

IN THE APPEAL BEFORE THE EBRD ADMINISTRATIVE TRIBUNAL

Appellant

vs

European Bank of Reconstruction and Development
(the “Bank” or the “Respondent”)

Decision on Case EBRDAT 2018/AT/06

by the Administrative Tribunal

composed of

Giuditta Cordero-Moss (Chair of the Panel)
Spyridon Flogaitis
Maria Vicien-Milburn

20 February 2019

1. Introduction

The Statement of Appeal object of these proceedings was submitted on 7 December 2018. Appellant challenges a President's Decision rendered on 14 September 2018 in Case No. ARC/33/2018 (the "President's Decision").

The challenged President's Decision endorsed the Administrative Review Committee ("ARC") report and recommendations issued on 16 August 2018 (the "ARC Report"). The ARC Report was rendered on Appellant's Request for Administrative Review Decision submitted on 8 February 2018 (the "RARD"). The RARD regarded the decision to terminate the Appellant's employment in the course of the probationary period, with effect on 10 November 2017.

In brief, the challenged President's Decision confirmed the conclusion in the ARC Report, according to which the Bank's decision to terminate Appellant's employment during his probationary period was taken in the exercise of managerial discretion and did not violate the applicable law. Appellant submits that the decision was taken in violation of the applicable law. Respondent denies Appellant's allegations.

Appellant further submits that the object of these proceedings is connected to another administrative review proceeding which the Appellant has pursued, Case No. ARC/35/2018. This case originated with two reports of improper behaviour that Appellant filed on 9 and 10 November 2017 in accordance with the Harassment-free and Respectful Workplace Behaviour Procedures under Annex 13.3 of the Staff Handbook (the "RWPs"). The Managing Director responsible for Human Resources (the "MDHR") dismissed Appellant's RWP reports on 26 January 2018 stating that, if the facts alleged had been substantiated, they would not amount to misconduct. Appellant submitted a RARD against the MDHR decision on 25 April 2018. The ARC report was issued on 6 August 2018. The ARC Report recommended that the matter be referred to investigation under the Bank's Conduct and Disciplinary Rules and Procedures. The President endorsed the ARC report in a decision dated 4 September 2018. In the Statement of Appeal, Appellant informs that he requested an update on the status of the investigation, but did not receive any information.

2. The facts

The main lines of the facts as presented by the Parties in, respectively, the Statement of Appeal and the Response, are as follows:

Appellant was appointed as a Principal Banker on a regular term contract on 21 November 2016.

On 30 June 2017, the Line Manager held a mid-year performance review with the Appellant. The Parties' submissions diverge on whether the Line Manager during the review mentioned any performance issue. Appellant alleges that only new business planning was discussed, while Respondent alleges that shortcomings in Appellant's performance were discussed. Respondent refers to documentary evidence that was submitted to the ARC and supported its view. The ARC Report found that performance issues were discussed at the June mid-year performance review. At the June mid-year performance review, Appellant agreed to a three-months plan with specific objectives, that was meant to improve his performance.

On 21 September 2017, the Line Manager and Appellant had a further performance review meeting. The Line Manager expressed concerns with the Appellant's performance and pointed out that he had not met some of the objectives set in the three-months plan that had been agreed in the June mid-year performance review. The Line Manager also recognized some of the Appellant's achievements and acknowledged the fact that some of the work that had been delayed was not entirely within the Appellant's control or attributable to him. The Line Manager sent a detailed follow up email recognizing some of Appellant's achievements and listing ongoing performance concerns.

On 20 October 2017, the Line Manager notified Appellant that the Bank was intending to terminate his employment. Appellant affirms that this occurred on 27 October 2017, while Respondent refers to evidence that was submitted to the ARC and supporting that this occurred on 20 October 2017. The ARC Report found that this occurred on 20 October 2017. The Line Manager did not specifically invite Appellant to comment on the intention to terminate the employment.

On 23 October 2017, Appellant informally initiated, by a phone conversation and email correspondence, a process to report improper behaviour he deemed to be victim of, particularly due to lack of support and discrimination.

On 6 November 2017, Appellant was informed that a recommendation to terminate his employment would be made to MDHR.

On 8 November 2017, Appellant received a formal termination letter signed by MDHR. Termination was to have effect from 10 November 2017. The probationary period was due to expire on 21 November 2017.

On 9 and 10 November 2017, Appellant filed two reports of improper behaviour in accordance with the RWPs.

3. The Findings of Facts in the ARC Report

The ARC heard from three witnesses pursuant to paragraph 6.4.2(c) of the Directive on the Administrative Review Process: the MDHR, Appellant and the Line Manager. Transcripts of the interviews were provided to the Parties pursuant to paragraph 6.4.2(e) of the Directive, and the Parties were given an opportunity to make any further submissions in accordance with paragraph 6.4.2(g) of the Directive.

The ARC Report extensively referred to international case law affirming that an employer has a duty, also during an employee's probationary period, to act in good faith and inform the employee of his underperformance and of the risk that employment be terminated. Also, employers are to give the employee the possibility to give their comments. However, provided that the performance of a probationer has been properly assessed, that the employee has been given due warning of his underperformance, as well as of the risk that his employment may be terminated, management has a very broad discretion to determine the suitability of a probationary employee. In particular, a tribunal may not substitute its own judgement for that of the employer on the employee's suitability for permanent employment.

The ARC Report found that Appellant "must or should have been aware that his performance was not meeting the expectation of his line manager and that if he was to be confirmed in post he would need to improve his performance" (para 16 of the ARC Report, see also para 22).

The ARC Report bases this on the June mid-year review meeting and the three-months plan with specific objectives for improvement agreed therein (para 16 of the ARC Report).

Also, the review after the lapse of the three-months period resulted in a detailed written list of objectives that had been achieved and objectives whose performance had not been satisfactory, with specific comments on the need to improve in various areas (paras 19-21 of the ARC Report).

As part of the three-months plan decided in the June mid-year review, the Line Manager was to have bi-weekly review meetings with Appellant, to support him in his activity. The ARC Report refers to evidence that the Line Manager had sent to Appellant over 100 emails in the three-months period, addressing specific project issues. However, the Report found that the Line Manager failed to follow up the plan with formal bi-weekly reviews or to take notes from those meetings (Para 17 of the ARC Report).

The ARC Report refers to the Line Manager's perceived difficulty in dealing with Appellant, due to her conflicting concerns to be clear on Appellant's performance, while at the same time not being seen as patronizing him. The ARC Report finds that this is consistent with Appellant's ambition to maintain his independence (para 18 of the ARC Report).

The ARC Report finds that, while Appellant ought to have understood that there was a risk that his employment would not be confirmed at the end of the probationary period, he could not expect that his employment would be terminated prior to the expiry of the probationary period. According to the ARC Report, Appellant “did as at 21 September still think that he had two months in which to improve” (para 22 of the ARC Report).

The ARC Report describes the internal process that led to the decision to terminate Appellant’s employment (paras 23 to 26 of the ARC Report). The ARC Report concludes that the decision was taken by the Line Manager, supported by her manager and Human Resources, and that it was based on the conclusion that Appellant’s performance, compared with peers at Headquarters, was unacceptable. The letter of termination was signed by MDHR on 8 November, who had been briefed by the Line Manager and by the HR (para 30 of the ARC Report).

Appellant was informed of the intention to terminate his employment on 20 October 2017 (para 27 of the ARC Report), and on 6 November 2017 he was informed in a manner that made it clear that the decision was not reversible (para 28 of the ARC Report). The ARC Report finds that Appellant was not given a possibility to make submissions (para 31 of the ARC Report).

The ARC Report finds that the process leading towards termination was poorly managed (para 36 of the ARC Report). In particular, the ARC finds that Appellant should have been advised that termination prior to the expiry of the probationary period was being contemplated (para 36 of the ARC Report). While Appellant should have understood that confirmation of his employment was at risk, he had no reason to expect an early termination. The ARC Report concludes that the early termination had not been planned by the Line Manager, but was driven by an incorrect calculation of time periods made by Human Resources (paras 25 and 34 of the ARC Report).

The ARC Report criticizes Respondent for not having alerted Appellant that his employment would be early terminated and for having failed to give him the opportunity to comment before the decision was taken (para 35 of the ARC Report). Also, the ARC Report finds that the Line Manager should have taken notes of formal review meetings (para 35 of the ARC Report).

The ARC Report concludes that, notwithstanding the above mentioned criticism, “it was open to the Line Manager to arrive at the conclusion that she did, at the date that she did, and that her decision to recommend termination was taken in good faith and was a legitimate exercise of her managerial discretion. Further that the failure to formally warn the staff member that he was at risk of dismissal, whilst poor management, did not render the

decision of the MDHR unlawful. The Staff Member was sufficiently aware that there were concerns about his performance such that he knew that he needed to improve” (para 37 of the ARC Report).

The ARC Report finds that the Line Manager “had reached a firm decision supported by her managers that his contract should be terminated, no doubt in the full knowledge that the staff member would not agree, and so we consider the staff member would not have been able to persuade her to change her mind” (para 38 of the ARC Report). Therefore, the ARC Report concludes that failure to have provided the staff member with an opportunity to plead its case did not affect the decision to terminate employment (para 39 of the ARC Report).

Appellant’s view of the Findings of Facts in the ARC Report is twofold: On the one hand, Appellant states that he does not contest the narrative of the ARC Report (para 3.1 of the Statement of Appeal); on the other hand, he states that he does not agree with parts of the Findings of Facts in the ARC Report (para 3.3 of the Statement of Appeal). This will be discussed in section 4 below.

Respondent finds the ARC Report acceptable, although it does not agree with its view that Appellant’s rights were breached by the way in which communication was conducted. Respondent agrees in any event with the ARC Report’s evaluation that any procedural irregularities did not reach the threshold of materiality necessary to consider the decision on termination unlawful.

4. Appellant’s position

Appellant argues that the ARC Report is unreasonable because on the one hand it criticizes the manner in which the Bank has dealt with the termination of Appellant’s employment, while it on the other hand concludes that the Bank has not breached the applicable law.

Appellant refers to his own pleadings before the ARC, according to which the Bank failed to (i) provide Appellant with sufficient support during his probationary period; (ii) notify Appellant that his performance was below expectations and thus deprived him of the opportunity to improve; (iii) give Appellant the opportunity to respond to the Bank’s assessment of his performance; and (iv) gave consistent and fair reasons for the termination.

Appellant recalls that the ARC Report largely supported Appellant’s pleadings. In particular, Appellant refers to the following findings by the ARC:

1. Employers have an obligation to seek to support and train staff members and give an opportunity to improve any shortcomings before a decision is taken as to whether or not to confirm them in post (paragraph 32);
2. The line manager should have formalised her concerns about the Appellant and made her position clear in meetings and emails with him (paragraph 34); and
3. That there was poor management of the process which did not meet the high standards of behaviour and managerial practice espoused at the EBRD (paragraphs 35-36).

Nevertheless, the ARC Report concludes that the Bank acted in good faith, and that therefore it did not violate the applicable law. Appellant argues that this is an inconsistency in the ARC Report.

Appellant argues that the ARC does not apply the standard of good faith as established in case law by the ILOAT, according to which the principle of good faith requires that the employee be informed if his performance is assessed as poor, so that he be given the opportunity to improve. Appellant refers to the ARC Report's recognition that the Line Manager misrepresented who was responsible for taking the decision on termination (the Line Manager herself or her managers) and according to which parameters (benchmarking with peers at the Headquarters), thus confusing Appellant and depriving him of a chance to improve his performance.

Appellant also argues that the ARC Report disregarded specific situations Appellant presented to the ARC as illustration of improper behavior by the Line Manager: Appellant initiated discussion for a project, but was later not invited to follow up meetings without receiving any reasons for that; Appellant did not receive assistance in negotiating legal clauses, thus affecting Appellant's ability to achieve the objective, while other bankers in comparable situations received such assistance; Appellant was not permitted to reduce a fee, while the fee in another comparable project was reduced; the Line Manager considerably postponed the dates for trips and meetings, thus affecting Appellant's ability to meet his objectives; Appellant was overloaded with operational responsibility, which negatively affected his ability to achieve his objectives as opposed to the other bankers, who had significantly lower work load.

Appellant argues that these specific situations prove that the Bank abused its power and treated Appellant unfairly and in a discriminatory manner. This conduct is the object of the RWP reports Appellant submitted on 9 and 10 November 2017. Appellant argues that the ARC should have taken this conduct in consideration or at least should have suspended the RARD, pending the review of the RWP reports.

Finally, Appellant points out that the ARC Report recognizes that the Bank materially breached its duty of fairness towards Appellant, in that it failed to formally alert him of the

risk that he would be dismissed and to invite him to comment before a final decision was taken. However, the ARC Report considers these to be procedural defects and not sufficiently serious to be considered an abuse of process. Appellant argues that this is an inconsistency.

Appellant requests following relief:

1. Suspension of the 14 September 2018 decision of the President in ARC/33/2018 until such time as the Appellant's RWP complaints have been finally determined;
2. Suspension of the time limits in which the Appellant can request any further action or review of the RWP outcomes;
3. Material and moral damages equivalent to at least three months' salary or such other amount as the Tribunal deems appropriate for the procedural irregularities, breaches of contract, the loss of career opportunity, and the unfair and injurious handling of the Appellant's termination by the Bank;
4. Damages in the amount that the Tribunal deems appropriate for the medical condition of stress and anxiety caused by the Bank's conduct; and
5. Reasonable legal costs.

6. Respondent's position

Respondent argues that the decision to terminate Appellant's employment during his probationary period was a lawful and legitimate exercise of managerial discretion. The decision was objectively and reasonably founded on the persistent and material shortcomings of Appellant's performance. Respondent points out that Appellant was employed as a Principal Banker, a senior position in which a high degree of independence is expected. Appellant was unable to perform at the high level expected of this position.

Respondent refers to case law confirming that management enjoys a very broad discretion to determine the suitability of a probationary employee. Respondent comments on Appellant's allegations that the decision to terminate was taken not on the basis of legitimate operational factors such as performance, but rather by prejudice against the Appellant, and points out that these allegations were extensively considered by the ARC. The ARC Report concluded that the decision was taken in good faith, namely in light of the Line Manager's view that the Appellant was not performing to the level required of a Principal Banker.

Regarding Appellant's allegations of misconduct, Respondent refers to the transcripts of the meetings between the ARC and the Line Manager, from which it results, i.a., that Appellant was taken off a project team *inter alia* as a consequence of meetings he had been having on

the project without informing his management, and that Appellant's workload was in line with other members of the team when considering seniority, project complexity and other responsibilities.

Regarding Appellant's allegations that the principle of due process was breached, Respondent argues that Appellant was notified of his performance shortcomings in a timely manner, was set achievable objectives and was offered adequate support.

The Appellant was aware or should have been aware that the termination of his appointment was being considered, as the Staff Regulations and Staff Handbook are clear as to the purpose of a probationary period. Appellant had the opportunity to be heard in this respect in connection with the mid-year performance review in June, the review of the three-months plan in September and when he was informed of the Bank's intention to terminate his employment in October. However, Appellant chose not to exercise such right. Appellant did not mention the Bank's alleged misconduct until after he was informed that a decision had been taken to terminate his employment.

Respondent concedes that the Line Manager's communication could have been clearer, but it denies that such communication was flawed to an extent that deprives Appellant's of his right to be heard.

The allegations contained in the RWP reports are irrelevant as they are part of separate proceedings. In any event, they were extensively considered by the ARC and found to be unpersuasive.

Respondent believes that it has treated Appellant with all due consideration and respect throughout his employment and subsequently.

Respondent requests that the Appeal be dismissed in its entirety.

7. The Tribunal's evaluation

7.1 Request of oral hearing

In the Statement of Appeal, Appellant requested that the Tribunal hold an oral hearing for the purpose of hearing him and other involved individuals. This request was explained in para 1.9 of the Appeal as follows: "the facts at stake could be properly analysed through the direct testimony of the former Staff Member and of the other individuals involved".

Respondent objected, in para 1.7 of the Response, that the Parties had the possibility to articulate their respective position in the written submission, and argued against the necessity of holding an oral hearing.

On **9 February 2019**, the Tribunal rejected Appellant's request to hold an oral hearing, on the basis of the considerations set forth below.

7.1.1 The sources

Pursuant to Article 7.02 (a) of the AP, an oral hearing may be held in exceptional cases.

A possible basis to assume that exceptional circumstances justify an oral hearing, might be if a party requests to be allowed to submit new evidence.

Pursuant to Rule 7.01(c), a party may be allowed to submit new evidence if that party details such new evidence and explains why such new evidence was not available to it during the Administrative Review, as well as when and how such new evidence became available to it.

For the sake of completeness, the Tribunal also examined sources regulating how the Tribunal is to establish the facts relating to the disputed matter (more extensively examined in section 7.3). These sources do not necessarily have a direct impact on the evaluation of whether an oral hearing is to be held, but they may have relevance to the question.

Pursuant to Article 7.01 (a) of the AP, the tribunal shall rely on the ARC's finding of facts.

Pursuant to Article 7.01 (b) of the AP, the tribunal may depart from the ARC report if the report is:

- i. manifestly wrong on the face of the written material in front of the Tribunal,
- ii. perverse or
- iii. in breach of the applicable law, or
- iv. if there is new evidence.

The Rules contain more detailed regulation on some of these requirements:

- Pursuant to Rule 7.01 (a), Appellant may in the Appeal seek to assert that the ARC findings of facts have a manifest error. In such case, pursuant to Rule 7.01 (b), Respondent may reply and the Tribunal shall decide the matter;
- Pursuant to Rule 7.01(c), new evidence may be requested only if it was not available during the Administrative Review and the request is detailed as described above.

7.1.2 Appellant's position

Appellant requested that the Tribunal hear him and "other individuals involved". Appellant did not explain how this request that the Tribunal hears him and other individuals complied with the requirement contained in Rule 7.01(c), according to which new evidence may be requested only if it was not available during the Administrative Review. Also, Appellant did not explain whether his request regarded people who were not already heard by the ARC, and what the testimony was supposed to prove.

Appellant did not explain which circumstances were exceptional in this case and could meet the requirements of Article 7.02 (a) of the AP. Appellant affirmed that the ARC, in its description of the facts, moved criticism against the conduct of the Bank, but concluded that the decision to terminate his contract was lawful. According to Appellant, there is a contradiction between the ARC's reasoning and its conclusion.

For the sake of completeness, the Tribunal also referred to Appellant's comments on the ARC findings of fact. These are more extensively examined in section 7.3.

7.1.3 Respondent's position

Respondent submitted that an oral hearing was not necessary, given that the ARC made its finding of facts and the parties had articulated their respective position in the written submissions to the Tribunal.

Respondent responded to Appellant's alternative description of facts in detail and with reference to evidence already referred to in the ARC Report.

7.1.4 The Tribunal's evaluation

Pursuant to Section 7.02 (a) of the AP, an oral hearing may be held in exceptional cases.

The Tribunal found that Appellant did not explain which exceptional circumstances in the case at hand may support holding an oral hearing. The conclusion by the ARC that the decision was lawful, even though it criticized Respondent's conduct, does not meet this requirement. Appellant's criticism was directed at the ARC Report's reasoning and it did not seem that an oral hearing may be relevant to this issue.

Outside the situation envisaged in Article 7.02 (a) of the AP, the Tribunal has no basis to hold an oral hearing.

For the sake of completeness, the Tribunal turned to Appellant's request to submit new evidence and to Appellant's comments on the ARC Report, as these may be conceived to give a basis for exceptional circumstances which may justify an oral hearing.

Regarding Appellant's comments on the ARC Report, the Tribunal observed that the general rule laid down in Article 7.01 (a) of the AP is that the Tribunal shall rely on the ARC's finding of facts. The bases to depart from the general rule are examined below.

Pursuant to Article 7.01 (b) of the AP, the Tribunal may depart from the ARC report if the report is manifestly wrong, perverse or in breach of the applicable law, or if there is new evidence.

The Tribunal found that the mere disagreement by the Appellant with the ARC's findings facts, not substantiated by any new evidence, was not sufficient to meet these requirements.

Pursuant to Rule 7.01(c) of the AP, new evidence may be requested only if it was not available during the Administrative Review.

The Tribunal found that the request to hear Appellant, who already was heard by the ARC, did not meet these requirements. The request to hear "other individuals involved" was not sufficiently precise to be evaluated.

7.2 Request of additional submissions

On **16 January 2019**, having read the Bank's Response, Appellant asked for the possibility to submit a further pleading. Appellant justified this request stating that: (i) he contested the Response on a number of points, (ii) the Response raised new points and (iii) the Response did not address the request of an oral hearing. Appellant also wished to (iv) be allowed to provide additional evidence on the legal costs.

On **31 January 2019**, Respondent replied that its Response solely addressed Appellant's pleas as stated in the Statement of Appeal, and that it did not present new evidence. The Response solely relied on the finding of facts in the ARC Report. Respondent pointed out that both Parties had the opportunity to present their arguments on the basis of the evidence before the Tribunal, and that Appellant did not make out a case for the necessity of a further round of pleadings.

Regarding Appellant's request for an oral hearing, Respondent recalled para 1.7 of the Response, and confirmed the argument made therein, that the case could be decided upon on the basis of the Findings of Fact and the series of written submissions already received by the Tribunal.

Regarding legal costs, Respondent affirmed that it had no objection to legal costs being awarded to the Appellant, to the extent that any such award took into account Appellant's ultimate successes and failures throughout the review process and that the legal costs were appropriately documented.

On **9 February 2019**, The Tribunal rejected Appellant's request to be allowed to submit additional briefs. The decision was based on the considerations set forth below:

7.2.1 The sources

Article 6.03 (a) of the Appeals Procedures provides that the proceedings shall be based on the following documentation: Statement of Appeal, Response, Administrative Review Committee's Report (including the Findings of Fact) and a transcript of proceedings before the Administrative Review Committee.

As a general rule, no additional exchange of submissions between the parties is foreseen. This is confirmed in Article 7.01 (a), that reads as follows:

In the ordinary course, the Tribunal shall decide the Appeal on the basis of the Appeal Documents which shall include the Statement of Appeal, Response, Findings of Fact of the Administrative Review Committee and a transcript of the proceedings before the Administrative Review Committee and any other documents and evidence submitted to the Tribunal.

However, Article 6.03(b) gives the Tribunal the possibility to, *on its own initiative*, ask for additional submissions:

In addition, at any time during the proceedings, the Tribunal may require evidence or argument additional to that put forward by the parties.

The Parties' opportunity to request additional submissions is not directly regulated in the Appeals Procedures. However, it may be based on Article 7.01 (b) of the Appeals Procedures. This provision regards only submission of additional evidence, and not submission of additional arguments.

The opportunity for the parties to request to be allowed to submit additional evidence is subject to the following restrictions: (i) The Findings of Facts contain a manifest error, are perverse or reached in breach of the applicable law, or (ii) new evidence is allowed, that was not available before the Administrative Review Committee.

In case a party requests to be allowed to produce new evidence, according to Rule 7.01 (c) it shall detail such new evidence and explain why such new evidence was not available to that party during the Administrative Review, as well as when and how such new evidence became available to that party. Appellant shall make such request in the Statement of Appeal, if the evidence was available at that time (Rule 7.01(c)(i)).

Regarding the sources on the parties' ability to request an oral hearing, The Tribunal made reference to the separate decision described in section 7.1.

7.2.2 Evaluation

Appellant's request to be allowed to submit an additional brief is based on the following: (i) Appellant contested the Response on a number of points, (ii) the Response raised new points and (iii) the Response did not address the request of an oral hearing. Appellant also wished to (iv) be allowed to provide additional evidence on the legal costs.

As the overview made in section 7.2.1 above shows, the Appeals Procedures provide for only one exchange of submissions.

The ability of the parties to request additional exchanges is limited to submission of new evidence and is subject to restrictions.

However, the Tribunal may request additional submissions. In exercising this power, the Tribunal shall balance the interest in permitting that both parties fully develop their arguments on one side, and the interest in procedural efficiency on the other side.

In proceedings under the Appeals Procedures, the parties have already, in the course of the review process before the ARC, had the opportunity to develop their respective arguments, and to respond to the other party's arguments. In the statement of appeal and the response before the Tribunal, the parties have had a further opportunity to develop their arguments on the same issues and to respond to the other party's arguments. Particularly considering that the factual basis for the Tribunal's decision is the same factual basis in respect of which the parties have developed their arguments as described above, it seems that the Appeals procedures provide the parties with sufficient possibility to present their case.

On the basis of the foregoing, there must be strong reasons for a further exchange of submissions to be allowed.

The mere circumstance that one party disagrees with the other party's arguments is not a sufficient basis to deviate from the general rule contained in the Appeals Procedures, according to which the Tribunal decides on the basis of one exchange of submissions. Therefore, Appellant's ground (i) for requesting additional submissions was not a sufficient basis for deviating from the rule of one exchange of submissions.

In ground (ii), Appellant alleged that the Response raised new points. However, Appellant failed to explain which points were new. This ground did not seem to be sufficiently reasoned or substantiated. Therefore, it was not a sufficient basis for deviating from the rule of one exchange of submissions.

In ground (iii), Appellant alleged that the Response did not address the request of an oral hearing. The Response in fact did address the matter, albeit briefly, in para 1.7. Appellant had anyway the opportunity in his request for an oral hearing to develop his arguments on the necessity to hold an oral hearing. There did not seem to be a need for a new submission on the same issue. Therefore, ground (iii) was not a sufficient basis for deviating from the rule of one exchange of submissions.

In ground (iv), Appellant requested to be allowed to submit evidence on legal costs. The Tribunal considered that, should it determine, on the basis of the outcome of the case and other relevant circumstances, that such costs shall be reimbursed, it can allow Appellant to submit evidence of the costs. However, at that stage this seemed to be premature. Therefore, ground (iv) was not a sufficient basis for deviating from the rule of one exchange of submissions.

Based on the forgoing, in the Tribunal's opinion Appellant did not submit sufficient reasons to depart from the general rule that the Tribunal shall decide on the basis of one exchange of submissions. The Tribunal observed that, should it, during the deliberations on the merits, find that it would be useful to ask for further submissions, it remains free to direct the Parties to do so.

7.3 Findings of Facts:

Pursuant to Article 7.01 (a) of the AP, the tribunal shall rely on the finding of facts made in the ARC Report.

Pursuant to Article 7.01 (b) of the AP, the tribunal may depart from an ARC report if the report is:

- v. manifestly wrong on the face of the written material in front of the Tribunal,
- vi. perverse or
- vii. in breach of the applicable law, or
- viii. if there is new evidence.

The Appellant affirms, in para 3.1 of the Statement of Appeal, that he does not contest the narrative of facts made in the ARC Report. However, in para 3.3 of the Statement of Appeal, he states that he only partially agrees with the finding of facts.

This apparent inconsistency may be explained in light of the issues on which Appellant disagrees, as described in letters c), d), e), f), g), h) and i) of para 3.3 of the Statement of Appeal. Appellant disagrees on the interpretation of the facts, rather than on the description of the facts. In particular, Appellant disagrees on how clearly he was informed of performance issues during the mid-year performance review or otherwise; on whether communication between Appellant and the Line Manager may be defined as frequent; on whether Appellant was easy or difficult to work with; on whether Appellant was given the possibility to express his views during meetings.

Appellant provides in para 3.3 i) a description of the facts partially different from the description made in the ARC Report. Appellant does not substantiate the differences from the ARC Report by references to new evidence.

In the opinion of the Tribunal, the foregoing does not meet the requirements of Rule 7.01 (a) of the APs, pursuant to which the Appellant might seek to assert that the ARC Report is affected by a manifest error. Appellant does not substantiate the differences from the ARC Report by references to evidence. Rather, Appellant expresses his disagreement with the ARC evaluations.

The Appellant's disagreement with the ARC's evaluations is not, in the Tribunal's view, sufficient basis to depart from the general rule laid down in Article 7.01 (a) of the AP, cited above.

The Tribunal, therefore, relies on the ARC Report and assumes that Appellant was informed, in the June mid-year performance review, that his performance had shortcomings; that he was given, with the three-months plan, the possibility to improve his performance; that he was informed, on 21 September 2017, that his performance still had shortcomings; that he was informed, on 20 October 2017, that the Bank intended to terminate his employment; that he was informed, on 6 November 2017, of the Bank's decision to recommend termination of his employment; that he received, on 8 November 2017, a letter communicating that his employment was terminated with effect from 10 November 2017,

during his probationary period, which probationary period would elapse on 21 November 2017.

The Tribunal, therefore, assumes that Appellant as from June 2017 was aware or should have understood that the confirmation of his employment was at risk unless his performance improved, and that as from September 2017 he was aware or should have understood that his performance was still unsatisfactory.

The Tribunal further assumes that Respondent did not formally invite Appellant to make comments on the evaluation of his performance. Appellant was not prevented from making any comments, but did not offer to make any.

7.4 The substantial aspects of the decision to terminate

The Tribunal observes that, as a general matter, administrative tribunals do not have the power to review the exercise of managerial discretion. It is only when a decision is taken in violation of the applicable law, that tribunals have jurisdiction. In particular, in respect of a decision to terminate employment of an employee in the probationary period, a tribunal may verify that the decision was taken with due regard to principles of due process, but may not substitute its own evaluation to the employer's evaluations of the employee's performance or workload, or on how the employer organizes and carries out its activity.

The applicable law in this case consists primarily of the Staff Regulations, the Staff Handbook, as well as principles of international administrative law, including principles on due process.

These sources set out a general duty to deal with employees in a fair and impartial manner (section 3(a) of the Staff Regulations).

Regarding the probationary period, the internal law makes clear that the purpose of the probationary period is to allow to assess the suitability of the employee to the employer (section 5(c) of the Staff Regulations and section 2.5.2 of the Staff Handbook). On this basis, pursuant to section 12.2.2(1) of the Staff Handbook, the Bank

“may terminate the appointment of an employee who is on probation, by giving him/her notice in writing, at any time during the probationary period or at the end of this period.”

The termination of Appellant's employment during the probationary period is, in other words, the exercise of a discretionary right of the Bank, and the Tribunal does not have jurisdiction to rule on the substantive reasons on which the decision was based.

7.5 The procedural aspects of the decision to terminate

While the assessment of the Bank's managerial discretion falls outside the scope of the Tribunal's discretion, the procedure followed by the Bank in exercising its discretion may be evaluated to verify whether the decision was taken in compliance with the applicable law.

The Tribunal observes that the Bank has a duty to respect the principles of due process and to not abuse its powers. These duties are set forth in section 4.18.1(1) of the Staff Handbook, pursuant to which the Bank is,

“where shortfalls or weaknesses in performance are observed, to bring these to the attention of the employee concerned” and to “provide or arrange for the provision of a reasonable level of advice, coaching and, where appropriate, training to less experienced staff, and to other members of the team who may need it.”

Employees have, pursuant to section 4.18.1(2) of the Staff Handbook, a corresponding duty:

“Each employee is responsible for carrying out the duties and responsibilities of his/her position to the best of his/her abilities, and in a manner that meets the performance standards required of the position. Employees are expected to respond positively to criticism, to take advantage of advice and available assistance, and to make best efforts to rectify weaknesses that are brought to their attention. They are not entitled to demand an unusual amount of coaching or other assistance to help overcome performance weaknesses, or to rely on the lack of such assistance to justify or excuse such weaknesses.”

While neither of these provisions expressly refers to employees serving during probationary periods, it is fair to assume that they are applicable also to employees on probationary contracts.

As the findings of facts described above show, Appellant was made aware of, or should have understood, the shortcomings in his performance in the June mid-year performance review; the three-months plan was developed to contribute to improving Appellant's performance; the shortcomings in Appellant's performance were addressed again in the September meeting; Appellant was informed of Respondent's intention to terminate his employment in October; it was first in the meeting on 6 November, that the decision to terminate became irreversible.

In the opinion of the Tribunal, this suggests that Respondent has informed Appellant of the performance shortcomings and has developed a plan to permit him to overcome them. Hence, Respondent's duties towards Appellant have fulfilled.

It results from the fact finding that Respondent has not formally invited Appellant to comment on the evaluation of his performance; also, it results that periodical performance reviews were not formalized beyond the meetings in June, September and October. However, it results that in the time between June and September there was frequent communication between Appellant and the Line Manager on specific project-related matters. Given the frame set by the performance reviews formally held in June and September, communication on project-related matters can be construed as an implementation of the criteria according to which performance was assessed. Appellant, therefore, was not left without follow up.

Furthermore, Appellant had the possibility to offer his comments on the performance evaluation. He would have been expected to give comments in the context of the meetings that were devoted to the performance evaluation in June, September and October. However, it does not result that he contested the evaluation or its criteria; to the contrary, he agreed to the three-months plan to improve his performance. Furthermore, although not expressly invited to do so, Appellant could have offered his comments also outside of the mentioned meetings in June, September and October. However, it does not result that he did so.

The first time he offered comments, in the form of complaints for improper behavior by the Bank, was with the RWP reports he filed after his employment was terminated, on 9 and 10 November 2017. Appellant informs that he informally initiated the RWP process on 23 October 2017. Also this date, however, is after the date on which Appellant was informed of Respondent's intention to terminate his employment (20 October 2017).

On the basis of the foregoing, the Tribunal is of the opinion that Respondent did not breach Appellant's right to be heard in relation to the decision to terminate Appellant's employment. While it could have been desirable that communication on the matter be more structured and formalized, Respondent's conduct may not be seen to be unlawful.

The Tribunal finds that the alleged confusion as to who took the decision to terminate employment, the Line Manager or her manager, does not have an impact on Appellant's right to be heard, as Appellant was informed of the substance of the decision and could have presented his comments in either alternative.

While Appellant's right to be heard was not breached because Appellant had reason to expect that his employment would not be confirmed after expiry of the probationary period, the ARC Report found that Appellant had no reason to expect that his employment would be terminated earlier. In other words, Appellant had reason to expect a non-confirmation with effect from 21 November 2017, rather than an early termination with effect from 10 November 2017.

The Tribunal finds that this distinction does not have material relevance as to Appellant's right to be heard, as the difference between the date of his effective termination and the the date of expiry of the probationary period is a minor time difference of 11 days. All parameters of the evaluation, including Appellant's expectations and possibility to be heard, remain common in both scenarios.

The Tribunal turns to assessing whether Appellant had legitimate expectations to remain employed until 21 November 2017, and whether these expectations were not met by Respondent's decision to terminate employment early, rather than to wait until the lapse of the probationary period 11 days later.

The Tribunal observes that, pursuant to section 12.2.2(1) of the Staff Handbook, Respondent is entitled to terminate employment before the expiry of the probationary period by giving written notice. Pursuant to the ARC Report, Appellant was informed on 20 October 2017 of Respondent's intention to terminate employment. Appellant was further informed on 6 November 2017 that a recommendation to terminate employment would be made to MDHR. Appellant received written notice of termination on 8 November 2017. The termination notice also informed Appellant that he would be paid a lump-sum in lieu of notice as provided for in section 12.2.2(1) of the Staff Handbook.

On the basis of the applicable law, of the process that took place to assess Appellant's performance and of the information Appellant was given, the Tribunal finds that Appellant did not have legitimate expectations to remain in employment until the expiry of the probationary period.

7.6 The relevance of Appellant's reports of misconduct

The tribunal observes that the issues raised by Appellant in relation to Respondent's alleged misconduct are the subject of separate proceedings.

The ARC considered the issues that are object of these proceedings, as it results from the transcripts of the witness testimonies. The ARC did not find that these issues had a bearing on the disputed matter.

On the basis of the description of the RWP reports made by Appellant in the Statement of Appeal, the Tribunal understands that the alleged misconduct regards the composition of a project team, whether to encourage negotiations of certain contract terms, whether to accept reduction of a fee, the time table of the Line Manager and the allocation of work among various employees. The Tribunal observes that these are decisions that an employer

takes on the basis of the employer's evaluations regarding its organization, strategy, policy and other relevant circumstances. Appellant did not, in the Statement of Appeal, substantiate his allegations with regard to the facts in a way that gives sufficient reason to evaluate whether they may be relevant to an assessment of whether the managerial discretion was exercised in an abusive or discriminatory way.

On this basis, the Tribunal deems that there is no basis to suspend the President's Decision pending the investigation regarding Appellant's RWP reports.

7.7 Recommendations by the ARC

The Tribunal endorses the recommendations made in the ARC Report.

The ARC Recommendations read as follows:

1. The Committee recommends that in future where a recommendation is being made to the MDHR that a probationer's employment should be terminated, especially in circumstances where it is to be terminated early, the probationer should be given an opportunity to "*plead their cause*" prior to the MDHR taking a final decision.
2. Furthermore, the Committee recommends that the Bank should decide whether the procedure set out at section 4.18.2 should apply to probationers or expressly exclude it from applying.
3. The Committee also recommends that all probationers are subject to regular formal review during the probationary period (without prejudice to the rights of the Bank to terminate a probationer's employment early in the probationary period for good reason), in order that they are clear whether their performance is acceptable and what they need to do in order to be confirmed in post.

7.8 Decision

On the basis of the foregoing, all requests made by Appellant are dismissed.

For the Administrative Tribunal



Giuditta Cordero-Moss
Professor Dr Juris, PhD