IN THE APPEAL BEFORE THE
EBRD ADMINSTRATIVE TRIBUNAL

2017/AT/07

Ms Hiromi SAKURAI

v.

the European Bank for Reconstruction and Development

Decision by the Administrative Tribunal

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26 October 2017

1. Procedural history

1. On 11 September 2017 Ms Hiromi Sakurai (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"), an Application to the EBRD Administrative Tribunal for an Appeal (the "Statement of Appeal") against the European Bank for Reconstruction and Development (the "Respondent" or the "Bank"), requesting an order compelling the Bank to review the substance of the two warnings disputed by her and an award of moral damages at the discretion of the EBRD Administrative Tribunal (the "Tribunal"). More specifically, she alleged that the Bank improperly did not follow the Grievance Committee's Report and Recommendation concerning legal possibility of challenge of oral and written warnings to staff members. On 11 October 2017 the Respondent filed a Response to the Statement of Appeal (the "Response") denying all contentions of the Appellant.

2. The matter was previously considered in the course of the grievance procedure GC/26/2017, initiated by the Appellant with a Request for an Administrative Review Decision filed on 1 March 2017 (the "RARD"). On 22 March 2017 the Bank filed a challenge to jurisdiction of the Grievance Committee. On 26 April 2017 the Appellant filed her response to the Bank's submission to the Grievance Committee. On 6 June 2017 the Grievance Committee submitted its Report and Recommendation to the President of the Bank (the "GC's Report and Recommendation"). The President of the Bank considered the Grievance Committee's Report and on 26 June 2017 rendered the President's Administrative Review Decision (the "PARD"), rejecting recommendations made in the GC's Report and Recommendation. The appeal in front of this Administrative 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 Statement of Appeal was considered in accordance with Agreement Establishing the Bank, the Staff Regulations in force on 12 October 2016 (date on which the Appellant believes the erroneous administrative decision laid in foundation of her RARD was taken) and the Grievance Procedures adopted on 15 March 2011, as revised on 25 May 2011, 19 December 2013, 1 April 2014, 10 August 2015 and 1 January 2016.

2. The dispute

5. The Appellant submits that on 1 February 2016, she had a meeting with her Line Manager and the HR Business Partner. At that meeting, she was notified of a performance improvement plan (PIP). On 23 June 2016, she had a formal performance review meeting, under the PIP, and was

notified of an oral warning (the "Oral Warning") in accordance with Section 4.18.2 (1) of the Staff Handbook. On 27 September 2016, at the formal performance review meeting under the Oral Warning period, the Appellant was notified of a written warning (the "Written Warning") in accordance with Section 4.18.2 (2) of the Staff Handbook.

6. On 10 August 2016, the Appellant had a meeting with an HR dispute resolution staff with law degree and asked where the PIP and the Oral Warning stood in the Grievances and Appeals Procedures flow charts of HR's official website (Overview of Process which constitutes Annex 3 to the Appellant's Statement of Appeal). The Appellant submits that due to the absence of reference and two procedures apparently running for handling work performance of the staff members, the consultation was inconclusive and she was advised to concentrate on the delivery of her assigned work under the PIP (paragraph 5 of the Statement of Appeal).

7. On 11 October 2016, the Appellant indicated to her HR business partner that she intended to request a review of the above mentioned Written Warning. On 12 October 2016 the HR Business Partner advised her that the warnings are not challengeable according to the EBRD's practice (paragraph 7 of the Statement of Appeal).

8. On 10 November 2016 the Appellant submitted a request for a review of that initial decision to Managing Director, Human Resources (MD HR) as per the Normal Administrative Process (the "NAP"). On 2 December 2016, she received MD HR's decision to decline her request for review because the Bank's view was that warnings were not considered as administrative decisions (paragraphs 8 and 9 of the Statement of Appeal).

9. On 6 December 2016, at the meeting of the formal performance review meeting under the Written Warning period, the Appellant was notified by the Line Manager and the HR Business Partner that the next phase of the procedure (dismissal or demotion) was suspended subject to the improvements to be sustained for a year from the date of the Written Warning. She was also notified by the Line Manager and the HR Business Partner that the procedures would be reactivated in accordance with Section 4.18(3) of the Staff Handbook if the improvement was not sustained during that period (paragraph 10 of the Statement of Appeal).

10. On 1 March 2017 the Appellant submitted the RARD to the President of the Bank. On 27 March 2017 she received the Bank's challenge to Jurisdiction from the Grievance Committee ("the GC") Secretariat (paragraphs 11 and 13 of the Statement of Appeal).

11. On 6 June 2017, the Appellant received from the GC Secretariat a letter from the Chairman of the GC together with the Report and Recommendations of the Grievance Committee which in her opinion basically agreed with her claim (paragraph 15 of the Statement of Appeal).

12. On 27 June 2017, the Appellant was notified of the President's decision (the "PARD") not to follow the GC's Report and Recommendations and to maintain the management's view that warnings were not considered as administrative decisions and therefore could not be challenged (paragraph 16 of the Statement of Appeal).

13. The Appellant requested the Tribunal to order the Bank to review the Warnings on their substance, which is what she requested in her RARD, and to order the Bank to pay for moral damages in the amount it deems appropriate (paragraph 11 of the Statement of Appeal).

14. The Appellant did not request reimbursement of any legal costs or anonymization of the Decision (paragraph 14 of the Statement of Appeal). The Bank also did not ask for anonymity of this Decision (Paragraph 1.10 of the Response).

15. In the Response, the Respondent argued that the Appellant's requests for remedies sought should be rejected in their entirety, since the Written Warning was not an administrative decision subject to review by the Grievance Committee (Paragraph 2.2 of the Response).

16. The Parties' respective arguments are summarized below.

3. Summary of the Appellants' position

17. The Appellant described the merits of the dispute at stand as follows: "Do Oral and Written Warnings notified to me within the framework of Section 4.18 of the Staff Handbook constitute challengeable administrative decisions? If the reply to this question is positive, then the Bank should review these two Warnings on the substance, which has been denied to me so far, on account of these Warnings being unchallengeable". In the opinion of the Appellant, the Bank's Warnings were, in fact and in law, equivalent to performance appraisals and that they are therefore challengeable as per the generally recognised principles of international administrative law. This line of arguments in opinion of the Appellant was fully supported by the Grievance Committee (paragraph 18 of the Statement of Appeal).

18. The Appellant contends that due to the wording of Section 4.18.2 of the Staff Handbook which is entitled "Procedure for handling cases of unsatisfactory performance", the outcome of which being a demotion or a dismissal, which can be notified to the concerned Staff member within 12 weeks after the procedure is triggered, the Staff member is, at best, at high risk of termination during 12 months (paragraph 22 of the Statement of Appeal).

19. With reference to various cases of the ILOAT (ILOAT Judgements 3150 (paragraph 5), 3219 (paragraph 18), 3282 (paragraphs 5 and 6), 2916

(paragraphs 4, 11, and 12), 3026 (paragraphs 7, 8 and 12), 3070 (paragraph 9) and 3224 (paragraph 7)) the Appellant concludes that termination for unsatisfactory performance must be based on the yearly performance appraisal reports which must be drawn up in strict compliance with the rules established to evaluate performance, and such rules must be adversarial (paragraph 23 of the Statement of Appeal).

20. The effect of the ILOAT case law cited by the Appellant in paragraph 23 of her Statement of Appeal is that there exists a principle of international administrative law in accordance with which principle termination of a staff member on grounds of unsatisfactory performance takes time – at least one year – because it must be founded on the yearly evaluation report and because the staff member concerned needs to be given time for the requested improvement to occur (paragraph 24 of the Statement of Appeal).

21. The Appellant believes that the Bank's understanding of Section 4.18.2 of the Staff Handbook allows to dismiss a staff member outside the performance evaluation mechanism – aiming at terminating or demoting staff members – just in 12 weeks, which is obviously not a reasonable time frame in which a staff member can demonstrate improvement, and on the basis of a procedure which is not adversarial. (paragraphs 25 and 26 of the Statement of Appeal).

22. The Appellant concludes that In fact, and in law, the Bank's Warnings are not less than a poor evaluation of a staff member's performance calling for improvement. In other words, these Warnings constitute a performance appraisal report *per se* however drawn up outside the regular performance appraisal system and in breach of the adversarial principle. In view of the above, stating that these Warnings are not challengeable amounts to saying that the evaluation of performance done by the Bank's managers is immune from criticisms or legal process (paragraphs 28 and 29 of the Statement of Appeal).

23. With reference to various source of ILOAT case law (ILOAT Judgements 3239 (no number of paragraph was indicated), 3241 (paragraph 5) and 3253 (paragraph 15)) the Appellant submits that it is well settled case law that the evaluation of performance does constitute an individual administrative decision which can be challenged by Staff members (paragraph 29 of the Statement of Appeal).

24. In support of its challenge to jurisdiction before the Grievance Committee, the Bank put forth two arguments, which the President decided to fully endorse in his RARD These two arguments are the following:

(i) The Warnings are not "administrative decisions" because they allegedly produce no direct legal consequences and have no effect on staff members' rights and obligations (see paragraphs 4.4.1, 6.1, 6.2, 6.3, 6.4,

6.5, 6.15 of the Bank's submission before the Grievance Committee); This argument was restated in in paragraph 4 c) of the challenged RARD.
(ii) The Warnings are allegedly part of a "series of steps" within an administrative process which lead to a final decision (see paragraphs 4.4.2, 6.10 of the Bank's submission before the Grievance Committee) and as such, they would have no adverse impact on staff members (see paragraphs 4.4.3 of the Bank's submission before the Grievance Committee); Correlatively, the warnings are part of a process aiming at giving the employee an opportunity to improve and serve at safeguarding his/her interests. Accordingly, staff members would have no legitimate interest to challenge them (see paragraphs 4.4.4, 5.5, 6.11, 6.12, 6.13, 6.14 of the Bank's submission before the Grievance Committee. These arguments are restated in paragraphs 4 a) and b) of the challenged RARD (paragraph 31 of the Statement of Appeal).

25. The Appellant concludes that the Bank considers that the Warnings do not constitute individual administrative decisions *per se* because - as part of a series of steps within the context of an administrative process (allegedly aiming at reminding the staff member that s/he needs to improve his/her performance) – they would not have any adverse impact on the staff member, so that staff members would have no legitimate interest in challenging them (paragraph 32 of the Statement of Appeal).

26. In its challenge to jurisdiction before the Grievance Committee, the Bank referred to three series of ILOAT and UNAT judgements, which the Appellant believes are likely to be reiterated in the Bank's Response. In her opinion, these Judgements are completely irrelevant to the present dispute (paragraph 33 of the Statement of Appeal).

27. The Appellant observes that the argument, raised in paragraph 4d) of the RARD, that staff members subject to unfair treatment within the framework of an Oral or Written Warnings, should avail themselves of the Harassment-free and Respectful Workplace Procedures ("RWPs") and the Conduct and Disciplinary Rules and Procedures ("CDPRs"), is an admission that such Warnings may entail legal adverse effects, contrary to what has been asserted by the Bank so far. However, she did not agree with the Bank's reasoning that unfair or improperly motivated decisions (as the Warnings) should be complained of through the RWPs and CDPRs. These kind of decisions are explicitly included in the scope of the Grievance Procedures and shall therefore be reviewed within this framework (see Article 7.03 (c) of the Grievance Procedures) RWPs and CDPRs are meant to address, as explicitly mentioned in such procedures, "improper interpersonal behaviour" of a staff member, which materialises more through various types of behaviours than through decisions (even though such decisions may be part of a broader complaint of improper behaviour). Therefore, Oral or Written Warnings tainted with, for example, abuse/misuse of power or unfair treatment should be challengeable through the Grievance Process, as are performance

appraisal reports or any other kind of discretionary decisions (paragraph 37 of the Statement of Appeal).

28. The Appellant agrees with the President's last argument in paragraph 4 e) of his RARD that Oral and Written Warnings are not comparable and should therefore not be compared. However, she observes that the idea remains that all adverse decisions taken by the Bank against staff members, being either disciplinary measures or performance related decisions, should be challengeable (paragraph 38 of the Statement of Appeal).

29. In its section 2 about the scope of the RARD (paragraphs 2.1 to 2.6 of the Bank's submission to the GC), the Bank raised the question of the receivability of the Appellant's claim regarding the Oral Warning. The Bank submitted that this Oral Warning was not part of the Normal Administrative Process and could therefore not be addressed at the Grievance Committee stage. While the Appellant would in principle agree with such legal argument, she requests the Tribunal to decide on this argument in equity. She explains that at the time the Oral Warning was notified to her, on 23 June 2016, she sought advice from HR and the Ombudsman as to how to challenge such oral warnings. However, facing peremptory statements on the impossibility to challenge such decision, she naturally gave up and let the time fly. At the time of the Written Warning, on 28 September 2016, the Staff Legal Adviser had just been recruited and provided her with a divergent opinion about the challengeable nature of such Oral and Written Warnings so that she decided to file a request for review. However, at that time, the procedural time limit to challenge the Oral Warning had expired so that she could no longer challenge this decision. In view of the fact that she was misled by the Bank about the possibility to challenge the Oral Warning as well as the fact that, at the time of the Oral Warning, no Staff Legal Adviser were available to staff members (contrary to Section 14.2 of the Staff Handbook), the Appellant requests the Tribunal to consider her claim regarding the Oral Warning (together with that of Written Warning). In addition, since in the Appellant's opinion the Oral and Written warnings are based on the very same facts, should the claim to withdraw the Written Warning from the personal file be granted to the Appellant, the same outcome should logically apply to the Oral Warning (paragraph 42 of the Statement of Appeal).

30. The Appellant submits that had these two warnings been reviewed in due time and possibly withdrawn from her personal file, the year-end performance evaluation report which was drawn up recently may have been favorable to her (instead, based on these two warnings, it logically reflected poorly on her 2016 performance appraisal) (paragraph 40 of the Statement of Appeal).

4. Summary of the Respondent's position

31. The matter before the Tribunal is solely one of jurisdiction of the Grievance Committee, i.e. does the Grievance Committee have jurisdiction to review the decision of the MD HR to refuse a review of the act of the Appellant's line manager to issue a Written Warning to the Staff Member as a step in the process of managing sub-standard performance. The Bank considers that, by implication, the consideration of the foregoing requires a determination whether the MD HR erred in law when qualifying written warnings as steps in a process which, in and of themselves, are not subject to review by the GC in accordance with the Grievances Procedures (the "GPs"). As stated in Article 8.01(b) of the GPs, only an administrative decision which "*allegedly alters*, *in a material adverse manner*, *or allegedly is in breach of*, [a staff member's] *Terms and Conditions of Employment in force at the time the Administrative Decision was taken*" could be subject to review in accordance with the GPs and the APs (Paragraphs 2.2.2 and 4.6 of the Response).

32. In the opinion of the Bank, the matter before the Tribunal at this time does not pertain to a challenge to the act of the Appellant's line manager to issue the Written Warning, as such challenge can only be considered if the Tribunal determines that MD HR erred in law in her qualification of the nature of the act of the line manager to issue a written warning in the context of the process for managing sub-standard performance and that accordingly, the GC has jurisdiction to review the MD HR's decision to refuse a review of such an act of the line manager. This matter would, in such case, need to be reviewed first by the GC (Paragraph 2.2.3 of the Response).

33. The Respondent submits that the issuance of a written warning in the context of the Bank's performance management process constitutes only one step in a series of steps in the process of dealing with sub-standard performance and the Written Warning does not constitute an administrative decision capable of altering, in a material adverse manner, or breaching the Terms and Conditions of Employment of the Appellant and, as a consequence, the Written Warning is not capable of being reviewed under the GPs. Accordingly, the MD HR did not err in law and correctly informed the Appellant that the written warning issued to her in the context of the process of managing substandard performance is not subject to review by the GC in accordance with the GPs, but that as a step in the decision making process, can be reviewed as part of a challenge to a decision to terminate employment or to demote on grounds of unsatisfactory performance, if such decision is taken at the end of the process. Consequently, the Respondent submits the communication from the MD HR is only a notification of the legal position and does not in itself constitute an administrative decision the review of which falls within the jurisdiction of the GC (Paragraph 2.2.4 of the Response).

34. With respect to the Oral Warning, the Bank submits that the originating claims with respect to the issuance of the Oral Warning were made for the first time in the RARD, i.e. such claims were not raised in the Normal Administrative Process and, in any event, the Appellant would have been out of time to raise a challenge with respect to any aspect of the act of the line manager to give an oral warning to the Appellant in the context of the process of managing sub-standard performance. Without prejudice to the Respondent's position in this respect, the Bank notes that as a general principle, the Oral Warning is, like the Written Warning, merely a step in an administrative decision-making process and the submissions set out below with respect to written warnings apply equally to the issuance of oral warnings (Paragraph 2.2.5 of the Response).

35. The Bank submits that unlike the decisions of the Tribunal, which are binding on the Respondent, GC reports and recommendations are not binding on the Respondent. The President of the Bank is not prohibited from rejecting the GC's Report and Recommendation and, further, unlike the decisions of the Tribunal, previous GC reports and recommendations are not, in and of themselves, part of the Bank's internal law. The Bank made those observations since GC's Report and Recommendation makes reference to one previous matter before the GC (Paragraph 2.3 of the Response).

36. With a reference to a number of cases of international administrative law (Judgment No. 086 (2009) *Planas v Secretary-General of the United Nations*; ILOAT Judgment No. 532 (1982), and many others) the Bank submits that in similar cases various employers' acts were not construed as administrative decisions which could be separately challenged before a competent authority (Paragraphs 3.1.5, 4.7-4.8 4.12 and 4.13 of the Response).

37. The Respondent submits that the issuance of a written warning is not an administrative decision that can be subject to a review in accordance with the GPs and, accordingly, the PARD was lawful and correct (Paragraph 4.2 of the Response).

38. The Bank insists that the issuance of written warnings (and oral warnings), in the context of the Respondent's performance management process, constitutes only one in a series of steps in the process of dealing with sub-standard performance set out under Section 4.18 of the SHB. The process involves a series of steps and findings which could, but may not necessarily, lead to an administrative decision which would be subject to review; either demotion or termination of a staff member's employment. These steps are preliminary in nature and irregularities in connection with them may be challenged only in the context of a challenge to the outcome of the entire process of managing unsatisfactory performance, but, they cannot alone be the subject of a review in accordance with the GPs. That conclusion is based on references to the sources of the corresponding case law (Judgment No. 2015-UNAT-509,

Judgment No. 2015-UNAT-562, Judgment No 2016-UNAT-617) (Paragraph 4.3 of the Response).

39. The Bank observes that if an administrative decision to demote or terminate the employment of a staff member is not taken, the act of issuance of a written warning remains legally inconsequential for a staff member. In opinion of the Respondent, these are the circumstances of the Appellant in this Appeal. If each individual step of a decision making process is considered to give rise to an administrative decision, then the GC and ultimately the Tribunal would essentially assume the role of the management of the Bank, undertaking the day-to-day management of administrative processes of the Bank, which is unbearable as a matter of principles of international administrative law (Judgment No. 2015-UNAT-509) (Paragraphs 4.4 and 4.5 of the Response).

40. In the opinion of the Bank, in order for an act to constitute an administrative decision which may be challenged on its own, it has to have *legal effect* or *direct legal consequences* on a staff member's rights and obligations. The Respondent submits that the issuance of a written warning does not have such legal effect or consequences and, therefore, a written warning does not satisfy the criteria of being an administrative decision that alters, in a material adverse manner, or breaches staff member's employment contract, as required under Article 8.01(b) of the GPs. The Appellant relies on paragraphs 27 and 28 of the GCs Report and Recommendation which describes certain purported consequences attached to being in receipt of a written warning. It is submitted by the Respondent that none of the scenarios cited as possible consequences of receiving a written warning, as relied upon by the Appellant, constitute a direct legal consequence, which, as noted above, is a necessary prerequisite for a decision to constitute an administrative decision that is capable of being grieved (Paragraph 4.9 of the Response).

41. Accordingly, the Bank concludes that the decision to issue a Written Warning is a step in the process of managing sub-standard performance and as such is preliminary in nature and may only be challenged in the context of a request for an administrative review of a final decision of the Respondent which has direct legal consequences (Paragraph 4.10 of the Response).

42. The Bank contests the Appellants' conclusions that that the process of managing sub-standard performance is "*outside the performance evaluation mechanism*" and this process is an "*expedited termination process*" or a disciplinary measure. In opinion of the Bank, the purpose of the procedure under Section 4.18.2 of the Staff Handbook is to notify the staff member that his/her performance does not meet the required standards in one or more aspects. This procedure affords the staff member the opportunity and time to improve his/her performance and to avoid potential future adverse legal consequences, such as demotion or termination on grounds of unsatisfactory performance. The process is

designed as an additional safeguard (in addition to, and not *in lieu* of, the annual performance appraisal process and report) to the interests of a staff member (Paragraphs 4.16-4.18 of the Response).

43. The Bank explains that there is a clear distinction between a written warning under Section 4.18 of the SHB on "*Dealing with sub-standard performance*", and a written censure being a disciplinary measure under the Conduct and Disciplinary Rules and Procedures under Annex 13.2 of the Staff Handbook. The principles of international administrative law differentiate between decisions to impose disciplinary measures (for example, a "written censure") and an executive discretionary decision (such as, for example, a decision to terminate employment on grounds of unsatisfactory performance). The decision to impose a disciplinary measure, while also involving discretion, is considered to be one which is taken in the exercise of quasi-judicial powers to impose sanctions or penalties for offences as opposed to the exercise of an executive discretion. Further, and perhaps more importantly, the Respondent notes that the decision to impose a disciplinary measure is the outcome of the disciplinary process and not a step in it (Paragraph 4.23 of the Response).

44. The Bank refers to case law set out by the EBRDAT (EBRDAT 2011/AT/01), according to which disciplinary decisions "*constitute a distinct category* [of management decision] *due to the seriousness of their consequences*, *and therefore are subject to plenary review as to (i) the alleged facts*, *(ii) their proper characterization as misconduct*, *(iii) the legal bases for the sanction imposed*, *(iv) proportionality of the sanction*, *and (v) due process*." Accordingly, disciplinary measures are subject to even higher scrutiny and control by Administrative Tribunals than discretionary administrative decisions, let alone steps in an administrative decision-making process (the same Paragraph 4.23 of the Response).

45. The Respondent contends that the PARD was correct to hold that (i) issuance of a written warning in the context of the Bank's performance management process constitutes only one in a series of steps in the process of dealing with sub-standard performance; (ii) the Written Warning does not constitute an administrative decision capable of altering, in a material adverse manner, or breaching the Terms and Conditions of Employment of the Appellant, (iii) accordingly, the communication from the MD HR is only a notification of the foregoing legal position and also does not constitute an administrative decision capable of altering, in a material adverse manner, or breaching the Terms and Conditions of Employment of the Appellant and, (iv) as a consequence, the GC does not have jurisdiction to review the refusal of the MD HR to review in accordance with the GPs the issuance of the Written Warning (Paragraph 6.2 of the Response).

46. On the basis of this Response, the Respondent invited the Tribunal to dismiss in full the Appeal and to decline the remedies sought by the Appellant (Paragraph 6.3 of the Response).

5. The Tribunal's evaluation

47. Commencing its evaluation of the matter, the Tribunal reiterates the norms of international administrative law which has to be fulfilled in the course of consideration of this Appeal. Those are Section 3 of the Staff Regulations according to which the Bank has to "act with fairness and impartiality in relations with Staff Members", and Article 2.01(b) of the Appeals Procedures, according to which "[a] *Staff Member may only appeal an Administrative Decision which allegedly alters, in a material adverse manner, or allegedly is in breach of, his Terms and Conditions of Employment in force immediately before the Administrative Decision was taken.*"

48. After that the Tribunal restates the provisions of the of the Staff Handbook which require an interpretation in the course of the present Appeal:

> 4.18.2 Procedure for handling cases of unsatisfactory performance If the performance of an employee is found to be less than fully satisfactory in one or more respects, the line manager should draw this to the employee's attention at the earliest opportunity. If the performance continues to be less than fully satisfactory in spite of efforts to improve it, or falls so far short of required standards as to raise serious doubts about whether sufficient improvement is possible, the line manager in consultation with the Human Resources Department will initiate the following procedure:
> (1) *Stage One: Oral Warning:* The employee will be given a formal oral warning that his/her performance is unsatisfactory in certain specific respects. The employee will be informed of the improvement needed and, where appropriate, ways in which the manager will try to assist in the process. The line manager should set a date, usually about 6 weeks in the future, for a further formal meeting at which performance will again be reviewed to see whether the required improvement has occurred. A brief note confirming that this oral warning has been given will be sent to the Human Resources Department and kept on the employee's personal file.
> (2) *Stage Two: Written Warning:* If the employee's performance is still unsatisfactory at the first formal review date, the line manager will give the employee a written warning, the contents of which have been agreed in advance by the Human Resources Department. The written warning should indicate the improvement still required, and the employee should be given

further time, which will normally be approximately 6 weeks, to achieve the necessary improvement before a second formal review meeting is held. The written warning should make clear that dismissal will be considered if the required performance standards have not been reached. A copy will be sent to the Human Resources Department and kept on the employee's personal file.
(3) *Stage Three: Dismissal or Demotion:* If by the time of the second formal review meeting the employee's performance has not reached the required standards, action will normally be taken to terminate his/her employment by giving the employee written notice in accordance with Section 12.2.5 (1)(a). The Bank may decide to demote the employee rather than terminate his/her employment and to reduce his/her salary to a level appropriate for the new position.

49. The Appellant believes that the Written Warning constitutes a challengeable administrative decision. This is opposed by the Bank's position in this case formulated on 1 December 2016 by the (interim) MD HR that "*within the framework of the procedure for handling cases of unsatisfactory performance, only the decision to demote or to terminate employment on the grounds of substandard performance would be an Administrative Decision*".

50. The Tribunal notes that arguments of the Appellant were supported by the GC's Report and Recommendation, and wishes to cite several most important conclusions of the GC:

> "We consider that it would be most surprising and contrary to the principles of international administrative law, that an individual has no remedy against a formal warning, whether oral or written unless and until they were either demoted or dismissed" (Paragraph 29 of the GC's Report and Recommendation).
>
> "We do not consider that staff would have sufficient protection against unfair, unlawful or irrational treatment during the warnings procedures, if they could only challenge the warnings given at the point at which they are dismissed or demoted" (Paragraph 30 of the GC's Report and Recommendation).
>
> "For the reasons given above we consider that the written warning was an Administrative Decision in respect of which Ms Sakurai has the right to seek redress under Article 2 of the Grievance Procedures" (Paragraph 34 of the GC's Report and Recommendation).
>
> "With regard to the decision of the MDHR as set out in her email of 1 December, we consider that email contains an Administrative Decision which is to deprive Ms Sakurai of the normal administrative processes through which she should be able to seek

a review of the Initial Decision to issue her with a written warning. The decision to refuse to allow Ms Sakurai's request to be progressed was a unilateral decision that had direct effect on Ms Sakurai and produced direct legal consequences affecting her terms and conditions of appointment" (Paragraph 35 of the GC's Report and Recommendation).

51. Following careful consideration of arguments of the Appellant and of the Respondent, the Tribunal arrives at the conclusion that the Bank's understanding of the nature and purposes of warnings under Section 4.18.2 of the Staff Handbook are indeed correct and hence the Appeal has to be dismissed.

52. The Tribunal observes that the Warnings outstanding in this case indeed did not constitute an administrative decision which *alters*, *in a material adverse manner*, *or allegedly is in breach of*, *Terms and Conditions of Employment of the Appellant*. In this particular case the Appellant did not plead that she was demoted or terminated (probably she was not, since she did not inform the AT so in her Appeal of 11 September 2017, and the fact that she was not demoted or terminated is also reflected in the GC's Report and Recommendation). This is the most important fact on which the Tribunal relies dismissing the Appeal.

53. With all esteem to the GC's Report and Recommendation, the Tribunal believes that the Bank's argument that "disciplinary measures are subject to even higher scrutiny and control by Administrative Tribunals than discretionary administrative decisions, let alone steps in an administrative decision-making process" (Paragraph 4.23 of the Response) is more persuasive.

54. If the Appellant was in fact dismissed or demoted due to the Warnings which she contested, the corresponding administrative decision of the Bank concerning termination or demotion would have been fully appealable, together with the Warning representing its necessary legal components. But in this case the Warnings did not materialize in any administrative decision which alters, in a material adverse manner, terms and conditions of the Appellant's employment, since she was not demoted, terminated or subjected to imposition of any disciplinary sanctions. That fact indeed proves that those Warnings indeed constituted "discretionary administrative decisions" (paragraph 4.23 of the Response) which were aimed at improvement of the Appellant's performance, rather than at adverse alteration of conditions of her employment.

55. The Tribunal agrees with the Bank that principles of international administrative law proven by cited case law in fact differentiate between decisions to impose disciplinary measures (for example, a "written censure") and an executive discretionary decision (which took place in this case). The decision to impose a disciplinary measure is aimed at

imposition of an immediate penalty upon the staff member, and should be immediately and unconditionally challengeable, while an executive discretionary decision may have some other reasons (like improvement of performance). To extent the latter type of decision did not create any immediate adverse alteration in terms and conditions of employment of concerned staff member, it should not be construed as an administrative decision being *per se* challengeable in the course of the NAP.

56. Assuming the foregoing main conclusion, the Tribunal shall now consider certain specific legal matters raised by the Appellant and the Respondent.

57. In the opinion of the Appellant, the Bank's Warnings were, in fact and in law, equivalent to performance appraisals and that they are therefore challengeable as per the generally recognised principles of international administrative law. The Tribunal does not agree with this analysis: the facts of this case reveal that the Appellant's performance was subject to evaluation which took place not long before the Appeal was filed on 11 September 2017 (paragraph 40 of the Statement of Appeal), i.e. almost a year after the Written Warning was communicated to her on 27 September 2016, i.e. those Warnings were not equivalent to performance appraisals. Moreover, the Appellant explained at paragraph 10 of her Statement of Appeal, that on 6 December 2016 any procedure for dismissal or demotion on the basis of the Warnings was suspended due to improvement of her performance. In opinion of the Tribunal, that also proves that the Warnings were not equivalent to performance appraisals.

58. The Appellant submits that the two Warnings in question influenced somehow the subsequent report on her performance: but to extent she believes that such report in fact had any adverse effect on terms of her employment, she is free to challenge it in the course of the NAP, the Tribunal is not competent to consider that submission as a matter of Appeals Procedures, and also as a matter of fact (since that report has not been annexed to the Statement of Appeal or even cited therein).

59. The Appellant believes that the Bank's understanding of Section 4.18.2 of the Staff Handbook allows to dismiss a staff member outside the performance evaluation mechanism – aiming at terminating or demoting staff members – just in 12 weeks, which is obviously not a reasonable time frame in which a staff member can demonstrate improvement, and on the basis of a procedure which is not adversarial (paragraphs 25 and 26 of the Statement of Appeal). That conclusion is not proven by the facts of this case, especially assuming the fact, that the Appellant has been neither demoted nor terminated on the basis of the contested Warnings, neither just in 12 weeks, nor later.

60. Foregoing notwithstanding, the Tribunal supports the Appellant's view that paragraph 4d) of the RARD is mistaken when it submits that executive discretionary decisions could be complained of through the RWPs and CDPRs. In this matter the Warnings were not connected any

"improper interpersonal behavior", they rather concerned the overall performance of the Appellant, accordingly, RWPs and CDPRs were inapplicable. However, that does not change the Tribunal's general conclusion that the Warnings in question did not create any immediate adverse alteration in terms and conditions of employment of the Appellant, and hence could not be construed as an administrative decision being *per se* challengeable in the course of the NAP.

61. The Appellant requests the Tribunal to consider her claim regarding the Oral Warning (together with that of Written Warning) relying on contention that she was misled by the Bank about the possibility to challenge the Oral Warning, and also because at the time of the Oral Warning, no Staff Legal Adviser were available to staff members (contrary to Section 14.2 of the Staff Handbook). Since it was established that neither Warning outstanding in this case was challengeable, this request should be rejected, although the Tribunal wishes to agree with the Appellant that Staff Legal Adviser should have been available to staff members at any time in accordance with the Staff Handbook.

62. The Bank observes that if an administrative decision to demote or terminate the employment of a staff member is not taken, the act of issuance of a written warning remains legally inconsequential for a staff member. In opinion of the Respondent, these are the circumstances of the Appellant in this Appeal. If each individual step of a decision making process is considered to give rise to an administrative decision, then the GC and ultimately the Tribunal would essentially assume the role of the management of the Bank, undertaking the day-to-day management of administrative processes of the Bank. The Tribunal agrees with that understanding and believes that the GC and the AT should consider only those administrative decisions, which in fact adversely affect the concerned staff member(s), otherwise normal day-to-day operations of the Bank would be jeopardized by endless challenges.

6. Decision

On the basis of the foregoing, the Tribunal, acting by a panel composed of Judges Boris Karabelnikov (Chair), Professor Giuditta Cordero-Moss and Professor Spyridon Flogaitis, hereby decides as follows:

> The remedies sought by the Appellant, Ms Hiromi Sakurai, are dismissed in their entirety.

For the EBRD Administrative Tribunal

Boris Karabelnikov