF by the Original Decision. Therefore, the loss of the Appellant as a consequence of the Original Decision was zero until the date of 1 April 2016. On this date, salaries were adjusted on the basis of a benchmarking exercise. The PARD accorded compensation for the difference between the Appellant's salary as from 1 April 2016, and the salary the Appellant would have had from 1 April 2016, had the Original Decision assigned him to band 5.
32. Regarding the Appellant's request that interests be calculated on the compensation as from 1 April 2016, the Respondent alleges that the Grievance Committee's Report recommended to calculate the annual compound interest used by the Respondent to set the level of pay rises. The Respondent alleges that such interest is not applicable, because the amounts were overdue only for a couple of months within the same financial year.
33. Regarding the Appellant's request that the Respondent pays moral damages, the Respondent alleges that a payment of 3.000 GBP was made in respect of the delay with which the RARD was handled. The Respondent argues that this payment is reasonable, and that it should not be raised by the Tribunal. The Respondent also alleges that the time between the RARD and the Statement of Appeal in this case was comparable to that in EBRDAT 2016/AT/02, where no moral damages were granted in respect of any delay.

5. The Tribunal's evaluation

34. The Tribunal observes that the factual basis of the present case largely overlaps with the factual basis of the case EBRDAT 2016/AT/02. The Tribunal points out that, while it is a goal to ensure that Tribunal's

jurisprudence is coherent, each case has to be decided on the basis of the circumstances specific to that case, as pleaded by the parties.

35. Regarding the first request for remedy by the Appellant, the request that his title be changed into Associate, Office Manager, the Tribunal observes that it is in the managerial discretion of the Respondent to organize its staff in the way that the Respondent finds most suitable to achieve its goals in an efficient manner. The Tribunal does not have any authority to review the Respondent's exercise of its managerial discretion. It is only when the discretion is exercised in an abusive manner, that the Tribunal has authority to order remedies.
36. The Tribunal finds it sufficiently proven that there is a large overlap between the Job Descriptions for OM (Associate, Office Manager) and SAO (Analyst, Office Manager). However, the Tribunal does not find it abusive that two largely overlapping roles be designed with two different titles, particularly not when the two roles are placed in the same band – as it is the case as a consequence of the Job Description Review and of the PARD. The difference in title is explained on the basis of objective and rational criteria, i.e. the number of staff members in the relevant office, and the size of the office's budget. The size of the office implies that the same role may have different degrees of responsibility and accountability, and this is a rational basis for differentiating the titles. The Tribunal notices that this coincides with the Grievance Committee's evaluation.
37. Regarding the Appellant's argument that the PARD is capricious because it follows the Grievance Committee's recommendations only in part, the Tribunal observes that Grievance Committee's Report affirms that a distinction of titles based on the office's size is reasonable. The Tribunal further notices that the Grievance Committee's Report found the distinction in bands discriminatory, because of the limitations that derive from being placed in band 4 and not being able to move upwards. This has been remedied by the Job Description Review and by the PARD. The Grievance Committee's Report also found that the title for the role in the Appellant's office could be maintained as SOA (Analyst, Office Manager), once the discrimination due to placing in different bands was remedied. On the basis of the foregoing, the Tribunal does not find the PARD capricious or arbitrary.
38. However, the Grievance Committee's Report found that, while the distinction between the two titles in the abstract was not arbitrary, its application to the Appellant was discriminatory because some OMs were confirmed in their roles with the title of OM in smaller offices, that did not meet the quantitative criteria for justifying the title OM. The Tribunal understands that the title of OM was assigned to these smaller offices prior to the Original Decision, and that the Original Decision did not change the title of the affected staff members into SAO, among others because of the impossibility of unilaterally making adverse changes to the conditions of their employment contracts. However, the PMF and the Job

Description Review provide that, when a new employment contract is entered into for the relevant position in those smaller offices, the title will be SAO (Analyst, Office Manager) – unless the office in the meantime meets the quantitative criteria for having an OM (Associate, Office Manager). The Respondent informed that, of the five smaller offices in which the issue is relevant, two are fast growing, while three have an OM who has been employed in that position for a considerably long time. Moreover, the quantitative criteria for having an OM have been refined as a consequence of the Job Description Review, so that it will be easier to meet these criteria. As a consequence of the foregoing, the situation where some persons have the title OM (Associate, Office Manager) notwithstanding that their offices do not meet the criteria for OM, is only of a temporary character may be explained in light of the factual circumstances.

39. The Tribunal observes that, should the Respondent be required to offer the title of OM (Associate, Office Manager) to all SAOs (Analyst, Office Manager) as long as there are smaller offices with an OM, there will always be new OMs in offices which do not meet the quantitative criteria – unless all OMs in smaller offices terminate their employment at the same time, which is highly unlikely. Such a requirement would perpetuate a situation that today is meant to be temporary and is based mainly on historical reasons. Such a requirement would, in essence, deprive of significance the distinction between OM (Associate, Office Manager) and SAO (Analyst, Office Manager). However, this distinction is the reflection of a legitimate exercise of the Respondent's managerial discretion, an exercise that the Tribunal does not have the authority to review. The Tribunal further observes that also the Grievance Committee recognized that the distinction between OM (Associate, Office Manager) and SAO (Analyst, Office Manager) is legitimate. Hence, the Grievance Committee's recommendation that the title of SAO (Analyst, Office Manager) be changed into OM (Associate, Office Manager) as long as there are OMs in offices that do not meet the quantitative requirements for an OM, seems to be in contradiction with the Grievance Committee's recognition that the division into two roles is not abusive, and that maintaining the title of SAO (Analyst, Office Manager) for the position in the Appellant's office is not abusive. Hence, there is no basis for ordering that the Appellant's title be changed into OM (Associate, Office Manager).
40. Regarding the second request for remedy by the Appellant, the request that compensation for earlier pay be calculated as from the date of the Original Decision, the Tribunal observes that compensation is due to the extent the Original Decision caused a loss for the Appellant. The Appellant has suffered a loss if the salary of the Appellant was not raised to the level that it would have been raised to, if the Original Decision had not been discriminatory. The Tribunal understands that the PMF is not a tool for setting salaries. When the Original Decision applied the PMF to the Appellant, therefore, there was no direct consequence in terms of salary. There is no evidence that the application of the PMF to individual staff

members resulted in an immediate adjustment of the salary of other staff members. The Tribunal understands that the first occasion in which salaries were adjusted on the basis of the placement in bands, was 1 April 2016, following the benchmarking exercise. The Appellant argues that the Respondent was in possession of alternative models for benchmarking prior to 1 April 2016. However, there is no evidence that these alternative models were used to adjust salaries following the Original Decision and prior to 1 April 2016. The Appellant failed to substantiate that he would have been entitled to a higher remuneration prior to 1 April 2016, if the Original Decision had not been discriminatory. Hence, while in principle the Appellant is entitled to compensation from the date of the Original Decision, in practice there is no loss to be compensated until the date when salaries were adjusted.

41. Regarding the third request for remedy by the Appellant, the request that the Appellant be granted moral damages in addition to the already made payment of 3.000 GBP relating to the delay, the Tribunal notices that the Grievance Committee had rejected the request for reimbursement of moral damages (apart from damages relating to the delay). The Appellant refers to moral damages awarded in EBRDAT 2016/AT/02. In this case, the Administrative Tribunal based the decision on moral damages on the assumption that the staff member had been arbitrarily downgraded from her original position. This was deemed to have been cause for “serious moral suffering [...] particularly in connection with both her own and her co-workers’ perception of her professional performance and prospects.” In the present case, the Appellant was not downgraded, but simply confirmed in his previous position. Therefore, there is no basis for claiming moral damages. This coincides with the evaluation made by the Grievance Committee, which rejected the request for moral damages relating to the Original Decision, but awarded moral damages in the amount of 3.000 GBP relating to the delay with which the RARD was handled. The PARD has accorded a payment related to the delay, in the same amount as the amount recommended by the Grievance Committee. The Tribunal deems this to be a sufficient compensation.
42. Regarding the fourth request for remedy by the Appellant, the request that interests be granted on the amount of compensation as from the date when the compensation was due, the Tribunal finds that it is generally recognized that amounts bear interests from the day payment is due. That the period during which the compensation was overdue is shorter than one year, does not change the principle that interests are due for the period an amount is overdue. If the interest is calculated on an annual basis, the amount of interest that is to be paid will be adjusted pro rata. If the recommended method for calculating interest may not be applied in this case, the interest rate shall be calculated in the manner prescribed for late payments of amounts expressed in the same currency as the overdue payment.

43. As for the legal costs, the Tribunal observes that one out of four of the requests for remedy has been granted. The costs incurred by the Appellant shall therefore be reimbursed by the Respondent in the measure of 25%.

6. Decision

On the basis of the foregoing, the Tribunal, acting by a panel composed of Judges Giuditta Cordero-Moss (President), Boris Karabelnikov and Stanislaw Sołtysiński, hereby decides as follows:

1. The Request that the Appellant be given the title Associate, Office Manager is dismissed;
2. The Request that that the Appellant be compensated for the difference in earnings from the date of the Original Decision to 31 March 2016 is dismissed;
3. The Request that the Appellant is accorded moral damages is dismissed;
4. The Request that interest is calculated on the amount of 2.732 Euro (compensation for the difference in earnings) is granted. The Respondent shall pay interest on the amount of 2.732 Euro from 1 April 2016 until the date of payment, calculated at the rate for overdue interests at the European Central Bank's reference rate plus 8%;
5. The Request that the Appellant is reimbursed for his legal costs (in the amount of 2.052 GBP) is granted in proportion to the number of requests for remedies that were granted. The Respondent shall pay 25% of the Appellant's legal costs, in the amount of 513 GBP plus interest at the European Central Bank's reference rate plus 8% from the date hereof until the date of payment.

For the Administrative Tribunal



Giuditta Cordero-Moss
Professor Dr.juris, PhD