

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

Case No. 2021/AT/02

Appellant

VS

European Bank for Reconstruction and Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Thomas Laker (Chair)

Spyridon Flogaitis

Chris de Cooker

26 August 2021

I. Introduction

1. In the present Appeal, the Appellant contests the decision of the President of the European Bank for Reconstruction and Development (“EBRD” or “Bank”), dated 5 May 2021, which considered that the Appellant’s request for review of 14 April 2021 was not admissible.

In substance, the dispute concerns the scope of the Appellant’s entitlement to so-called ‘surrogacy leave’.

2. On 14 April 2021, the Appellant submitted a Request for Review of an Administrative Decision to the President regarding the decision of the Managing Director, Human Resources and Organisational Development (MD, HR&OD), dated 17 February 2021, rejecting the Appellant’s views about the amount of surrogacy leave he was entitled to. In this decision, MDHR had stated that the Appellant’s request did not meet the requirements of the Bank’s Directive on the Administrative Review Process (ARP Directive), since the Bank’s internal law on surrogacy leave, as laid down in the Directive on Leave (Leave Directive) had been properly applied. Further, MD, HR &OD argued that she did not have the authority to change or deviate from the stipulated terms of surrogacy leave.

3. On 5 May 2021, the President determined that the Request for Review was inadmissible. She confirmed that the Appellant’s request did not meet the requirements of the ARP Directive. Further, she declined the Appellant’s suggestion to grant a deviation from the provisions of the Leave Directive.

II. Procedural History

4. The present Appeal was lodged on 11 June 2021.

5. The Tribunal directed the Bank to provide its Response to the Statement of Appeal by 15 July 2021.

6. The Response was received on 15 July 2021.

III. The Facts

7. On 3 November 2020, the Appellant and his HR Business Partner discussed issues related to his forthcoming fatherhood of twins by way of surrogacy, including his potential leave entitlements. The Appellant had a number of queries to which his HR Business Partner indicated she would look into and follow up with the respective clarifications.

8. On 16 November 2020, in response to the Appellant's initial queries, the HR Business Partner sent an email to him clarifying a number of his questions with regard to certain entitlements, such as entitlement to surrogacy leave, health insurance coverage and child allowance. The email from the HR Business Partner stated that there is no difference to the entitlement to paid surrogacy leave for a staff member who becomes a parent to more than one child by surrogacy. Specifically, it was indicated: "[Staff Handbook] states under Directive on leave - Surrogacy Leave can be up to 22 consecutive weeks/ or 10 days. Shared leave is up to 14 consecutive calendar weeks. Is there a different entitlement for multiple births. No. this is because it follows adoption leave not maternity leave, given that the couple will legally adopt the child/children being born to the surrogate mother".

9. In response, on 16 November 2020, the Appellant asked the following: "[c]ould you please explain to me why the option of shared leave for multiple births would not apply to me? [...]. I don't understand why either the way in which my twins are born, which I don't have to disclose to the Bank, and/or the fact that there's no mother would make me have a different and shorter leave entitlement than a straight couple, which would be 33 weeks of shared paid leave and 45 weeks of unpaid shared leave."

10. On 4 January 2021, the HR Business Partner wrote an email as a follow up to a call on 18 December 2020, in which she noted the clarifications provided on the Bank's parental leave entitlement and in particular to the Appellant's assertions that it unfairly discriminates against him on the basis of his gender and/or sexual orientation. The Appellant was informed that "[s]urrogacy and adoption leave benefit all staff members regardless of their gender and/or sexual orientation" and "that there is a legitimate distinction to be made in case of maternity/birth leave for multiple births as the Bank recognizes that in those situations, extra time may be needed for the postnatal care given the physical nature giving birth to multiple children may have on the staff member (and/or the support required from the partner)."

11. The email ends with the assertion that it endeavoured to explain the Bank's position in this regard, informing the Appellant that he had "recourse under the Administrative Review Process should [he] wish to pursue the matter further."

12. On 18 January 2021, the Appellant submitted to the MD, HR&OD a document entitled "Surrogacy Leave request (twins)" asking for a confirmation that he will be granted leave

entitlement in the same amount as granted to staff members under the provisions of maternity leave and/or birth leave. The Appellant considered that the explanations received by his HR Business Partner relating to why there was a difference in entitlement between the various forms of parental leave not to be justified and as such, there was no valid reason “for treating staff members who have more than one child through surrogacy different than staff members who give multiple births.”

13. In her response of 17 February 2021, the MD, HR&OD indicated that the “Request does not meet the requirements of the [ARP Directive] as staff members do not have recourse when the Bank’s internal law has not been altered or breach[ed] and has been properly applied. In this regard, I note that the information provided to you by your HR Business Partner setting out the eligible entitlement for the different types of parental leave does not constitute any individual administrative decision that alters in an adverse manner or allegedly breaches the terms and conditions of your employment at the Bank. Rather the information you received from your HR Business Partner confirms the stipulated terms of Paid Surrogacy Leave, which are part of the terms and conditions of your employment that you accepted. Additionally, a request to grant you 33 weeks of Paid Surrogacy Leave is a request to change the existing and applicable terms and conditions of your employment, which also do not meet the requirements of the ARP Directive. I further note that I do not have the authority to change or deviate from the stipulated terms of Paid Surrogacy Leave nor to top up the amount of Paid Surrogacy leave from 22 weeks to 33 weeks to align with the entitlement of leave under the terms of Paid Maternity Leave.”

14. The MD, HR&OD also reiterated the rationale, which had already been provided to the Appellant by his HR Business Partner, explaining why staff members eligible for maternity leave are provided additional leave in circumstances of multiple births: “This is based on a recognition that, saying it simply, the act of giving birth to multiple children puts a person at a higher risk of experiencing physical and emotional exertion and as a result requires additional time for postnatal recovery. This is why there are additional days provided for maternity/birth leave for multiple births. The same does not apply to staff members who become parents in circumstances of either surrogacy or adoption.”

15. Finally, the Appellant was advised that in case of disagreement with the above response he “may search further review as set out in Section IV, paragraph 6.4 of the ARP Directive.”

16. On 14 April 2021, the Appellant submitted a request to the President pursuant to Section IV, paragraph 6.4 of the ARP Directive. The Appellant considered the response by the MD, HR&OD to constitute “the first administrative decision taken in respect of the requested parental shared leave. According to Section IV 6.1 (b) of the ARP Directive, an administrative review would therefore have to be filed to the Vice-President, Human Resources and Corporate Services.” Nevertheless, the MD, HR&OD advised him in her response to “seek further review as set out in Section IV, paragraph 6.4 of the ARP Directive”, i.e. to the President of the Bank. The Appellant alleged that the “regulatory content of the Leave Directive regarding Parental Leave for a single child shows that maternity, surrogacy and

adoption leave are granted for more than the act of physically giving birth to multiple children...”. He requested to be “granted 11 weeks of paid shared leave, once [his] husband has completed 22 weeks after the date [their] twins [would] start living with [them], which will be immediately as of their births. In addition, [he] request[ed] to be granted 14 weeks of unpaid leave to be taken with 78 weeks after the date our twins will start living with [him].”

17. On 5 May 2021, the President responded to the Request informing the Appellant that she considered it inadmissible pursuant to Section IV, paragraph 6.4.1(d) of the ARP Directive. Paragraph 5 of the President’s Decision set out the various reasons for considering the Appellant’s Request inadmissible noting in particular that “[w]hether your request to the MD, HR&OD is (i) a request for paid and unpaid surrogacy leave or shared parental leave, or (ii) a stage 1 request for review of the administrative review process, I wish to clarify that the response of the MD, HR&OD is only a decision of a confirmative nature setting out the paid and unpaid surrogacy leave entitlement under the provisions of the Directive on Leave.” The President further explained that “the MD, HR&OD does not have the authority to grant such request for a change to the applicable terms and conditions of your employment under the Directive on Leave nor in the context of a request for administrative review pursuant to the provisions of the ARP Directive.”

18. On 11 June 2021, the Appellant submitted the present Appeal against the President’s decision of 5 May 2021. This is the contested decision.

IV. The Appellant’s position

19. The Appellant holds that the President erred when she determined that his request for administrative review, submitted on 14 April 2021, was not admissible.

20. In the Appellant’s view, by not granting his leave request of 18 January 2021, the MD, HR&OD’s negative response constituted a challengeable administrative decision: Section IV 3 (a) of the ARP Directive stipulates that “Individual Decisions (...) which allegedly alter, in an adverse manner, or allegedly are in breach of, the terms and conditions of employment of a Staff Member in force immediately before such Administrative Decision is taken” are subject to review in accordance with the Administrative Review Process. The MD, HR&OD’s response was an individual decision, as it effectively denied his right to the requested surrogacy leave and therefore had direct legal consequences.

21. In addition, the Appellant claims that the MD, HR&OD’s response was in breach of the terms and conditions of his employment: Section 1.7. of the Directive on General Provisions and Glossary of Terms for the Staff Handbook provides that “Terms and Conditions of Employment include all pertinent regulations and rules identified in the Directive on the Appeals Process (...) relating to the staff member’s employment.” As pointed out in his request for administrative review, the right of a staff member not to be the subject of

unjustified unequal treatment follows the EBRD Staff Regulations, which stipulate in Section 3 a) that “[t]he Bank shall at all times act with fairness (...) in its relations with staff members.” Hence, he claims that the MD, HR&OD’s decision not to grant the requested leave constituted a breach of the terms and conditions of his employment.

22. The Appellant adds that it also bears noting that the aforementioned Section 1.7 clarifies (“include”) that “Terms and Conditions of Employment” are not limited to the Bank’s internal law. In his view, the right not to be the subject of unjustified unequal treatment is a recognised principle of international administrative law, and as such also a term and condition of his employment. The MD, HR&OD’s response was therefore subject to review in accordance with the Administrative Review Process.

23. Further the Appellant believes that the President’s statement that the MDHR did not “have the authority to grant [a] request for a change to the applicable terms and conditions of [my] employment under the Directive on Leave (...)”, is neither correct nor serves to show that his request for administrative review was inadmissible. Rather, pursuant to the Appellant’s own words, “the issue in the present case is that the regulatory content of the Leave Directive breaches higher human resources norms, namely Section 3 a) of the Staff Regulations and recognised principles of international administrative law”. In the Appellant’s view, it was therefore incumbent upon the MD, HR&OD – in her capacity as the Bank’s Chief Human Resources Officer - to ensure that a response to his leave request would comply with these higher norms and that there would be no unjustified unequal treatment.

24. The Appellant reiterates the emphasis in his request for administrative review, that the Leave Directive stipulates in its Section V that “the President may grant a deviation from a requirement of [the Leave Directive].” Pursuant to the Appeal, the MD, HR&OD would have thus been able to request a waiver from the President to deviate from the terms of the Leave Directive in order to discharge her aforementioned duty.

25. Regarding the President’s view that “deviations under the Directive on Leave are not intended to be issued in order to change the applicable entitlement to parental leave as set out in the Directive of Leave, which reflects the Bank’s policies with respect to such leave”, the Appellant sees no merits in this argument. He asks what is the purpose of Section V of the Leave Directive, if not ensuring that the application of the Leave Directive does not result in unjustified unequal treatment or any other unlawful outcome? Both the MD, HR&OD’s and the President’s responses essentially suggest that in cases where the application of the Bank’s Leave Directive amounts to an unjustified unequal or otherwise unlawful treatment, the President and the MD, HR&OD are not in the position to deviate from the regulatory content of the Leave Directive to prevent the unlawful treatment from happening. According to the Appellant, such outcome is manifestly unacceptable, as it violates the most basic principles of justice.

26. The President’s argument that the MDHR was “not an official of the Bank whose approval is required when staff members seek to take their eligible parental leave entitlement”

is not convincing either. A request for leave exceeding the time periods stipulated in the Leave Directive, in line with other staff members in the same situation, obviously requires the approval of a senior HR manager, as it would otherwise not be recorded in the HR online systems.

27. The Appellant concludes that the MD, HR&OD's response of 17 February 2021 constituted a challengeable decision, which the President should have referred to the Administrative Review Committee, in accordance with Section IV 6.4.1 (e) of the Bank's Directive on the Administrative Review Process.

28. The Appellant requests:

- to overturn the contested decision taken by the President, and to direct her to refer his case to the Administrative Review Committee;
- that the publication of any Tribunal decision preserves his anonymity since his reputation might be adversely affected by such publication.

V. The Respondent's position

29. The Bank submits that the President's decision, when considering the Appellant's request inadmissible, was lawful and correct because the Appellant's request did not meet the requirements for a referral to the Administrative Review Committee.

30. Pursuant to the Bank, in the circumstances of the Appellant's matter, no administrative decision had been taken that altered the Appellant's right to take surrogacy leave in an adverse manner, or was in breach of his terms and conditions of employment with the Bank. When the Appellant submitted his request for surrogacy leave to the MD, HR&OD, he had not requested to take surrogacy leave pursuant to the terms set out in the Leave Directive, which was then subsequently denied. Rather, the earlier correspondence between the Appellant and his HR Business Partner shows that there were conversations in which the Appellant had asked questions in relation to his eligible parental leave entitlement and was provided with the respective clarification of such entitlement. During these exchanges, the Appellant was also provided with the justification/rationale for why the eligible entitlement to parental leave differs slightly for staff members taking maternity or birth leave as compared to staff members who take adoption or surrogacy leave. It was clear early on that the Appellant disagreed with the parental leave policy of the Bank even though it forms part of his terms and conditions of employment. The Appellant's disagreement was acknowledged by the HR Business Partner who informed him that he had "further recourse under the Administrative Review Process should you wish to pursue the matter further."

31. The Bank submits that when the Appellant raised his request to the MD, HR&OD he was not requesting the MD, HR&OD to grant her approval for taking paid surrogacy leave in line with the eligible entitlement set out in the Leave Directive. Rather, the Appellant's request to the MD, HR&OD was a request to be granted more generous leave in connection with surrogacy than what is provided under the Leave Directive. However, at no point was the Appellant ever advised that surrogacy leave requires the approval by the MD, HR&OD. In fact, staff members are not required to seek approval from the MD, HR&OD for requests related to parental leave. Staff members at the Bank only need to fill out and submit their surrogacy leave form after they have notified and discussed their parental leave plans with their line manager. The Appellant's request seeking approval to take paid surrogacy leave was therefore incorrectly lodged to the MD, HR&OD.

32. The above notwithstanding, the Bank submits that the MD, HR&OD was correct to respond and treat the Appellant's request as a request for administrative review despite his assertion that his request was a leave request. As noted by the MD, HR&OD, the Appellant's request to her was in fact a request to be granted more generous leave in connection with surrogacy outside the scope of the eligible entitlement established in the Leave Directive. Such request did not meet the requirements of the ARP Directive as the administrative review process is not available to staff members when the Bank's internal law has not been altered or breached. The MD, HR&OD also identified that the Appellant's request to her, namely that he be granted 33 weeks of paid leave in connection with surrogacy, was a request to amend/change the applicable terms and conditions of his employment with the Bank, which also did not meet the requirements of the ARP Directive. It was thus prudent for the MD, HR&OD to respond to the Appellant's request in this regard irrespective of the fact that no administrative decision existed. Had the MD, HR&OD not clarified to the Appellant that she did not consider his request to meet the requirements of the ARP Directive, then he would have considered her response to be an initial administrative decision. In such case, the Appellant would have then submitted his request for further review by the Vice-President, Human Resources and Corporate Services, which would not be in line with the procedural requirements of the administrative review process.

33. The Bank reiterates that staff members do not need to seek the approval of the MD, HR&OD when requesting to take their parental leave entitlement. Staff members need to discuss and agree leave plans with their line manager and submit the relevant parental leave form for subsequent administrative confirmation by HR payroll. At the time of submitting the request to the MD, HR&OD (or when the Appellant submitted the Request to the President), the Appellant had not submitted his surrogacy leave form. As such, the Appellant has attempted to create an appealable administrative decision by putting forward his surrogacy leave request to the MD, HR&OD for approval, and in doing so, has considered the response to the request as a request reviewable by the Administrative Review Committee. The Bank holds that this is not supported by its procedural requirements for parental leave, the provisions of the ARP Directive, or by principles of international administrative law.

34. Finally, regarding the admissibility of the Appellant's request, the Bank submits that even if the MD, HR&OD's response to the Appellant was an administrative decision that could be appealed further to the President, the denial of the Appellant's request to be granted 33 weeks of paid leave in connection with surrogacy did not alter in an adverse manner or allegedly breach his terms and conditions of employment. The Bank emphasizes that the Appellant is eligible and entitled to take paid surrogacy leave in line with the terms established in the Leave Directive. This applies equally to all other staff members who also wish to take paid surrogacy leave, whether or not they are becoming parents to one or multiple children through a surrogate. Accordingly, the President's decision was lawful and correct when it considered the request inadmissible under the terms of the ARP Directive.

35. Notwithstanding the above, the Bank considers that their parental leave entitlement is not discriminatory and does not give rise to unequal treatment between staff members.

36. The Bank emphasizes the established principle of international administrative law that unequal treatment only arises when there is unequal treatment of equals. Pursuant to the Bank, the assertion by the Appellant that he is being subjected to unequal treatment is untenable. Unequal treatment arises when individuals in like circumstances are treated differently. In the present matter, however, the Appellant is not in the same circumstance as a staff member who gives birth to multiple children. Rather the Bank's provisions as relating to maternity leave for multiple births (and the corresponding entitlement to birth leave) are not constructed by reference to the male gender or by reference to an individual's sexual orientation but as a recognition of the specific physical needs of staff members in circumstances where they physically give birth to more than one child. To emphasize, these provisions apply equally to all staff members who physically give birth to more than one child, regardless of how they identify and regardless of their sexual orientation.

37. The Bank submits that contrary to the Appellant's arguments, surrogacy leave is not targeted at staff members of a specific gender or sexual orientation because such leave is available to all staff members if they become parents through the use of a surrogate. A staff member who is physically capable of birthing their own child (or children) but who becomes a parent (to one child or more than one child) through the use of a surrogate would be equally entitled to the same paid surrogacy leave entitlement as established under the Bank's Leave Directive.

38. Although already explained to the Appellant, the Bank reiterates the rationale of the Bank's policy establishing additional leave entitlement for staff members who give birth to multiple children (or whose spouses do). Specifically, staff members who give birth to more than one child receive additional leave entitlement and this is in recognition of the fact that

such staff members may need additional time for medical considerations, including more time to recover physically (and psychologically) from the actual act of giving birth to more than one child. This is a rationale that provides for a legitimate distinction and does not unfairly disadvantage the Appellant who would not find himself in a similar situation as a staff member who gives birth to more than one child.

39. As a final point, the Bank wishes to note that its provisions on parental leave are progressive, inclusive and generous, particularly when compared to other international organisations and national systems. Although in many of the Bank's member countries surrogacy leave is not recognised or provided under national laws, the Bank has ensured that its parental leave entitlements support all staff members regardless of gender or reproductive abilities.

40. The Respondent

- does not oppose the Appellant's request for anonymity,
- requests to reject the appeal in full.

VI. The Tribunal's evaluation

41. At the outset, the Tribunal notes that the subject of this dispute needs clarification with respect to the nature of the Appellant's request for parental leave. When considering the present appeal, the Tribunal has to take into account the contested decision of 5 May 2021, determining that the Appellant's request for administrative review is inadmissible, as well as the Appellant's submissions and requests in the present appeal.

42. Further, the Tribunal recalls that, pursuant to Section IV, paragraph 3.02 of the Appeals Process Directive, it "shall base its decisions on the provisions of the Staff Member's contract of employment, the internal law of the Bank and generally recognised principles of international administrative law", including "the body of rules and procedures issued in writing by or under the authority of the President, the Vice President, Human Resources and Corporate Services & Chief Administrative Officer and the Managing Director, Human Resources & Organisational Development".

43. In light of the above, the Tribunal will firstly identify the core issue of the present appeal and then set forth the applicable law before drawing its conclusions regarding the Appellant's requests in his appeal. Finally, it will be necessary to address the fact that in the Bank's messages of 5 January 2021 and of 17 February 2021, the Appellant was advised to seek recourse under the ARP in case of disagreement.

a. Subject of dispute

44. The Tribunal takes note that the parties disagree about the question whether the rejection of the Appellant's request for extended surrogacy leave amounts to an individual administrative decision within the meaning of the ARP Directive.

45. This disagreement is based on the fact that the Bank responded to the Appellant's respective queries by written answers dated 5 January 2021 and 17 February 2021, followed by the contested decision of the President of 5 May 2021.

46. In these documents, the Bank referred to the provisions of the Leave Directive which, regarding the length of leave in the event of multiple births, undoubtedly and explicitly includes a distinction between maternity leave on the one hand, and adoption leave or surrogacy leave on the other hand. In addition, explanations for the distinctions made in this Directive were given.

47. As the Appellant considered the differentiation and the explanation given unconvincing, he expressed his disagreement by submitting his "Surrogacy Leave request" of 18 January 2021 as well as his request for administrative review, addressed to the President on 14 April 2021. He claimed that the rejection of his request for (extended) surrogacy leave constitutes a breach of his right as staff member not to be subject to unjustified unequal treatment.

48. The Tribunal takes note and wishes to emphasize that the relevant provisions governing the parental leave in the present case themselves fix the amount of the respective leave precisely. Unlike the granting of discretionary adoption leave (see Section IV, paragraph 4.8 of the Leave Directive), these provisions do neither ask nor allow for any kind of discretion in their application. Depending on the fulfilment of certain factual requirements, the amount of the parental leave is established without further ado, *i.e.* quasi automatically.

49. It follows from these specific legal circumstances that the present case, indeed, does not deal with an allegedly wrongful application or interpretation of a provision of the Bank's internal law. Rather, the substantial content of certain rules on parental leave forms the subject of this dispute. It is thus not necessary to assess the legal nature of the respective individual decisions taken by the Bank. However, the general legal provisions on which these decisions were based are at stake. Or, as the Appellant put it in the appeal: "The issue in the present case is that the regulatory content of the Leave Directive breaches higher human resources norms ... and recognised principles of international administrative law."

50. The Tribunal is aware of the Appellant's reference to Section V of the Leave Directive, stipulating that the "President may grant a deviation from a requirement of this Directive." However, the Tribunal notes that the Appellant never did nor does now ask for a deviation in his individual case. Rather, he requests a revision of the relevant provisions on parental leave. The Appellant's aim exceeds a mere exception in his single case, as can be seen already in his

initial request of 18 January 2021, expressing the belief “that it is in the interest of the Bank, as a diverse and inclusive workplace, to provide equal access to parental leave to all parents, including LGBT spouses and partners.” Thus, the Appellant is not applying for an individual deviation from the Leave Directive in its present form, but for a general change of its provisions for all concerned. Therefore, the Tribunal does not consider a request for deviation from the Leave Directive to be the subject of this dispute.

b. Applicable Law

1. Internal Law of the Bank

51. Within the Bank’s internal justice system, the requirements of the administrative review process are contained in the ARP Directive. Section IV, paragraph 3 (a) of the ARP Directive, sets out the following: “The following Administrative Decisions are subject to review in accordance with the Administrative Review Process set out in this Directive: (i) Individual Decisions; and (ii) Regulatory Decisions implementing Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors, which allegedly alter, in an adverse manner, or allegedly are in breach of, the terms and conditions of employment of a Staff Member in force immediately before such Administrative Decision is taken.”

52. Further, paragraph 3 (c) of the said provision stipulates that specific categories of administrative decisions “are not subject to the Administrative Review Process“, including “Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors”.

53. Lastly in this respect, paragraph 3 (d) of the said provision clarifies that administrative decisions “that fall under paragraph 3 (c) above may be reviewed by the Tribunal in accordance with the Directive on the Appeals Process. 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”.

54. The glossary of terms in Section IV, paragraph 2 of the Directive on General Provisions and Glossary of Terms for the Staff Handbook, defines the different types of decisions as mentioned in the ARP Directive as follows:

- Regulatory Decision(s) taken by the President, the Board of Directors or the Board of Governors are “a policy or directive of the Bank affecting the terms and conditions of employment of all EBRD staff members ...”;
- Regulatory Decision(s) implementing Regulatory Decisions taken by the President, the Board of Directors or the Board of Governors are “procedures of the Bank adopted by a Vice President or a Managing Director of the Bank and affecting the terms and conditions of employment of all EBRD staff members ...”.

55. Finally, with respect to the award of remedial measures, Section IV, paragraph 8.04 (a) of the Directive on Appeals Process stipulates, *inter alia*, that “the Tribunal may grant, in whole or in part, the remedies sought by the appellant...”, if it concludes that the Appeal is well founded.

2. Recognised principles of international administrative law

56. The scope of principles of international administrative law is not limited to matters of substantial law. Rather, it includes principles of procedural law, e.g. the right to be heard (*audiatur et altera pars*). Thus, similar recognized procedural instructions must be observed. Among these is the general principle of procedural law that a tribunal may not go beyond the pleadings of a party (*ne ultra petita*). The Tribunal notes that this recognized principle is also reflected in the Directive on Appeals Process by limiting the award of remedial measures to such remedies that are “sought by the appellant” (see above paragraph 61).

c. Conclusions

1. Admissibility of the request for administrative review

57. As demonstrated above, the subject of dispute in the current case is the Bank’s internal rules on parental leave, namely the distinctions drawn between paid maternity leave and surrogacy leave. These rules are incorporated in the Bank’s Leave Directive of 1 April 2019.

58. Due to its nature as a Directive, the respective set of norms, pursuant to Section IV, paragraph 2 of the Directive on General Provisions and Glossary of Terms for the Staff Handbook, meets the definition of a Regulatory Decision taken by the President, the Board of Directors or the Board of Governors.

59. Pursuant to Section IV, paragraph 3 (c) of the ARP Directive such type of Regulatory Decisions is not subject to the Administrative Review Process.

60. As the provisions of the Leave Directive are not subject to the Administrative Review Process, a respective request for such a review is inadmissible.

61. It follows from the above that the contested decision of 5 May 2021 rightfully rejected the Appellant’s request for administrative review as inadmissible, regardless of its reasoning. However, the inadmissibility follows directly from the Bank’s internal law (see above paragraph 59) rather than from its application in the contested decision.

2. The Appellant’s requests

62. It has to be reiterated that the Appellant requests the Tribunal to direct the President to

refer his case to an ARC. As demonstrated above, the provisions of the Leave Directive are not open to an ARP. Therefore, as the request for an ARP is inadmissible, a referral to the ARC as an integral part of the ARP is excluded. The Appellant's request must fail.

63. The Tribunal is aware of its competence to review the provisions of the Bank's Directives, including the Leave Directive, as foreseen in Section IV, paragraph 3 (d) of the ARP Directive. However, the Appellant has not submitted any such request. By contrast, as reiterated above, he has limited his request to a procedural measure, without asking the Tribunal to look into the substantial merits of his complaint of allegedly being treated unequally without justification. Also, the Tribunal notes that in his appeal before the Tribunal, the Appellant does not even present and/or submit substantial arguments with respect to the alleged unjustified equal treatment.

64. Pursuant to the general principle of *ne ultra petita*, a tribunal may not go beyond the pleadings of a party when considering a case. Since the Appellant's unambiguous request does not cover an inquiry into the substantial merits, the Tribunal is prevented from any respective review.

65. The Appellant requests to remain anonymous, and the Bank does not oppose this request. The Tribunal grants this request, recalling that it is inherent to an appeal process that certain facts and opinions become known, both inside and outside the Bank. This being said, it is the Tribunal's established approach to limit to the maximum extent possible, *inter alia*, the exposure of facts or descriptions that may identify participants of the process.

66. Finally, the Tribunal notes with concern that the Appellant was twice misinformed and misled about the correct way to express his disagreement. The Bank wrongly advised him in both messages of 5 January 2021 and of 17 February 2021 to make use of the ARP although this channel was not open to him. Thus, the Appellant has lost time. However, it was his own choice to limit his requests before the Tribunal, and, as indicated above (see paragraph 64), it is not for the Tribunal to go further *ex officio*.

VII. Costs

67. Regarding the costs related to the proceedings before the Tribunal itself, paragraph 8.06 (a) of the Directive on the Appeals Process provides:

If it upholds an Appeal, in whole or in part, the Tribunal may order that the respondent reimburse the appellant for such reasonable expenses, including reasonable legal costs, the appellant has incurred in presenting the Appeal. Exceptionally, the Tribunal may order that the respondent pay all or some part of the appellant's legal costs where the Appeal has not succeeded.

68. The Tribunal does not uphold the Appeal. Moreover, the Appellant did not ask for the reimbursement of costs. Therefore, the Tribunal has no reason to order that the Respondent pay exceptionally all or some part of the Appellant's legal costs.

VIII. Decision

69. The Tribunal rejects the Appeal in its entirety. No remedy is awarded.

26 August 2021

For the Administrative Tribunal



Thomas Laker

Chair of the Panel