THE ADMINISTRATIVE TRIBUNAL
OF THE
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Case No. 2019/AT/02

Appellant

vs.

European Bank for Reconstruction
And Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Michael Wolf, Chair
Giuditta Cordero-Moss
Spyridon Flogaitis

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20 February 2020

I. Factual Background

1. Appellant began working for the European Bank for Reconstruction and Development ("EBRD," "Bank" or "Respondent") on 24 September 1999. Her work for the Bank was undertaken pursuant to a Consultancy Services Agreement ("Consultancy Agreement") executed between Westek IT Recruitment Ltd. ("Westek") and KWLC Ltd. Under that agreement, KWLC agreed to provide "consultants" who would perform work for Westek's client, which was identified as the EBRD. Appellant is the sole director and employee of KWLC.

2. Appellant's initial work for the Bank was on a fixed term Consultancy Agreement, but, after repeated extensions, she continued her work with the Bank for more than 19 uninterrupted years. She alleges she did not work for any other clients in that time.

3. The earliest Consultancy Agreement between Westek and KWLC is not in evidence in this proceeding. The earliest Agreement in the record is dated 14 February 2011, with a term of 27 February 2011 to 26 August 2011. Appellant signed the Consultancy Agreement and its multiple extensions on behalf of KWLC.

4. The EBRD did not sign the Consultancy Agreement and was not identified as a party to this Agreement, although its rights and privileges as the "client" are specified throughout the contract.

5. Pursuant to the Consultancy Agreement, Appellant worked as a "support analyst" providing IT services to the EBRD, with the work to be performed at the Bank's headquarters in London. That Agreement identified Appellant as the "primary consultant" for KWLC. There is no evidence that anyone other than Appellant provided consultancy work under the Agreement between Westek and KWLC.

6. The Consultancy Agreement specified the hours of work, the hourly rate of pay and other terms of Appellant's work. The terms of that Agreement were "subject to amendment by Westek, who shall endeavor to give as much notice as is practicable to [KWLC]." The Agreement also specified that Westek and the EBRD could alter the hours of work and the rates of pay "as and when required" and gave the Bank authority to provide and direct Appellant's work.

7. The Consultancy Agreement stated that it was "not a contract of employment and neither Westek nor [KWLC] intend that the provision of services should constitute or create a relationship of employment between any of the parties. In particular [KWLC] shall be responsible for administering and paying all employer's and employee's income tax, National Insurance and similar contributions in respect of its Consultants…."

8. KWLC also agreed in the Consultancy Agreement to indemnify both Westek and the Bank with respect to various liabilities, including taxes owed or claims arising from statutory employment laws.

9. The Consultancy Agreement stated that it "shall be governed and construed in accordance with the laws of England and Wales and the parties submit to the jurisdiction of the Courts of England and Wales."

10. On 10 July 2012, the Bank and Westek entered into a "Framework Contract for Assignment Services (Technical and Professional Positions)." Under that contract, Westek agreed to "manage and co-ordinate the Bank's recruitment and temporary resourcing requirements as provided in this Agreement." The Framework Contract remained in effect during all times relevant to this appeal.

11. Part of Westek's obligations under the Framework Contract was to provide "Agency Personnel to perform the Assignment Services" designated by the Bank. The Bank reserved the right to review the *curriculum vitae* of proposed personnel and to interview them. However, Westek was responsible for the payment of compensation and benefits to Agency Personnel and for compliance with relevant statutory (e.g., tax) obligations. Appellant was "Agency Personnel" for purposes of the Framework Contract.

12. Agency Personnel under the Framework Contract were distinguished from Bank employees (i.e., staff members). Although the Bank retained input into the selection and retention of Agency Personnel, the latter were subject to the following conditions:

> Agency Personnel shall, and shall be deemed to, be employees, consultants, contractors or agents of the Agency [Westek] and nothing in this Contract shall establish the relation of employer and employee or a master and servant as between the Bank and such Agency Personnel. The Agency acknowledges that Agency Personnel are not Employees or Officials of the Bank and they are not entitled to the rights, benefits, privileges and immunities attached to the status of being an Employee or Official of the Bank.

13. After the Bank and Westek entered into the Framework Contract, Appellant (through KWLC) continued to work at the Bank in IT services pursuant to her Consultancy Agreements with Westek. The last such Agreement ended 31 January 2019. The Bank was not a signatory to any of the extensions of the Consultancy Agreement.

14. The Framework Contract stated that "any dispute controversy or claim arising out of, or relating to this Contract" shall be resolved by arbitration under UNCITRAL arbitration rules. Neither Appellant nor KWLC was a party to the Framework Agreement.

15. Appellant was informed verbally on 8 January 2019 by Mr. David Nock, an official of Westek, that her Consultancy Agreement would not be renewed as of 31 January 2019.

II. <u>Procedural Background</u>

16. Appellant filed a Request for Administrative Review of an Administrative Decision ("RARD") on 5 March 2019. She alleged that she had been a *de facto* member of the Bank's staff and that the Bank had failed to accord her several of the rights and benefits

available to staff who are terminated for reasons of redundancy. The RARD itemized several benefits for which monetary compensation was being sought.

17. On 26 March 2019, the President of the Bank sent an email to Appellant's counsel stating:

> The company Westek is not a part of the Bank and neither Mr Nock nor [Appellant] is a staff member of the Bank. Accordingly, I cannot consider the document you submitted to be a request for review pursuant to the Directive [on Administrative Review Process] as I have no authority to review the decision made by Mr Nock, on behalf of Westek.

18. As a result of the President's 26 March 2019 email, there has been no hearing before the Administrative Review Committee ("ARC"). Appellant filed a Statement of Appeal directly to this Tribunal on 11 June 2019.

19. On 8 July 2019, the Bank filed a "Challenge to the Tribunal's Jurisdiction." Appellant replied to that "Challenge" on 29 July 2019.

20. Upon invitation from this Tribunal, Counsel for the parties made oral presentations to all five members of the Tribunal on 14 January 2020 with regard to the jurisdictional dispute in this case and three related cases (EBRDAT Cases 2019/03, 2019/04 and 2019/05). At that hearing, the Tribunal members had the opportunity to pose questions to counsel on both factual and legal issues relating to jurisdiction.

III. Appellant's Position

21. The following are the principal arguments raised by Appellant in her RARD, Statement of Appeal, Reply to the Bank's Challenge to Jurisdiction and oral argument.

22. Under principles of international administrative law, the EBRD's Administrative Tribunal has the authority to look behind Appellant's written contract with Westek and determine whether she is *de facto* an employee (i.e., staff member) of the Bank. Under relevant precedent, the Tribunal may decide whether to disregard or set aside her written contract if it was used to perpetrate an unfair employment practice.

23. Appellant's working conditions with the Bank were inconsistent with her being an independent contractor. Her terms and conditions evidenced the creation of an employment relationship between Appellant and the EBRD.

24. The EBRD's own internal law supports Appellant's position that she was *de facto* a staff member. In two prior Grievance Committee recommendations and reports, the Committee found that two persons working for the Bank under contracts with Westek should be treated as staff members notwithstanding multiple written contracts of limited

duration. Both of those recommendations were accepted by the President of the Bank and thereby became part of the Bank's internal law.

25. The EBRDAT has already ruled in Case 2018/02 that persons working for the Bank in circumstances like Appellant's have a right to avail themselves of the internal administrative review processes to determine whether they are *de facto* employees. The Bank's position that Appellant has no standing to initiate administrative review has already been rejected by this Tribunal.

26. The President's decision of 26 March 2019 was issued in bad faith, since it ignores the Tribunal's holding in EBRDAT Case 2018/02 and pretends that the Bank had nothing to do with the termination of Appellant's Contract. The fact that a Westek official communicated the termination to Appellant does not detract from the fact that the EBRD was the decision-maker with respect to the termination of Appellant's consultancy for the Bank.

27. "The reality is that the Appellant's 19 continuous years working at the Bank were cut short because of the reorganisation and transformation of the Bank's IT function and she was not paid any redundancy amounts." Reply to Challenge at ¶2.5.

28. "[J]urisdiction and merit are concomitant in cases such as this because the very essence of the claim is that the Appellant was a staff member…. The EBRD … cannot argue that the Appellant cannot access its internal justice system because she was not a staff member until that issue has been determined by the ARC." Appeal at ¶3.3.

29. Appellant's right to invoke the Bank's dispute resolution processes is not dependent on the language used by the Bank's President in his 26 March 2019 email. The absence of reference to admissibility or "administrative decision" in that email cannot alter the fact that the Bank was rejecting her claim that she was a *de facto* staff member entitled to utilize the administrative review and appeal processes.

30. Multiple factors support Appellant's claim that she was a *de facto* staff member. For this reason, Appellant is ultimately entitled to various forms of remuneration specified in the Staff Handbook. However, the immediate remedy in this appeal should be an annulment of the President's decision of 26 March 2019 and the referral of Appellant's claims to the Administrative Review Committee for further proceedings consistent with EBRDAT Case 2018/02.

31. Appellant should be awarded reimbursement of the legal fees incurred for bringing this matter to the Tribunal, since the issue of receivability in this circumstance has already been litigated before the Tribunal.

IV. The Bank's Position

32. The following are the principal arguments raised by the Bank in its Challenge to the Tribunal's jurisdiction and in its oral argument.

33. The Bank entered into the Framework Contract with commercial services provider Westek, pursuant to which Westek provided IT services to the Bank. KWLC was a subcontractor of Westek.

34. Under the terms of the Framework Contract, Appellant has a contracting relationship with Westek. The Contract specifically states that personnel appointed by Westek under that agreement are not employees of the Bank.

35. The Westek Consultancy Agreement with KWLC states that it does not create an employment relationship with any consultant and further states that it is subject to the laws and courts of England and Wales.

36. Appellant did not have an express or implied contract with the Bank.

37. The Bank did not make the decision to terminate Appellant's contractual relationship with Westek.

38. Appellant has not identified a decision of the Bank that may be appealed to the Tribunal. The Bank President's 26 March 2019 email did not state it was an "administrative decision" on admissibility and did not constitute an administrative decision; it did not make any determination with respect to Appellant's rights or claims. The email was sent "only as a matter of courtesy." Challenge at ¶19.

39. Appellant had erroneously ascribed the 8 January 2019 termination decision to the Bank, when it was actually a decision by Westek. It was not an administrative decision "taken by the Bank," as required under the rules. The President's 26 March 2019 email merely pointed out this error and did not itself create an administrative decision.

40. Appellant admits there was no "formal written decision from the Bank regarding the natural end of her contract…." Challenge at ¶25. The President's email pointing out the absence of evidence cannot be converted into evidence of a Bank decision.

41. The Tribunal's decision in EBRDAT Case 2018/02 is inapposite, since it involves a different contractual structure, different facts pertaining to execution of the contract and different obligations by the parties. The Tribunal's decision relied on the fact that, in light of the particular facts therein, Appellant did not have recourse to any venue for resolution of his dispute except through the Bank's internal processes. Appellant in the instant case, in contrast, is entitled to seek relief in the courts of England and Wales.

V. The Tribunal's Conclusions

42. Appellant alleges that, notwithstanding the written Consultancy Agreement and Framework Contract, she must be recognized as a *de facto* staff member for purposes of receiving certain Bank benefits. She contends that she is entitled to this status under prevailing principles of international law. See *Amora v. ADB*, ADBAT Dec. No. 24 (1997); *In re Burt*, ILOAT Judgment 1385 (1995); *In re Bustos*, ILOAT Judgment 701 (1985).[1]

43. Appellant additionally points to two prior EBRD cases in which consultants had also claimed the status of *de facto* employees, and the Grievance Committee had accepted that characterization of their status and had rejected the Bank's argument opposing jurisdiction. See Cases GC/10/2012 and GC/11/2012.

44. Cases GC/10/2012 and GC/11/2012 also involved contracts between Westek and the Bank, pursuant to which Westek provided personnel ("consultants" or "service personnel") to the Bank to perform services for the Bank. As in the instant case, Westek then entered into temporary contracts with service companies controlled by an individual consultant who, in turn, was referred to the Bank. Both the Westek-Bank and Westek-Service Personnel contracts disavowed any employment relationships. Explicit language in the contracts stated that the consultants provided to the Bank by Westek were not considered employees of either entity. Disputes between Westek and its consultants were agreed by contract to be governed by the laws and courts of England and Wales.

45. The appellants in Cases GC/10/2012 and GC/11/2012 were individual consultants who had worked for the Bank under the above contractual arrangements for 13 years and 9 years, respectively. The terminations of their contracts were implemented pursuant to a reorganization by the Bank that the Grievance Committee found to have been a cost-cutting measure. The Grievance Committee found that, soon after their terminations, appellants were replaced by two younger and lower-paid consultants who were also referred to the Bank by Westek.

46. Upon their terminations, the appellants in Cases GC/10/2012 and GC/11/2012 asserted they were *de facto* employees of the Bank and requested, as a consequence of their terminations, the payment of severance packages consistent with those provided to staff under the Bank's Staff Handbook. Appellants did not claim an entitlement to any other benefits accorded to staff members (e.g., pension benefits).

47. At the outset of the proceedings in Cases GC/10/2012 and GC/11/2012, the Grievance Committee conducted a preliminary hearing to address the initial question whether the Committee had jurisdiction over the appeals.

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[1] For example, the Tribunal in *Amora* concluded:

> Usually, a contract signed by the parties is binding upon them. There are, however, some circumstances in which a contract may be set aside or varied by a competent tribunal. This happens, for example, when the contract fundamentally disregards reality. [¶22.]

48. On 15 October 2014, the Grievance Committee, by a majority of its members, issued a decision confirming that it had jurisdiction over the two cases. The Bank accepted this decision.

49. The Grievance Committee subsequently issued a decision on liability and remedies on 23 July 2015. It concluded that appellants were working pursuant to "de facto employment contracts with the Bank" and that they were "regular contracts of indefinite duration." ¶19. The Committee further concluded that the Bank's refusal to make severance payments to appellants "was in breach of their de facto employment contracts" or in breach of the Staff Handbook. ¶28. On 12 August 2015, the Bank President took "the decision to accept the Grievance Committee's recommendation" (the "PARD").[2] The cases were not appealed to the Administrative Tribunal.

50. The Bank argues that the PARDs in Cases GC/10/2012 and GC/11/2012 are not binding precedent and that they merely represent discretionary decisions by the Bank to enter into settlements with those particular grievants. The Tribunal agrees that those two PARDs did not bind the Bank in future cases and did not necessarily represent an endorsement of the Grievance Committee's reasoning. The Bank may have had operative, strategic or managerial reasons not to contest the Grievance Committee's recommended outcome. Nevertheless, to the extent Appellant believed her situation was factually comparable to the situation of the two earlier grievants, the two PARDs created a reasonable expectation that she too could claim the status of a *de facto* employee. When Appellant in the instant case filed her RARD in March 2019, she was effectively stating: In light of the PARDs in Cases GC/10/2012 and GC/11/2012 and in light of the precedent in *Amora*, *Burt* and *Bustos*, I am a *de facto* staff member who is entitled to certain staff benefits that had wrongfully been denied to me.

51. The Bank initially contends that it has not issued an "administrative decision" that can be challenged through the administrative review process. It asserts that the Bank President's email of 26 March 2019 does not qualify as an administrative decision. The Bank presents this argument through its "challenge" to jurisdiction. The Tribunal interprets this challenge as a motion to dismiss the appeal on the ground that it is not legally cognizable under the rules governing administrative review.

52. The recently-adopted Directive on Administrative Review Process (the "Directive") limits that process to "current or former staff members." Sec. IV, ¶2. An "administrative decision" is defined as a "decision taken by the Bank in the administration of staff of the Bank which produces direct legal consequences to the legal order and affects one or more staff members' rights and obligations…." Sec. IV, ¶2, Directive on Glossary of Terms.

[2] The Tribunal was provided only with the Bank President's decision in GC/11/2012. However, the parties herein agree that the decision in GC/10/2012 was comparable.

53. The first question before the Tribunal is whether the Bank President's email of 26 March 2019 (quoted above at ¶17), which refused Appellant access to the administrative review process, constituted an "administrative decision."

54. Appellant has presented allegations and documents that she claims support her position. The Bank has not, at this juncture, disputed the authenticity of the documentation accompanying the appeal and, in fact, has relied on that same documentation.

55. For purposes of a motion to dismiss, the Tribunal must assume the Appellant's non-frivolous allegations are true. This assumption is made as a preliminary matter for procedural purposes only. Whether the allegations are actually true will be a question to be decided when the merits of the Appeal are decided. A motion to dismiss is not the procedural context for litigating factual disputes between the parties. The Bank's burden in a motion to dismiss is to establish that it has the right as a matter of law to avoid participation in the internal appeal process. It must show that Appellant, regardless of the ultimate findings of facts, has no legal basis for prevailing.

56. The Bank President's 26 March 2019 email asserts that Appellant is not "a staff member of the Bank." By so stating, the Bank President implicitly rejected the holdings in *Amora*, *Burt* and *Bustos* or, at least, rejected the argument that Appellant was entitled to the same status as the claimants in those three cases.

57. It is normally the province of this Tribunal to issue final decisions on whether the Bank has complied with international law. If the Bank's jurisdictional argument were accepted, it would preclude this Tribunal from reaching such a decision. It also would preclude Appellant from introducing evidence intended to prove that her factual circumstances are indistinguishable from those in *Amora*, *Burt* and *Bustos*.

58. The Bank has referred to case law from other Administrative Tribunals in which the absence of a formal designation of employee status was a barrier to accepting jurisdiction. On the other hand, Tribunals such as the ones that issued *Amora*, *Burt* and *Bustos*, have held that jurisdiction may be asserted when there are exceptional circumstances creating a *de facto* employment status. At this preliminary stage of the instant appeal, the Tribunal concludes that Appellant should be given the opportunity to prove her case before the ARC and this Tribunal. The Bank has not established as a matter of law that Appellant is incapable of proving facts that would bring her under the umbrella of *Amora*, *Burt* and *Bustos* or that this precedent is inapposite to the instant case.

59. The Tribunal believes that it must use a functional, as opposed to a formalistic, approach to the jurisdictional issue before us. The 26 March 2019 email must be accepted for what it does and not merely for what it says. In this respect, it is a decision telling Appellant that she has none of the entitlements or benefits afforded to staff, notwithstanding international legal precedent indicating that she might, under exceptional circumstances, be deemed a *de facto* employee of the Bank. The Tribunal therefore concludes that the Bank President's email was an administrative decision under the Directive.

60. In reaching this decision, the Tribunal is not prejudging the merits of Appellant's claim. The Tribunal is not deciding whether Appellant is a *de facto* employee of the Bank. The Tribunal is not even deciding whether *Amora*, *Burt* and *Bustos* should be followed as part of EBRD jurisprudence. Rather, the sole question is whether Appellant has a right to assert her claim through the Bank's internal dispute resolution processes. The decisions in *Amora*, etc. support the view that this Tribunal may take jurisdiction over an Appellant's non-frivolous claim that she was a *de facto* employee. The difference in facts between those three cases and the instant case, as pointed out in the dissent in EBRDAT Case 2019/05 and EBRDAT Case 2019/04, is not relevant to the jurisdictional issue before the Tribunal. The principle enunciated in this decision is quite limited: The absence of a formal employment contract with the Bank or even a contract that excludes an employment relationship with the Bank does not alone prevent the Tribunal from asserting jurisdiction over an Appellant's non-frivolous claim to certain staff member benefits as a *de facto* employee.

61. As reflected in the dissenting opinion in this case (and in the three related cases), the Tribunal is divided on the issue of jurisdiction. This division reflects the differing approaches taken by other international Administrative Tribunals on the same subject. The majority in this case and some Administrative Tribunals are of the view that jurisdiction may be asserted in cases wherein the Appellant seeks staff member benefits notwithstanding the lack of a formal appointment to the staff and notwithstanding contractual language precluding an employment status. The dissent, with the support of other Administrative Tribunals, insists that an Appellant's formal status as a staff member is a necessary precondition to this Tribunal's assertion of jurisdiction and that additional fact-finding cannot overcome this jurisdictional defect.

62. This Tribunal's decision in EBRDAT Case 2018/02 concluded that, in exceptional circumstances, a person performing work for the Bank may argue he/she is a *de facto* employee notwithstanding the absence of a formal letter of appointment and notwithstanding contractual language that precludes an employment status; the Tribunal asserted jurisdiction over that Appellant's claim so that a factual record could be developed for purposes of assessing Appellant's status as employee (if any). However, this Tribunal is not a fact-finding body. The creation of a factual record necessarily had to be undertaken through the administrative review process before the ARC. In EBRDAT Case 2019/06, the same Appellant returned to the Tribunal after the ARC recommendations and an adverse PARD. The Tribunal concluded in the latter case that the threshold for considering a worker to be a Staff Member without a letter of appointment is very high and that reaching such a conclusion requires analysis of multiple factors. The appeal in Case 2019/06 was ultimately dismissed because Appellant failed to establish the exceptional circumstances justifying being treated as a *de facto* Staff Member. The decision on the merits in Case 2019/06, however, did not undermine the conclusion in Case 2018/02 that the Appellant should be given the opportunity to prove his case through administrative review. The Tribunal's decision in the instant case is consistent with the approach taken in EBRDAT Case 2018/02 and EBRDAT Case 2019/06.

63. The Bank also opposes Appellant's right of appeal, in part, by pointing to the Consultancy Agreement's provision allowing Appellant to argue English and Welsh law to English and Welsh courts. However, the Bank is not party to that Agreement, and that Agreement only permits Appellant to file claims against Westek. It provides Appellant with no opportunity to lodge claims directly against the Bank.

64. In this respect, Appellant is in a position analogous to the Appellant in EBRDAT Case 2018/02 and Case 2019/06. In both the earlier cases and the instant case, there was no contract directly between the Bank and Appellant. The Tribunal rejected the Bank's argument that the Grievance Committee did not have jurisdiction to address the claim, observing that Appellant would otherwise have no recourse to an adjudicatory mechanism for deciding the claims against the Bank in his Statement of Appeal. Significantly, in EBRDAT Case 2019/06, this Tribunal wrote, in summarizing the prior decision in Case 2018/AT/02: "Allegations that Staff Member rights have been infringed fall thus within the jurisdiction of the Administrative Tribunal. When the evaluation of whether Staff Member rights have been infringed assumes that a decision is made on whether the appellant was a Staff Member, it falls within the jurisdiction of the Administrative Tribunal to determine whether the appellant was a Staff Member or not." Dec. at pp. 2-3 (emphasis added).

65. The agreements entered into by the Bank, Westek and Appellant give her no means of presenting a claim to English or Welsh courts that she is entitled to Bank benefits as a *de facto* employee of the Bank. At this juncture, only the Bank's internal administrative review process can provide a forum for addressing such claims.

66. The Bank suggested that, if an appellant had no recourse through the internal administrative process or through other channels, a possible outcome might be that courts decline to recognize the Bank's immunity and accept jurisdiction on the appellant's claim. The Bank argued that, in any case, its immunity is not a basis for the Tribunal to assert jurisdiction in cases on which it has no jurisdiction. The Tribunal recognizes that immunity alone is not a basis to assert jurisdiction. However, the majority of the Tribunal is of the view that the prospect that the Bank may be deprived of its immunity is not a basis to decline jurisdiction either. As explained above, the Tribunal considers that it has jurisdiction to determine whether the factual and legal conditions for its jurisdiction are met, and that, in a case in which the absence of jurisdiction is not manifest on the face of an appeal, fact-finding is necessary to determine whether these conditions are satisfied.

67. Based on the decisions in EBRDAT Cases 2018/02 and 2019/06, the Tribunal concludes: (a) the Bank President's 26 March 2019 email is an administrative decision under the Directive on Administrative Review Process and (b) the Tribunal and the ARC have

jurisdiction to consider Appellant's claims. This decision is also consistent with the PARDs in Cases GC/10/2012 and GC/11/2012.[3]

68. The Directive on Administrative Review Process provides at Section IV, Paragraph 3(c) and (d):

> (c) The following categories of Administrative Decisions are not subject to the Administrative Review Process in accordance with this directive:
>
> i. Individual Decisions taken by the President;
> ii. Individual Decisions taken by any of the committees established under the Retirement Plans; and
> iii. Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors.
>
> (d) Administrative Decisions that fall under paragraph 3(c) above may be reviewed by the Tribunal in accordance with the Appeals Procedures. For purposes of Section 2.01(a) of the Appeals Procedures, there are no appropriate channels for administrative review of such decisions and, therefore, no requirement to exhaust such channels prior to recourse to the Tribunal.

69. The email of 26 March 2019 constitutes an individual decision by the Bank President under Section IV, Paragraph 3(c) of the Directive. As such, the Tribunal may decide the jurisdictional question without resorting to preliminary proceedings by the ARC. The Tribunal's conclusion that it has jurisdiction over this appeal and that Appellant is entitled to utilize the administrative review process is therefore final.

70. The Tribunal reiterates that this jurisdictional decision does not reach any conclusions regarding the merits of this dispute. It does not make any finding as to whether Appellant has or does not have employee status or any rights of a staff member. Those determinations can only be made after completion of the fact-finding process before the ARC and a decision by the Bank President. The Tribunal recognizes that there is considerable precedent that argues against *de facto* employment status. The discussion of that case law must await a final decision on the merits. The fact that the ultimate conclusion in this case, after the consideration of evidence, may be contrary to Appellant does not detract from the Tribunal's decision that jurisdiction lies in this case. Because of the procedural nature of motions to dismiss, the Tribunal cannot pre-judge Appellant's central allegations and claims and must allow those allegations and claims to be considered in the dispute resolution processes of the Bank.

71. The Tribunal adopts the following standard when this type of jurisdictional issue is raised: Whenever someone working for the Bank makes a plausible, non-frivolous claim that he/she is entitled to the rights of a staff member because of a *de facto* employment relationship with the Bank, that person is entitled to invoke the jurisdiction of the Bank's

[3] The Tribunal is not suggesting that these two PARDs are binding precedent. They are, however, instructive.

dispute resolution processes to consider that claim. There may well be future cases in which such a claim is deemed frivolous and incapable of succeeding under the criteria specified in EBRDAT Case 2019/06. However, in the instant case, we cannot reach such a conclusion at this preliminary stage of the proceeding. The Tribunal therefore rejects the Bank President's arguments in his 26 March 2019 email and in the Bank's challenge to this Tribunal's jurisdiction.

VI. Remedy

72. The Bank President's 26 March 2019 email to Appellant is annulled. The Bank is instructed to permit Appellant's RARD to proceed through the administrative review process, if Appellant so wishes.

73. If there are further proceedings before the ARC, it is instructed to gather and assess evidence in a manner consistent with the Administrative Tribunal's decision in EBRDAT Case 2019/06.

74. Although this case has not reached a conclusion on the merits, Appellant has successfully opposed the Bank's objection to jurisdiction. In light of Appellant's success, the Tribunal is awarding reimbursement of Appellant's counsel fees expended solely in opposition to the Bank's jurisdictional challenge, including attendance at the oral hearing on 14 January 2020. Appellant's counsel should submit an accounting of those hours and fees to the Tribunal and the Bank within 30 days of this decision. The accounting should not include time spent in preparation of the Statement of Appeal. The Bank will have 30 days thereafter to submit an opposition to the fee request, if it so wishes. The Tribunal will issue a supplemental decision after consideration of those submissions.

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VII. Dissenting opinion by Spyridon Flogaitis

1. There is disagreement within the Tribunal regarding its jurisdiction in this case and three other cases. I attach the same dissenting opinion in Case No. 2019/AT/03 and I also refer to the dissenting opinion of my colleague Chris de Cooker in Cases Nos. 2019/AT/04 and 2019/AT/05. Although I respect the opinion of my esteemed colleagues as for the deciding upon the present case, unfortunately I cannot agree with them for the following reasons:

2. In administrative law litigation it is well established in all traditional administrative law systems since the early days of this branch of law in post-revolutionary France, that in order to examine the merits of a case, the judge needs to first pronounce him/herself on four points, i.e. (i) the nature of the questioned act of the administration as an administrative act, the so called administrative decision, (ii) the deadline, (iii) the *locus standi*, the so called sufficiently protected interest, and (iv) exhaustion of all quasi-judicial pre-justice

administrative procedures. They are called conditions of receivability or conditions of admissibility.

3. In the present case, it is impossible to go to the merits of the case for a number of reasons:

4. Firstly, because the attacked answer of the President of the Bank is not an administrative decision, but a purely informative act of the administration. In fact, not all acts of the administration are administrative decisions and an act of the administration, in order to be administrative decision under the Law of the EBRD, needs to have specific characteristics and more in particular the concerned person must be a staff member as understood by the Law of the Bank, with a Letter of Appointment, which without any doubt the Appellant is not because he does not have a Letter of Appointment as required by the Law; at the same time and independently, the answer of the President is a merely informative letter as it is evidenced by its own text, and has produced no direct legal effects of its own; the legal effects are the result of the Law directly and not of the presidential answer.

5. Secondly, the Appellant has no *locus standi* under the circumstances of this case, because no procedure is offered to him by his contract(s) to address the case to the President of the Bank. His mistaken understanding of his case does not create for him a sufficiently protected interest.

6. Thirdly, because the Appellant, even if he could satisfy the above two conditions of receivability, he did not follow the administrative review level, which is a prerequisite for anyone to be accepted as an Appellant to this Tribunal. He appealed to the President of the Bank directly, pleading that her contract was terminated and therefore she had the right to address directly the President. By so doing, the Appellant baptized a non-renewal of contract as termination, but non-renewal and termination of a contract are two different legal situations and for that reason they are called differently. The Tribunal is not in the position to know how this is dealt with in the Law of England and Wales, and how this will be decided upon by the domestic Courts, should the case be brought to their knowledge.

7. Fourthly, the deadlines have not been observed, because, the Appellant, having taken a wrong legal path, has already missed the deadline to start a procedure before the Bank through administrative review.

8. In the hypothetical case where the Appellant would not be offered legal protection by any legal system but by the Administrative Tribunal of the Bank, this could not be healed by extension of the competence of the Tribunal over the case, because the Tribunal has a restricted jurisdiction and the rest belongs to the legal system of the headquarters. It is a general principle of law that the field of the applicability of an exceptional rule must be interpreted restrictively. The Appellant has all the legal system of England and Wales to go to and ask protection for her rights, and the domestic Courts are in a better position to know the Law of England and Wales which is, according to the letter of the employment contract of the Appellant, applicable in the present case.

9. For all four reasons and any one of them individually, the Tribunal is prohibited to go to the merits of this case and the Appeal must be rejected in its entirety.

For the Administrative Tribunal

Michael Wolf