

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

Cases No. 2019/AT/07 and 2020/AT/05

Appellant

vs.

European Bank for Reconstruction and Development,

PRELIMINARY DECISION

by a Panel of the Administrative Tribunal comprised of
Maria Vicien Milburn (Chair)
Giuditta Cordero-Moss
Michael Wolf

29 August 2020

I INTRODUCTION

1. Appellant has been a staff member of the European Bank for Reconstruction and Development (hereinafter “the Bank”) since [...] 2007. He currently serves [...] at the Bank’s Headquarters.
2. Appellant appeals two Administrative Review Decisions by the President of the Bank (hereinafter “PARD” or “PARDs”) dated 11 April 2019 (hereinafter, the “Transfer decision”) and 9 December 2019 (hereinafter, the “Allegations of Harassment decision”), respectively.
3. Appellant requested the Tribunal to join both appeals and issue one judgement. With respect to the “Transfer Decision”, Appellant claims, inter alia, that it was taken in violation of established procedures in the Staff Handbook and “is thus unlawful.” He requests the Tribunal to “refer the matter back to the ARC...”. With respect to the “Allegations of Harassment Decision”, he claims, inter alia, that he has “been subjected to prohibited conduct and retaliation in breach of the Bank’s internal law” and asks the Tribunal “to refer the matter back to the ARC...as it has failed to produce comprehensive findings of fact addressing the merits of the Appellant’s RARD [Request for Review of Administrative Decision].”

II THE TRANSFER DECISION

Procedural background and relevant facts

4. Appellant commenced employment with the Bank in [...] 2007 at one of the Bank’s Resident Offices. With effect from [...] August 2014, he accepted a long-term geographic reassignment to the “Team #1 Section” (denomination by the Tribunal).
5. Appellant was not satisfied working in the Team #1 Section and filed a Request for Administrative Review Decision (“RARD”) contesting his 2015 performance evaluation. [...] Appellant sought a transfer to another team, but it was refused on the basis that he was critical to the Team #1 Section. [...]
6. On 4 December 2017, Appellant was advised that he would be reassigned for six months to a different Section of the Bank, hereinafter the “Team #2 Section” (designation by the Tribunal) until 30 June 2018, when he would

be expected to return to his position with the Team #1 Section, but posted in a Resident Office, with effect from 1 July 2018. HR confirmed this decision in a communication dated 8 January 2018.

7. According to the record, during the six month reassignment, Appellant continued to be upset by certain actions of individuals in the Team #1 Section and in a number of discussions with Management, expressed his wish not to return to that Section. Officials at HR advised that they were reviewing various options to place him in a suitable position but the opportunities for placement were limited. He applied for several positions but was not successful.
8. In May 2018, the Bank and Appellant continued discussions regarding his future placement. Nonetheless, the Bank's HR Mobility Unit advised him that his relocation to the Resident Office would be effective 30 June 2018 and that the Bank's external advisor was facilitating his resettlement.
9. Appellant informed his managers in the Country Office that he would start work on 2 July. [...]. The Bank's relocation adviser had undertaken a shipping survey and scheduled a date for collection of Appellant's boxes of personal effects for the week of 18 June 2018.
10. On 29 May 2018, Appellant wrote to the MDHR [Managing Director, Human Resources] [...] requesting the opportunity to continue in the Team #2 Section. He asked for clarity on his employment situation if the temporary reassignment came to an end.
11. On 11 June 2018, Appellant wrote to the HRBP [Human Resources Business Partner] confirming his understanding that he would be reassigned with effect from 1 July. He also confirmed his unsuitability for a post in another Team.

In a reply dated 13 June, the MDHR informed Appellant regarding his:

“expressed desire to continue with/be transferred to the [Team #2 Section], if possible...[Y]ou will therefore be pleased to hear that, after further consideration and in light of: (i) the business needs and priorities as well as (ii) your experience and ability, it has been agreed to transfer you to the position of Associate Director, [...], [Team #2 Section] based at ... from [...] July 2018.

Your annual gross base salary will be GBP [...] and you will be eligible for the I.H.S [Internationally Hired Staff] status subject to the provisions of the Staff Handbook.

You will be receiving a formal copy of confirmation of the transfer from the People Operations Team in due course.

I trust the above is satisfactory but please let me know if you have any comments.”

12. On 15 June 2018, Appellant expressed his appreciation for “the effort HR is making to resolve this very unfortunate situation which has destroyed my career and [...].” Regarding the proposed transfer, he stated:

“I am indeed very grateful for this opportunity”

However, Appellant asked first for reassurance that if there was any reorganisation of the Team #2 Section, his new position would not be made redundant. In addition, he pointed out that he felt disadvantaged by a “22% decrease on the MRP [Market Reference Point] movement and second (sic) phased out I.H.S. benefits.” He asked the Bank whether they believed “this is a fair arrangement after what has happened in my situation and my move to the [Team #2 Section] being a forced move due to a hostile environment in my permanent team.”

He concluded as follows:

“Otherwise I am really grateful for the opportunity and I am very keen to continue providing good service to the Organisation. I will appreciate clarification on the above and HR guidance on the next steps.”

13. In a reply dated 18 June 2018, the MDHR informed Appellant, in part, as follows:

“Thank you for your email of 15 June 2018 in which you provide comments about the proposed transfer. The points you raised have been taken into account...”

The position of Associate Director, [...], [Team #2 Section] based at...is a regular position and therefore for an indefinite duration as per the Staff

Handbook. Any changes to the position or the employment terms & conditions, including termination of employment, are subject to the provisions of the Staff Handbook and all staff members are afforded the same treatment in the course of any such changes. In this respect, the decision to transfer you to this team has been made on the basis of existing business needs, your experience and ability, as well as your performance during your current reassignment and your interest in this role.

With regard to your concerns about the working environment, as you know, they have been in the past and are currently being addressed via the relevant processes, namely RWPs [Respectful and Harassment Free Workplace Procedures] and the CDRPs [Conduct and Disciplinary Rules and Procedures]. The Bank takes any allegations of improper behaviour very seriously and provides the staff members with full access to the routes to address their concerns. You have also utilised the Bank's internal dispute resolution system to request reviews of the administrative decisions.

The fact that you repeatedly informed HR, that

- (i) a transfer to the [Team #2 Section]...would be a good solution (see, for instance, your e-mail to me of 29/05/18);
- (ii) coming back to... [...] would create issues as you consider that you cannot return to your permanent team [...] caused by hostile work environment, harassment and victimisation´ (your e-mail to me of 15/06/18);
- (iii) coming back to... RO for another AD [Assistant Director] position as proposed by the Bank (...) would notably create ´public humiliation´ (...).

has also been taken into consideration.

The terms and conditions associated with the transfer are commensurate with your skills and experience and are in line with the salary scales for the AD, [...] at HQ.

The points about the status of your relocation have been noted and I have asked...to work with the Mobility team to put in place support and measures necessary to reverse the relocation and assist you in your settling in...

Considering the above I am therefore confirming the decision to transfer you to the position of Associate Director, [...] ...[Team #2 Section] based at...as from [...]. I wish you continued success in this role.”

14. On 8 August 2018, Appellant filed a request for review of the decision of 18 June 2018 by the MDHR pursuant to the provisions of Stage I of the Directive on Administrative Review Process (hereinafter “the Administrative Review Directive”). Efforts to resolve the matter before the VPHR [Vice President Human Resources] proved unsuccessful and the VPHR confirmed the MDHR Transfer Decision. Appellant also requested mediation, but no satisfactory resolution was reached.
15. On 29 November 2018, Appellant requested administrative review of the “Transfer Decision” by the Bank under the provisions of Stage II of the Administrative Review Directive.
16. The ARC adopted its report ARC43/2018 on the Transfer decision on 11 March 2019.

On the Transfer decision specifically, it concluded, inter alia, that it “was taken in violation of the applicable procedure”, as consultation with Appellant regarding the transfer did “not meet the EBRD AT’s description of the consultation that is necessary in order both to comply with the obligations contained in the Staff Handbook (SHB) and the obligation to act fairly.” Notwithstanding, the ARC recommended that the decision should stand as “it was not taken in a manner that affected the outcome.”

17. On 11 April 2019, the President of the Bank communicated to Appellant his decision on the ARC report 43/2018, concerning the “Transfer Decision” in a letter that reads, in part, as follows:

“1. ...

2. I have considered the Report and Recommendation and...concur with the ARC’s findings and recommendation as the Bank did observe the

applicable provisions of the Staff Handbook (“SHB”) when adopting such decisions (Sections 5.3.5, 6.11.4 and 6.12.4 respectively).

3. Regarding the Transfer Decision, the ARC expressly acknowledges that the decision ‘provided relief’ to you, was motivated by your desire not to have to come back to [Resident Office] and that you were ‘evidently pleased with the outcome’.
4. However, the ARC also regrets the lateness of the decision and considers that the Bank did not observe its consultation obligation in full since, notably, the invitation to provide comments you received on 13 June 2018 did not meet the requirements of Section 4.8.2 of the SHB, although the ARC concludes that this did not affect the outcome of the procedure and hence does not justify awarding you any form of compensation.
5. While I concur with the recommendation that compensation is not warranted I consider that the Bank did observe its consultation obligation, made decisions within reasonable periods of time considering the specific circumstances in your case and treated you with fairness. In this respect, I particularly note that:
 - (i) the situation at hand does not amount to a transfer unilaterally decided by the Bank as the initial requests to transfer came from you (...);
 - (ii) HR and you have been in continuous contact in the months that preceded the Transfer Decision and in particular since the beginning of your [...] assignment to the [Team #2 Section] in London [...] in order to accommodate your requests;
 - (iii) while your applications for other positions within the Bank have been unsuccessful, the Bank acted proactively and offered you the role of [...], Associate Director,...in [...]. Acting in good faith, the Bank took note of your reluctance about this transfer and decided not to impose it to you.

- (iv) on 29 May 2018, you wrote to the MDHR requesting again the opportunity to be transferred permanently to [the Team #2 Section] in...;
 - (v) on 13 June 2018, you have been given the possibility to provide comments about the transfer and, while expressing your gratitude for the proposed transfer, you seized this opportunity to comment and asked for a higher gross base salary and guarantees about future redundancies. These comments have been duly addressed by the MDHR in the Transfer Decision dated 18 June 2018.
6. You have therefore been given several opportunities to express your views and wishes thoroughly. The Bank did satisfy your requests to the best extent possible by not sending you back to [Resident Office] in your original team (or in another team) and by transferring you to the [Team #2 Section] in...I also agree with the ARC as I do not consider that, had there been further consultation, you would have raised issues that you did not otherwise raise in your correspondence.
 7. I therefore concur with the Report when it recommends that the Salary Decision, the Repatriation Decision, and the Relocation Decision should stand and that you shall not receive any compensation or contribution towards your legal costs. I however disagree with the findings of the Report with regard to the Transfer Decision as I consider, for the reasons exposed above, that the Bank did meet its obligation to consult you and to treat you with fairness.”
18. On 8 July 2019, Appellant lodged an appeal with the Tribunal.
 19. He requested an oral hearing pursuant to Article 7.02 of the Directive on the Appeals Process (hereinafter “the Appeals Directive”), as well as the production of new documents and anonymity pursuant to Article 9.02 of the Appeals Directive. He also alleged “manifest errors” in the ARC Report and requested the Tribunal “to reverse some findings of the ARC Report” and “refer the matter back to the ARC as it has failed to produce comprehensive findings of fact addressing the merits of the Appellant’s RARD.”

20. He further asked the Tribunal “to stay the proceedings until obtaining findings of fact on related matters, pursuant to Rule 6.04 (a) of the Appeals Process Directive...[until the Tribunal has received the findings of fact in relation to the outcome of the ARC 39/2018 and ARC 47/2019].”
21. On 5 August 2019, at the request of the Tribunal, the Bank informed the Tribunal that it did not deem that Appellant’s request to stay the proceedings was justified.

“...[W]hile the Bank already recognized before the ARC that the transfer of the Appellant (facilitated at the Appellant’s request and to the team he was willing to join) notably responded to the need to preserve ‘harmony and good relations in a working environment’ ..., the [transfer] case relates to (i) the procedure followed prior to the Transfer Decision and (ii) the allowances the Appellant was entitled to receive or not. In this respect, addressing the question whether the Bank did meet or not its obligations under the applicable law does not require the Tribunal to wait for the outcome of two cases relating to misconduct allegations raised by the Appellant.”

22. On 27 August 2019, the Tribunal, “in accordance with Rule 6.04(a) of the Appeals Process Directive, granted Appellant’s request in his Statement of Appeal to suspend the current proceedings....” It further ruled:

“The Tribunal understands that the ARC has not adopted its report in ARC/47/2019 and accordingly, the President has not taken a decision on the report. The Tribunal requests that this report and the President’s decision on the report be communicated to the Tribunal upon their issuance.

The suspension of proceedings in EBRDAT Case 2019-07 will last until the earlier of the following two dates:

- (1) Sixty days after issuance of the President's decision in ARC/47/2019;
- or
- (2) The date when the Tribunal (through its President) accepts for filing, under Rule 4.01, the Statement of Appeal against the President's decision in ARC/47/2019. "

III THE ALLEGATIONS OF HARRASSMENT DECISION

Facts and procedural background

23. On 17 July 2017, Appellant had instituted a complaint under the Respectful and Harassment Free Workplace Procedures (hereinafter, the “RWPs”). He alleged improper behavior by the Director of the Team #1 Section (hereinafter, “the Team #1 Director”), who was also Appellant’s line manager’s line manager. An investigation was conducted and although it was concluded that no disciplinary action should be taken against the Team #1 Director, the MDHR decided that he should be subject to managerial action under RWPs paragraph 15(ii). Appellant challenged this decision which was assessed by the ARC in its report ARC39/2018, later the subject of a PARD, and finally a decision by this Tribunal (Case No. 2019/AT/08). The Tribunal concluded in that case that Appellant had been the victim of an abuse of authority and that he was entitled to GBP 25,000 in compensation.
24. Almost a year later, on 24 April 2018, Appellant wrote to the HR Principal alleging retaliatory actions by his line manager and the Team #1 Director. In particular, he complained about the omission of his name from a congratulatory email sent on [...] December 2017 to all staff who worked on a project in which he had participated (hereinafter the “ Project”) and alleged the omission had been intentional and of retaliatory nature.
25. On 10 July 2018, after his transfer to Team #2 had been effected, as described in paras 4- 18 above, Appellant submitted a formal complaint to the MDHR alleging that, following his initial complaint submitted almost a year earlier on 17 July 2017, he had been the subject of “retaliatory treatment” by both the Team #1 Director and his line manager. [...].
26. On 31 July 2018, the MDHR referred Appellant’s allegations against the Team #1 Director and his line manager to OCCO [Office of the Chief Compliance Officer] to determine whether a prima facie case of misconduct could be established.
27. In an email dated 26 September 2018 to the CCO [Chief Compliance Officer], the officials who conducted the preliminary inquiry determined

that with regard to the Team #1 Director, the initial inquiry had not identified any conduct that would amount to misconduct. With regard to Appellant's line manager, the only matter that could amount to misconduct related to the circumstances surrounding the omission of Appellant from the Project.

28. The CCO accepted the recommendations of the Inquiry officers and the investigation into the allegations against the Team #1 Director was closed under the CDRPs. Appellant's line manager was notified that a formal investigation would be undertaken under the CDRPs.
29. On 9 November 2018, in accordance with Article 6.01(iv) of the CDRPs, an investigative report concluded that it could not be proved in accord with the required standard that the single complaint of retaliation by Appellant that had been formally investigated (the omission of Appellant's name from the Project's congratulatory email) constituted a retaliatory act by the line manager or any other form of misconduct.
30. On 5 December 2018, the HR Principal on behalf of the MDHR, informed Appellant about the outcome of the investigation. He explained that the investigation regarding alleged misconduct by the Team #1 Director had been closed by the CCO at the initial inquiry stage. Regarding Appellant's line manager, the communication provides as follows:

“it was determined that there was insufficient evidence to support a factual finding that [Appellant's line manager] had engaged in any form of retaliation, harassment, bullying or any other misconduct against you and that there should be no adverse finding against her with that regard.

The CCO has therefore recommended, in accordance with Article 5.05(a)(i) of the CDRPs that no further action be taken against [Appellant's line manager] and the matter should be closed. Having reviewed OCCO's findings, the MDHR has decided to accept that recommendation. Accordingly, pursuant to paragraph 15 of the attached RWPs this is to advise you that no further action will be taken by the MDHR in respect of the above allegations and the matter is now closed.”

31. On 1 May 2019, after an attempt to resolve the matter with the VPHR under Stage I of the Administrative Review Directive, Appellant requested

administrative review of the decision of 5 December 2018 taken by the MDHR pursuant to section 15(iii) of the RWPs.

32. On 8 November 2019, the ARC issued its report and recommendation in ARC47/2019 regarding Appellant's request for administrative review of the decision by the MDHR of 5 December 2018.
33. In summary, the ARC found and recommended that although the decision as to whether to take managerial action or close the matter "is a discretionary managerial decision of the MDHR", her decision not to take managerial action against the Team #1 Director "was unsurprising in light of the finding of the CCO that there was no evidence of misconduct." Having said that, the ARC also found that "the MDHR had a legal obligation to review the allegations that had been made by [Appellant] and reach her own decision as to whether or not the allegations warrant managerial action" (Cf. para 83). In fact, "[i]n the face of the number and seriousness of the allegations being made by the [Appellant], the [ARC could] not conceive how, acting lawfully, the MDHR could have satisfied herself that no managerial action was warranted." (Cf. para 84 (b)) .
34. The ARC concluded that "the decision taken was profoundly procedurally defective and also irrational" essentially because the MDHR had "attached considerable weight" to both the report by the CCO that "focused on a single allegation out of 19 raised by [Appellant], and failed also to even consider that single allegation in the context of the other 18 allegations raised" as well as a recommendation made by the CCO who "had no remit to make any recommendation whatsoever." (Cf. para 84)
35. In addition, with regard to the OCCO investigation, the ARC found that "there is an express obligation to consider all relevant evidence prior to arriving at a conclusion, and in this case in omitting to interview the [Appellant] before deciding not to progress all but one of the allegations, and in failing to put the allegations to [Appellant's line manager] as a pattern of behavior (these were very serious allegations) they failed to take account of all relevant evidence" (Cf. para 89). The investigators had "failed to understand that the requirement was to investigate the allegations individually and as a whole, and then consider first whether the staff member was subject to detriment, and if he was, whether those acts were

retaliatory. That required the drawing of an inference after a thorough investigation of all the allegations. That did not happen.” (Cf. para 86). The ARC also expressed its view that “the Bank’s process for considering complaints of bullying and harassment including retaliation are not compliant with international administrative law,…” (Cf. para 90)

36. Finally, in the Report’s Section on Remedies, the ARC concluded that it “ha[d] no power to determine whether or not [Appellant] was subject to retaliatory behavior, nor to refer the matter to independent investigation, as requested by [Appellant].” (Cf. para 96)

Notwithstanding, the Committee recommended to the President that “either the Bank should set aside those decisions, and the allegations should be fully reinvestigated by separate investigators within the department if that is possible, and if again no disciplinary action is to be taken, the MDHR should properly consider whether or not managerial action should be taken, or alternatively [Appellant] should be compensated for the way in which he has been treated in respect of the investigation of these allegations.”

37. On 9 December 2019, the President of the Bank conveyed to Appellant his decision on the Report and Recommendation by the ARC dated 11 November 2019.

In his decision, the President rejected the report’s recommendations and confirmed the Administrative Decision by the MDHR of 5 December 2018. He also rejected Appellants’ requests for remedies, damages, and reimbursement of incurred legal costs.

The decision reads in part as follows:

“3...[W]ith regard to the Bank’s duty to investigate misconduct allegations promptly and thoroughly, I do not concur with the findings of the Report on the conduct of the investigative process by OCCO. Indeed:

- the fact that you were not formally interviewed by OCCO does not affect the thoroughness of the investigation nor renders the process defective. Under the Bank’s internal law, interviewing the person who reported misconduct allegations during the Initial Inquiry, or the Formal

Investigation stage is not a mandatory element of the investigative process. I also note that the inquiry officer sent you questions on 17 August 2018 which you answered extensively. You have therefore been given the possibility to elaborate further your allegations.

- on the fact that only one of your allegations progressed to the Formal Investigation stage, the Report and Recommendation does not adequately take account of the fact that OCCO investigated all facts during the Initial Inquiry (which forms part of the “Investigative Process” set out in Part III, CDRPs). I particularly note that, during the Initial Inquiry, the inquiry officer reviewed [Appellant’s line manager’s] emails over the period of the complaint to assess whether they corroborate your allegations.
4. I am therefore satisfied that the OCCO investigative process did comply with all applicable obligations, and I do not concur with the Report and Recommendation when it states that the process was “defective” and that the CCO determination was “irrational.”
 5. I disagree with the finding of the Report and Recommendation that the MDHR decided not to impose managerial action because the CCO did not conclude that [the line manager] and [the Team #1 Director] had engaged in misconduct. Indeed, the MDHR is free to impose managerial action even when the CCO finds that the allegation submitted does not support a finding of misconduct. In this case, the MDHR Decision not to impose managerial action was taken on a reasonable and observable basis since:
 - with regard to [...], the Report and Recommendation makes clear that the facts submitted [...] had already been the subject of a prior report that you submitted under the RWPs and of a subsequent OCCO investigation. As you know, the MDHR already took managerial action towards [...] in February 2018;
 - with regard to [...]. I note that, for instance, on the [Project] congratulatory email, you did receive an apology and congratulatory message from [Appellant’s line manager’s] senior management (the Managing Director...), so that corrective measures had already been

taken. I also note that it was reasonable for the MDHR to consider that the other facts you presented did not warrant taking a managerial action. For instance, the congratulatory e-mail sent by [Appellant's line manager] in June 2018 regarding your transfer was not offensive or humiliating.

6. I am therefore satisfied that the decision not to impose managerial action was taken on a reasonable and observable basis.
7. On the refusal to disclose the Investigative Report, the Bank complied with its internal law (18.01 of the CDRPs) and followed the practice of peers and case law of certain international administrative tribunals. You have been provided with all relevant information about the steps taken during the assessment under the RWPs and OCCO investigative process, allowing you the opportunity to assess whether the Bank investigated promptly and thoroughly.
8. As conclusion, I reject the recommendations formulated in the Report and Recommendation. I therefore confirm the Administrative Decision and reject your requests for remedies, damages and reimbursement of incurred legal costs.”
38. On 9 March 2020, Appellant lodged an appeal with the Tribunal. In his appeal, he requested the Tribunal, *inter alia*, to remand the case back to the ARC; an oral hearing pursuant to Article 7.02 of the Appeals procedure; the production of relevant documents, pursuant to Article 6.03 of the Appeals Procedure; leave to submit new evidence pursuant to Article 7.01 of the Appeals Procedure and anonymity.
39. In a communication dated 12 March 2020, Appellant requested the Tribunal to suspend proceedings in the cases under consideration (Cases No. 2019/AT/07 and 2020/AT/05) as he was “hopeful that the Bank is open to finding a fair resolution to the Appellant's situation and address his concerns on a without prejudice basis.”
40. The Tribunal sought the views of the Bank on Appellant's request of 12 March 2020 and again, on joinder of both appeals (para 22 above). On 1 April 2020, the Bank reiterated its position on joinder and with respect to

the request for the stay of proceedings stated "...at this stage, no significant progress has been made and, despite several discussions and repeated requests from the Bank (the last on 20 March 2020) the Appellant and the Bank still did not reach a preliminary agreement on the terms which could be used as a basis for discussion."

41. In addition, also in its communication of 1 April 2020, the Bank informed the Tribunal that

"on 24 November 2019, [Appellant] had submitted to the MDHR a report alleging that, in the context of the OCCO investigation which led to the decision challenged in case EBRDAT 2020/AT/05, the subject of the investigation...allegedly committed misconduct by knowingly providing false and/or misleading information to the OCCO investigative officer.

Such allegation, mostly based on the transcripts of the interview of the Chief Compliance Officer and of the OCCO investigative officer by the Administrative Review Committee in case ARC47...has been referred on 11 March 2020 to OCCO pursuant to Section IV, paragraph 2.1 (b) of the CDRPs. This new allegation is now being dealt with in accordance with the CDRPs by OCCO. Since the outcome of this new request may have an impact on the lawfulness of the investigative process at the centre of case EBRDAT 2020/AT/05, the Bank invites the Tribunal to stay the examination of case EBRDAT 2020/AT/05 until the outcome of this new request is known and final. [Emphasis in original]

42. In a communication dated 16 June 2020, the Tribunal informed the Parties of its interim ruling on joinder and put further questions to the Parties on their views with respect to remanding the appeal to the ARC.

The communication reads, in part, as follows:

(A) RULING ON JOINDER

"...

2. Appellant has requested joinder of both appeals [cases 2019/AT/07 and 2020AT/05]. The Bank has opposed the joinder on the basis that "..., the [transfer] case relates to (i) the procedure followed prior to the Transfer Decision and (ii) the allowances the Appellant was

entitled to receive or not. In this respect, addressing the question whether the Bank did meet or not its obligations under the applicable law does not require the Tribunal to wait for the outcome of two cases relating to misconduct allegations raised by the Appellant.”

3. The Tribunal has considered the position of both Parties. It notes that the facts of both appeals are closely interconnected. The first administrative decision contested by Appellant deals with the conditions of Appellant’s transfer from [Team #1 Section] to the post of [...] at [Team #2 Section], and the second contested administrative decision relates to alleged harassment of retaliatory nature by the Director of the [Team #1 Section] and Appellant’s line manager.
4. Although the two complaints do not involve the same or similar questions of fact and law, ordinarily the basis for a joinder, the transfer of Appellant from the [Team #1 Section] was, according to the Appellant, prompted by a dysfunctional working environment. Similarly, the investigation of alleged retaliatory action by Director and Appellant’s line manager would not have taken place had the working environment from which Appellant sought a transfer been harmonious. Accordingly, joinder and the rendering of one judgment will facilitate fact finding (e.g., determining whether the two claims are related) and is in the interest of the efficient administration of justice.
5. For these reasons, the Tribunal informs the Parties that it has decided to join both appeals and hereby orders the joinder of Cases 2019/AT/07 and 2020/AT/05.”

(B) QUESTIONS ON REMAND

6. “The Appeals Directive provides in Section 7.01(b) that “the Tribunal shall take full account of the Findings of Fact made by the Administrative Review Committee’s Report and Recommendations unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error...or are perverse or are reached in breach of applicable law or the Tribunal grants a request of either party to present new evidence not available to that party before the Administrative Review Committee (hereinafter ARC) .” The Tribunal requests the parties’ views on the following questions within twenty days of receipt of this ruling:

- (i) Does the ARC have jurisdiction to consider an Appellant's harassment and retaliation claims independent of the OCCO?
- (ii) Whether the ARC erred by failing to address the merits of Appellant's claims that he was a victim of harassment and retaliation;
- (iii) If the first two questions are answered in the affirmative, whether the Tribunal has the authority to remand the cases to the ARC so that the ARC can conduct its own investigation into Appellant's harassment and retaliation claims."

(C) RULING ON STAY OF PROCEEDINGS

7. "The Tribunal has taken note of the Bank's request of April 1, 2020 to stay the proceedings in the light of a new OCCO investigation concerning new allegations by Appellant. The Tribunal declines to stay these proceedings."

43 On 6 July 2020, the Bank provided its response in a communication that reads, in part, as follows:

a) With respect to question (1) above:

"The Bank is grateful for the opportunity to address the Tribunal's question and is guided in its response by the Tribunal's decision in case 2019/AT/08. In the Bank's submission, there are two key proclamations which are highly relevant to the role of the ARC in its consideration of a staff member's harassment and retaliation claims:

(1) Applying paragraph 53 of the Tribunal's evaluation in case 2019/AT/08, "*the ARC process is to allow a hearing on the merits independent of the OCCO*"; and

(2) Such hearing as referred to under (1) is required to the extent necessary to enable the ARC, and on an appeal the Tribunal, to determine "*whether the discretionary powers were abused or not, i.e. whether the decisions have or have not been reached by the proper processes, or that the decisions either are or are not arbitrary, discriminatory, or improperly motivated, or that they could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed*".

This is aligned with the standard of review by the ARC of discretionary decisions as set out in the Directive on the Administrative Review Process (IV.6.4.2.(h)) which provides that the “[ARC] shall review the Administrative Decision...with a view to determine that it was...not tainted by abuse of discretion, i.e. was not arbitrary, discriminatory or improperly motivated.” As the Tribunal maintained in case 2019/AT/08, in the course of an investigative process “the Organisation takes a number of discretionary decisions” such as “to determine whether misconduct may have occurred” (para. 69).

As the Tribunal noted in case 2019/AT/08, in order to carry out such role, the “ARC can interview the same staff members who [the Office of the Chief Compliance Officer] interviewed” (in keeping with the Directive on the Administrative Review Process, section IV.6.4.2.(h), pursuant to which the ARC “may [...] meet separately” with staff members who “may have relevant information”). If the interview of all staff members is not necessary in order for the ARC to carry out such assessment as referred to in (2) above, then the ARC can interview some or none of the staff members.

The Bank further submits that it is not within the jurisdiction of the ARC to:

- (i) carry out a *de novo* investigation of a staff member’s harassment and retaliation claims;
- (ii) enter a microscopic review of the investigative process carried out by the Bank’s Office of the Chief Compliance Officer; or
- (iii) consider a staff member’s harassment and retaliation claims beyond the fact-finding and assessment necessary in order for the ARC to apply the test under (2) above.

The Bank acknowledges that, in its application of the test under (2) above, the ARC has discretion to determine what it considers necessary, in particular as regards its hearing of staff members. However, the Bank respectfully underlines the need for a balance to be struck between (a) the rights of the complainant staff member to have his/her complaints considered, (b) the ARC’s objective to review the administrative decision with a view to determine whether it was tainted by abuse of discretion, i.e. whether it was arbitrary, discriminatory or improperly motivated; and (c) the conduct of an efficient dispute resolution process, without undue or unnecessary delay.”

b) With respect to the Tribunal's question 2 above:

"In the Report issued on 11 November 2019 in case ARC47, the ARC declares that "the Committee has no power to determine whether or not the Staff Member was subject to retaliatory behaviour" (para. 96). The Bank acknowledges that such statement is not in line with the principles set out in the Tribunal's decision in case 2019/AT/08 and exposed in the Bank's response to Question 1. However, it is underlined that:

- when conducting its assessment, the ARC benefited from (and used) the possibility to interview all staff members considered relevant and decided to interview the MDHR, the CCO and the two OCCO Inquiry Officers. The Bank notes that the ARC expressed its disagreement with the non-disclosure of the investigative report but, in practice, did not make any use of the factual information on the merits gathered during the interviews and did not consider appropriate to interview [the Team#1 Director] or [the Appellant's line manager] (despite the Staff Member's request formulated at para. 6.3 of his RRAD);
- despite the strong words used by the ARC ("*no power to determine*"), the ARC did carry an in depth assessment of the case but concluded that the case had to be dismissed before assessing the merits due to "*serious procedural irregularities*" in the investigative process.

The Bank therefore submits that, regardless of the words used by the ARC, the ARC did not "fail to address the merits" but it rather decided not to address the merits of the Appellants' claim for the sole reason that it found "*serious procedural irregularities*" allowing it to dismiss the case even before considering the merits."

c) With respect to the Tribunal's question (3) above:

"The Bank did not answer to the second question in the affirmative but still notes that, in the present case, the Tribunal does not have the authority to remand the cases to the ARC for the two following reasons:

- The Directive on Appeals Process only allows the EBRDAT to refer a case back to the ARC in limited circumstances (6.01 Directive on Appeals Process "*If, in their Statement of Appeal, the appellant includes a ground of appeal or information which was not contained in their request for an Administrative Review and which, had it been included, might have materially altered the*

recommendation of the Administrative Review Committee and/or the Administrative Review Decision, the Tribunal may, at the request of the respondent, suspend the Appeal to allow the re-opening of the Administrative Review”). In the present case, these limited circumstances are not met since (1) the Appellant did not make a request under 6.01 and (2) there is no new “ground of appeal or information” in the Statement of Appeal.

- Should the EBRDAT not find all required elements in the Finding of facts made by the ARC (including also, in this case, the extensive transcript of the interviews held by the ARC), it has the possibility “*in exceptional circumstances*” to “*hold oral hearings to hear arguments of the parties or to re-hear the evidence (or part of the evidence) or to allow **new evidence to be heard*** (7.02 Directive on Appeals Process).”

The Bank finally notes that, in case 2019/AT/08, the Tribunal faced a similar situation (the ARC in its Report on case ARC39 did not address the merits of the Appellant’s claims) and did not send the case back to the ARC. Instead, the EBRDAT carried its own assessment of the merits based on the facts available.”

44. On 16 July 2020, Appellant provided responses to the Tribunal’s questions in a communication that reads, in part, as follows:

- (1) With respect to Tribunal’s question 1, in paragraph 44 above:

“In case 2019/AT/08 (on ‘abuse of authority’ towards the same Appellant) the Tribunal conclu[ded that]:

- ‘The ARC process is to allow a hearing on the merits independent of the OCCO and, where necessary, to correct the latter’s mistake’(point 53)...

...[And that]

- ‘[as the Tribunal’s] jurisdiction is not limited to what is addressed in the PARD’(point 79)...

[and]...there is no finding in [the ARC] report that Appellant was or was not a victim of harassment [the] Tribunal must now apply Bank law on harassment to make an independent assessment, based

on the facts already found by the ARC, and determine whether the MDHR's interpretation of the harassment rules was erroneous or if it in some other fashion abused its discretion (point 81)'. ”

In the light of the Tribunal's decision quoted above,

“[I]t follows...that the ARC has jurisdiction to consider the Appellant's harassment and retaliation claims, and the ARC's conclusion that it has no power to determine whether or not [Appellant] was subject to retaliatory behaviour (paragraph 96 of the ARC Report) is manifestly erroneous and has been reached in breach of the Bank's applicable law.”

Appellant further contends that

“should the ARC be denied to consider claims of harassment and similar conduct independent of the OCCO (...), this would mean in practice that the Bank's staff members would have no recourse to an adjudicatory mechanism.”

(2) With respect to Tribunal's question 2 in paragraph 44 above:

Appellant argues that the finding by the ARC that

“...under the Bank's processes the Appellant has no right to be told what findings of fact were made (paragraph 95 of the ARC Report)” and therefore “the ARC cannot address the merits of the Appellant's harassment and retaliation claims...” is mistaken. “[T]he ARC has erroneously declared that ‘the Committee has no power to determine whether or not [Appellant] was subject to retaliatory behaviour’ (paragraph 96 of the ARC Report) and failed to address the merits of the Appellant's claims ...” .

Appellant contends that “such reasoning and declaration are not in line with the principles as explained by the Tribunal in the earlier case [2019/AT/08] that:... ‘It was the ARC's mission in a case such as this to determine by its own exploration of documents and witnesses whether harassment occurred and therefore whether a

finding of no harassment by MDHR was inconsistent with the Bank's law (points 80-81)."

Appellant also argues that his due process rights were not respected, in accord with principles set forth in 2019/AT/08, which requires that the ARC review all "relevant documents and interview all relevant witnesses" (point 55).

He maintains that "In the circumstances of the present appeal, the ARC has not [had] access to the investigation report which it deemed critical to assess the RARD on the merits, has not interviewed either the Appellant or several witnesses requested by the Appellant (...), and could not interview another unidentified staff member interviewed by OCCO ..."

Finally, Appellant submits "that the fact that the former President of the Bank unreasonably ignored the ARC Report in its entirety should not be used by the Tribunal against the Appellant to conclude that the ARC decided to dismiss the case."

(3) With respect to question 3 in paragraph 44 above:

Appellant contends that it is within the Tribunal's authority to remand the cases back to the ARC on the basis that:

- "First, contrary to the Respondent's submissions, the Appellant has made a request to refer the case back to the ARC under section 6.01 the APs in the Statement of Appeal in case 2020/AT/05.
- Second, the Appellant included new information which was not available to the Appellant (and the ARC) during the Administrative Review Process in case 2019/AT/07 with respect to the reorganisation of the Appellant's new team (which has occurred within just a few months after the Appellant's transfer) and impact of such reorganisation on the Appellant's role and responsibilities. In light of the ARC's overall conclusion in case 2019/AT/07 made primarily on the basis of the ILOAT guidance that "it is not enough for the person

concerned to retain her or his grade and remuneration, care must also be taken to ensure that the new post provides her or him with work of the same level as that which she or he performed in her or his previous post and matching her or his qualifications (ILOAT 3662, cons. 9)”, the Appellant respectfully submits that such new material information..., might have materially altered the ARC Report and the Administrative Review Decision.

- Furthermore, the Appellant also included new information in case 2020/AT/05 addressing duties and responsibilities of the ARC with respect to staff members’ claims of harassment and retaliation, based on the guidance provided by the Tribunal in earlier case. The Appellant respectfully submits that, had this information been known to the ARC during the Administrative Review Process in case ARC47 (now 2020/AT/05), the ARC would have certainly addressed the RARD on the merits (and prepared comprehensive findings of fact with greater focus on the merits) and such action might have materially altered the recommendation made by the ARC and the Administrative Review Decision.
- For the above reasons, even ‘limited conditions’ allowing the Tribunal to suspend the proceedings and refer the cases back to the ARC are met...”

Appellant also informed the Tribunal “that on the basis of material new information previously unknown to him, the Appellant respectfully asked the MDHR (and the VPHR) to re-open case ARC47/2019 as these were additional grounds previously unknown to the Appellant. The case is currently being considered by the ARC. Pursuant to Article 6.04(a) of the APs, “at the request of either party, the Tribunal may, in its discretion, stay the proceedings at any time for any reason.” In the circumstances of the present case and in the interest of fair, impartial and thorough consideration of these cases, the Appellant respectfully invites the Tribunal to stay the proceedings of the joint cases until the finding of facts is prepared by the ARC. The Appellant is hopeful that the Bank would support such request.”

IV DECISION BY THE TRIBUNAL

45. The Tribunal is competent to decide case under Article 3 of the Appeals Directive.
46. The Tribunal grants Appellant anonymity pursuant to Article 9.02 of the Appeals Directive.
47. Appellant has filed two separate appeals against two PARDs dated 11 April 2019 (“the Transfer Decision”) and 9 December 2019 (“Allegations of Harassment Decision”) in Case Nos. 2019/AT/07 and 2019/AT/05 respectively.
48. The Tribunal is conscious that the Bank has not had the opportunity to submit its answer on the merits to Appellant’s appeal on the Transfer Decision in Case No. 2019/AT/07, nor to Appellant’s appeal on the Allegations of Harassment Decision in Case No. 2020/AT/05. The Tribunal has asked the Parties to submit their views on the question whether the Tribunal has the power to remand these cases back to the ARC so that the ARC can conduct its own investigation into Appellant’s harassment and retaliation claims (para 44 above). Both Parties have submitted their views thereby allowing the Tribunal to decide the remand question. In view of the Tribunal’s decision to join both cases, as ordered in its preliminary ruling of 16 June 2020, reproduced in para 44 above, and in view of the Tribunal’s decision to remand the joined cases to the Bank for referral to the ARC, as set forth below, the Tribunal deems that a response on the merits by the Bank at this stage would not only be premature, but devoid of purpose, as the ARC will be tasked with producing a new report on the joined cases and the President of the Bank will, in due course, issue a new PARD on the basis of a new recommendation to be provided by the ARC on the joined cases. The Bank will have an opportunity to submit its position on the merits after the new PARD is issued if the Appellant pursues his appeal.
49. First, the Tribunal will consider the PARD dated 11 April 2019 taken based on ARC Report 43/2018 Concerning the “Transfer Decision” (Case No. 2019/AT/07). In its Report, the ARC reached two conclusions relevant to this appeal. It found that the Bank failed to consult with Appellant in the manner required by Section 4.8.2 of the Staff Handbook and this Tribunal’s prior interpretation of the duty to consult. See Case No. 2006/AT/04

(2007). The ARC nevertheless went on to conclude that “further consultation in respect of the Transfer Decision would have made no difference” (Cf. para 37) and in its recommendations, stated its view that even if “the transfer decision was taken in violation of the applicable procedure... [it was] not taken in a manner that affected the outcome.” (Cf. para 47). The ARC further found “[t]here is no evidence to suggest that [Appellant’s] salary [after transfer] has been set outside of [the] salary scale” required by Section 5.3.5(1) of the Staff Handbook. (Cf. para 40). It concluded, therefore, that “further consultation [regarding compensation] would not have made any difference.” (Cf. para 49)

To sum up, the ARC concluded that although proper consultation was lacking, this procedural defect was not material because the outcome of the required consultation would not have had a bearing on the transfer itself or on the financial package ultimately offered to Appellant.

50. To the extent that the contested decision was not in accord with Section 4.8.2 of the Staff Handbook, the Tribunal concurs with the ARC’s determination that the decision is flawed. However, the ARC did not articulate specific factual findings explaining why the inadequacy of the consultation was not material to either the transfer decision or the compensation decision. With respect to the latter, it does not appear that the ARC undertook an independent fact-finding inquiry into the propriety of Appellant’s new salary level. For this reason, the Tribunal is unable to assess whether the financial package offered to Appellant was suitable under the circumstances and whether any further consultation with Appellant would have affected the outcome of the transfer. For this reason, it cannot yet concur with or reject the ARC finding that the outcome of the required consultation under the Handbook would not have changed the outcome of the case.

51. Article 7 of the Appeals Directive on “Proceedings” stipulates that

“(a) In the ordinary course the Tribunal shall decide the appeal on the basis of the Appeal Documents which shall include...Findings of Fact of the Grievance Committee and a transcript of the proceedings before the Grievance Committee...” and (b) The Tribunal shall take full account of

the Findings of Fact made by the Grievance Committee in the Grievance Committee's report unless, on application of either party, the Tribunal determines that the Findings of Fact contain a manifest error...or are perverse or are reached in breach of applicable law..."

52. Because the ARC failed to engage in adequate fact finding prior to issuing Report 43/2018, the Tribunal is prevented from considering the merits of the appeal. For the reasons stated in para 6 above, the PARD of 11 April 2019, taken on the basis of a flawed ARC Report, is also flawed and must be set aside. The Tribunal directs the Bank President, under Article 8.04 Of the Appeals Directive, to remand the case to the ARC, as a remedial measure, in order that the ARC may conduct a proper fact finding exercise and determine whether appropriate consultation with Appellant would have had a material impact on the transfer decision and the financial terms offered to Appellant upon transfer to the new position. The Tribunal will then be in a position to adjudicate the merits of the claim under the Appeals Directive if Appellant pursues his claim.
53. In order to make a factual determination as to the appropriateness of the financial terms offered to Appellant, the Tribunal directs the ARC to conduct a limited inquiry, through witness testimony and production of documentation, into the manner in which the Bank established the financial package given to Appellant and whether the financial terms of the package were consistent with the terms of financial packages given to other bankers at Headquarters with similar titles and responsibilities or in comparable situations. The ARC should also examine how the package compares to packages containing salary adjustments for other bankers who transferred from the field to Headquarters.
54. The Tribunal will now turn to Case No. 2020/AT/05 concerning the second PARD contested by Appellant, dated 9 December 2019, on the "Allegations of Harassment Decision", taken based on ARC 47/2019.
55. In its Report, the ARC stated that "[t]he Committee has no power to determine whether or not [Appellant] was subject to retaliatory behavior..." For the reasons set forth below, the Tribunal is of the view that, in making such determination, the ARC has made an incorrect assessment of the

powers that have been conferred upon it by Statute and thereby a fundamental mistake regarding its jurisdiction.

56. In accordance with well-established case law of international administrative tribunals, the obligation of good faith requires that an Organization give a staff member the opportunity to consider his or her harassment claims. Unless that opportunity is provided, “the Organization will be at risk of proceeding on incorrect facts or without regard to essential facts or of drawing false conclusions.” (ILOAT Cf. Jdgmt 934, Consideration 83)

The Glossary of Terms in the Staff Handbook defines “retaliation” to include harassment. See also Annex 13.2, Art. 1.04. (“Conduct and Disciplinary Rules and Procedures”).

The Bank’s Harassment-free and Respectful Workplace Policy (“Harassment Policy”) provides in Section 1.6 that an MDHR decision after completion of an investigation into allegations of harassment may include a decision that the targeted behavior “was not tantamount to misconduct but has been referred for managerial action” or a decision that “the allegations do not warrant any further action and the matter has been closed.” Significantly, either of those two decisions “shall constitute an initial decision for the purposes of the Directive on the Administrative Review Process.”

Under the Harassment Policy, therefore, an MDHR decision rejecting a harassment complaint in whole or in part, if affirmed by the Bank’s President, is subject to administrative review by a staff member who was allegedly a victim of harassment.

57. In his RARD, Appellant requested, in part, that the ARC recommend the following relief:

“To refer the matter for additional independent investigation or alternatively to determine that the Staff Member was subjected to behaviour which constitutes harassment, bullying, discrimination on medical grounds, retaliation and mobbing.”

58. Appellant, having requested that the ARC determine that he was a victim of harassment, retaliation, bullying, etc., was entitled under the Bank's Harassment Policy to consideration of his complaint by the ARC. The Tribunal is of the view that the ARC should have asserted its jurisdiction to consider the merits of Appellant's complaint. Although the ARC did not have authority to direct an independent investigation, it erred in concluding that it had no authority to consider whether Appellant's claim that he had been harassed was meritorious.
59. The Tribunal wishes to draw a distinction between the OCCO and the administrative review processes. They are fundamentally different. The OCCO process is designed to determine whether a staff member accused of committing misconduct is guilty of that misconduct. On the other hand, administrative review of a decision alleging that a staff member has been harassed is designed to determine whether a staff member is the victim of harassment. OCCO procedures are investigative, while ARC procedures may be more accurately described as adjudicative. The Tribunal does not consider an OCCO/MDHR decision in a harassment or retaliation case to foreclose the ARC's ability to make independent findings and conclusions regarding an Appellant's claim that he or she has been the victim of harassment or retaliation.
60. In response to a question put by the Tribunal to the Parties on whether the ARC erred by failing to address the merits of Appellant's claim on the basis that it lacked jurisdiction to entertain harassment claims, the Bank acknowledged "that such statement [that it has no power to determine [...]] with the principles set out in the Tribunal's decision in case 2019/AT/08...." The Bank also admits that, applying the Tribunal's jurisprudence, in particular para 53 of Judgement 2019/AT/08, "the ARC process is to allow a hearing on the merits independent of the OCCO" to enable the ARC and on an appeal to the Tribunal to determine "whether the decisions have been reached by the proper processes...or that they could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed."
61. The Bank further argues that "it is not within the jurisdiction of the ARC to...carry out a de novo investigation of a staff member's harassment and

retaliation claims...or consider a staff member's harassment and retaliation claims beyond the fact-finding and assessment necessary in order for the ARC to fulfil its mandate.”

62. Notwithstanding, the Bank proceeds to argue that

“despite the strong words used by the ARC (“*no power to determine*”), the ARC did carry an in depth assessment of the case but concluded that the case had to be dismissed before assessing the merits due to “*serious procedural irregularities*” in the investigative process.”

The Bank therefore submits that, regardless of the words used by the ARC, the ARC did not “fail to address the merits” but it rather decided not to address the merits of the Appellants’ claim for the sole reason that it found “*serious procedural irregularities*” allowing it to dismiss the case even before considering the merits.” [Emphasis in original]

63. The Tribunal is unable to concur with the Bank’s reasoning. There is an inherent contradiction in recognizing first that the ARC had erroneously failed to assert jurisdiction over the harassment claims but then arguing that it carried out “an in-depth assessment of the case.” The argument cannot be sustained. In fact, what happened here is that the ARC decided not to conduct a fact-finding inquiry into a matter that the ARC asserted was beyond its authority. As stated in Case No. 2019/AT/08, the ARC had jurisdiction to consider Appellant’s claims of harassment and retaliation and should have asserted its jurisdiction. In not doing so, it erred concerning its powers. Moreover, if it found material inadequacies and irregularities in the OCCO/MDHR procedures, it was incumbent upon the ARC to recommend corrective action. To the extent that the ARC did not exercise its jurisdiction, its recommendation in this case is also flawed.

64. The Tribunal has taken note of the Bank’s argument that the ARC does not have the power to conduct “a de novo investigation” and concurs. However, the Tribunal does not consider that asking the ARC to conduct a limited fact-finding inquiry into Appellant’s harassment claims constitutes a de novo investigation. In its Judgement 2019/AT/08, para 81, the Tribunal held that:

“It was the ARC’s mission in a case such as this to determine by its own exploration of documents and witnesses whether harassment occurred and therefore whether a finding of no harassment by MDHR was inconsistent with the Bank’s law.”

The Bank itself, in response to questions put by the Tribunal, admits that “the ARC process is to admit a hearing on the merits independent of the OCCO...” (See paras 45 and 60 above).

65. In an ARC hearing, a complainant should have the right to propose documents for review and witnesses who can be interviewed. The ARC retains discretion as to what witnesses it may interview but that discretion should remain independent from the OCCO investigation. In addition, the ARC should be entitled to call witnesses already interviewed by OCCO, especially since according to the Bank Rules, the Bank has not produced the results of the OCCO investigation to the ARC. The ARC may also interview witnesses that never appeared before OCCO. In this instance, the ARC had an obligation to interview all witnesses and review all documents that it believed necessary to give Appellant a fair hearing on his complaint that he was the victim of retaliation and harassment. See Case No. 2019/AT/08 (Cf. paras 51-55)
66. In view of the above, the Tribunal deems that the ARC must ensure that a proper inquiry is undertaken in the dispute resolution process so that Appellant’s due process rights to have his complaint heard are satisfied.
67. As the ARC proceeding moves forward, the Bank can either (a) provide a copy of the OCCO investigative report/findings to the ARC on a “need-to-know basis” pursuant to Article 18.01(c) and 19.03 of Annex 13.2 (in such event, the report would be released solely to the ARC, for consideration in camera, and the ARC would continue to treat it as “strictly confidential”) or (b) provide the Committee the identities of all witnesses interviewed for the report and copies of all documents reviewed by the investigator. After receipt of this information, the ARC can then decide which individuals it should interview (or re-interview) and which additional documents it should request.

68. In requiring the disclosure of the identities of witnesses consulted in the investigation, the Tribunal notes that Annex 13.2 of the Staff Handbook requires staff members to cooperate in OCCO investigations and “shall not make their cooperation subject to the condition that their identity or their oral or written statements shall remain confidential.” Art. 3.02(a)(i).
69. To the extent the PARD in the Misconduct/Harassment Decision case was premised on the ARC’s faulty understanding of its own jurisdiction, then the PARD of 9 December 2019 is likewise flawed. As there was no consideration of the merits of the harassment claim by the ARC, the PARD must be set aside and the case sent back to the Bank for referral to the ARC for reconsideration of the merits of the harassment claim. The procedure must resume from the point at which it was deemed flawed.
70. Under Article 8.04 of the Appeals Directive, if the Tribunal concludes that an appeal is well founded, it may grant , in whole or in part, the remedies sought by an appellant to rectify the adverse effects of the contested administrative decision. Appellant has asked for the cases to be remanded back to the ARC. The Bank contends that the Tribunal should conduct its own evidentiary hearing if it considers that the factual record is inaccurate. The Tribunal is of the view that initiating an inquiry into Appellant’s harassment claims would be inconsistent with Article 7.01 of the Appeals Directive, which provides that the Tribunal should take full account of the Findings of Fact by the ARC. Although the Tribunal is authorized by Article 7.02 of the Rules to supplement the record of a case with its own fact finding, the Appeals Directive does not endow the Tribunal with the power to act as initial fact finder in a case. That is the ARC’s role.
71. The Tribunal is also conscious that Appellant’s request for remand does not strictly meet the formal requirements of Article 6.01. Nonetheless, the Tribunal directs the Bank President, under Article 8.04 of the Appeals Directive, to remand the case to the ARC so that, as a remedial measure, the ARC can complete a comprehensive review of all relevant facts of both joined cases and conduct whatever inquiries it deems necessary, to evaluate Appellant’s claims, consistent with the foregoing guidelines. This is the only way in which Appellant’s due process rights will be respected.

72. The Tribunal takes note of the Bank's recent communication dated 1 April 2020, in which the Bank informed the Tribunal that on 24 November 2019, "Appellant submitted to the MDHR a report alleging that, in the context of the OCCO investigation which led to the decision challenged in Case EBRDAT 2020/AT/05 the subject of the investigation...allegedly committed misconduct by knowingly providing false and/or misleading information to the OCCO Investigative Officer. Such allegation...has been referred on 11 March 2020 to OCCO...[and] is now being dealt with in accordance with the CDRPs. Since the outcome of this new request may have an impact on the lawfulness of the investigative process at the centre of case EBRDAT2020/AT/05, the Bank invites the Tribunal to stay the examination of case EBRDAT2020/AT/05 until the outcome of this new request is known and final."
73. With respect to the new allegations under investigation referred to in the Bank's communication of 1 April 2020, and the Bank's request to stay the proceedings, the Tribunal is of the view that there is no need to stay these proceedings and rejects the request. As the allegations against the line manager stem from the ARC record now before the Tribunal in ARC47/2019 they should be considered by the ARC in the context of its new fact finding inquiry, as directed by the Tribunal, and after the OCCO completes its own pending investigation. The Bank will have an opportunity to present its case thereafter.
74. In requesting a remand, the Tribunal is mindful of the complexity of these cases. Nevertheless, the Tribunal urges the ARC to take a holistic approach to these cases and especially to the allegations of harassment.
75. The Tribunal decides
- i. The Tribunal does not accept the ARC's findings of fact in the Transfer and Allegations of Harassment cases because, for the reasons stated above, they are deficient and manifestly erroneous. See Article 7.01(b) of the Appeals Directive.

- ii. To set aside the PARDS dated 11 April 2019, concerning the Transfer Decision and 9 December 2019, concerning the Allegations of Harassment Decision.
- iii. To remand the cases to the President of the Bank for referral to the ARC under Article 8.04 of the Appeals Directive for further fact finding and determinations as set forth above.

76. In issuing this decision, the Tribunal is not expressing any opinion as to the merits of Appellant's claims in these cases.



Maria Vicien Milburn
