

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

Case No. 2021/AT/03

Appellant

vs

European Bank for Reconstruction and Development

DECISION

by a Panel of the Administrative Tribunal comprised of

Chris de Cooker (Chair)

Spyros Flogaitis

Michael Wolf

8 November 2021

I. Introduction

1. In the present Appeal the Appellant seeks the annulment of the decision of the President of the European Bank for Reconstruction and Development (EBRD or Bank) dated 8 June 2021 confirming (1) the administrative decision taken on 16 October 2020 by the Managing Director of Human Resources and Organisational Development (MDHR) to terminate his employment at the Bank during the probationary period and (2) holding that there is no legal basis in the Appellant's request to review the decision taken on 26 September 2020 by the Chief Compliance Officer (CCO) to close the matter with respect to the Appellant's report under the Bank's Whistleblowing Policy.
2. On 17 November 2020, the Appellant submitted a Request for Review of an Administrative Decision (RARD) regarding the decision to terminate his employment. On 20 November 2020, he submitted a RARD regarding the decision to close the investigation into a whistleblowing and misconduct report.
3. The President having determined that the Requests for Review were admissible referred them on 24 November 2020 to the Administrative Review Committee (ARC) for consideration. On 25 November 2020 the ARC's Chair directed the Bank to submit its Response by 6 January 2021.
4. In accordance with the ARC's direction, the Bank provided its Response to the ARC on 30 December 2020.
5. On 4 January 2021, the Appellant submitted to the ARC his "preliminary observations" to the Bank's Response. On 7 January 2021, the Chair of the ARC observing that the Appellant has no automatic right to file additional pleadings in reply to the Bank's Response, but may only do so upon the ARC's request, determined that the "preliminary observations" would not form part of the record and would not be taken into account in the determination of the ARC's review. He, however, invited the Appellant to file a reply to the Bank's response dealing fully and finally with the issues raised in the Response within 15 days. The Appellant was instructed that his reply should be a single document and should not seek to incorporate by reference the "preliminary observations" which are not part of the record.
6. On 12 January 2021 in an email to the Appellant the Bank's President reacted on some elements of the "preliminary observations," particularly regarding the timing of the administrative review process. Some bilateral exchanges ensued.
7. On 27 January 2021, the Appellant submitted his reply to the Bank's Response.
8. On 13 April 2021, the ARC informed the parties that additional time was needed for issuing the Report and the time period for issuing the Report was extended to 30 April 2021.
9. On 30 April 2021, the ARC advised that there would be a further minor delay and that the Report would be issued by 7 May 2021.
10. On 6 May 2021, the ARC issued the Report. On the same date, the Appellant sent an email to the President setting out his observations on the Report.
11. On 7 May 2021, the President responded to the Appellant's email informing him that

the next step was for her to consider the Report carefully and to issue an Administrative Review Decision by 8 June 2021.

12. On 24 May 2021, the Appellant wrote a six-page letter to the Chair of the ARC contending that the ARC had not heard his side of the story. He asked the Chair to reflect on the ARC's report and recommendations and maybe advise the President not to take them into account.

13. On 8 June 2021, the President issued her Decision. She confirmed the following findings as set out in the ARC's Report:

a. The decision to terminate your appointment with the Bank was supported by the contemporaneous correspondence demonstrating that you struggled to work harmoniously with colleagues even when given feedback and direction. The ARC found that your reaction and response to colleagues and line manager lacked collegiality and respect and that your temperament made you wholly unsuitable for the position to which you were appointed.

b. There was no evidence of retaliation and "no reasonable or adequate link" between your report under the Bank's Whistleblowing Policy and the decision by your line manager to recommend the termination of your employment during the probationary period.

c. Under the provisions of the Directive on the Administrative Review Process, a staff member only has a right of review of administrative decisions which allegedly alter, in an adverse manner or allegedly are in breach of the terms and conditions of employment of a Staff Member. Accordingly, there is no legal basis in your request to review the CCO's decision to close the matter with respect to your report under the Bank's Whistleblowing Policy.

She informed the Appellant to have taken the decision to accept the ARC's Report and its recommendation that no remedies be afforded to him.

14. On 1 September 2021, the Appellant lodged the present appeal.

II. Procedural History

15. Following the submission of the Appeal on 1 September 2021, the Tribunal directed the Bank to provide its Response to the Statement of Appeal by 5 October 2021.

16. The Response was received on 5 October 2021.

III. The ARC Report and the Administrative Review Decision

17. The Appellant submitted two Requests for Review on respectively 17 and 20 November 2020. The first Request concerned the decision to terminate his employment during the probationary period. He contends that the termination decision was taken in violation of applicable procedures in a manner that affected the outcome. Specifically, he contends that MDHR had not considered the comments he provided as a response to his line manager's recommendation not to confirm his probation, despite claiming that these were considered. Furthermore, and although it was concluded that his performance was "less than

fully satisfactory”, the Appellant asserted none of the steps related to sub-standard performance management (as per paragraph 3 of the Performance Management and Development Procedure) had been executed. He adds that the Decision was based on erroneous facts and that MDHR had disregarded essential facts. He argues that it was based on deliberate deceptions from his line manager, while his comments, and the context of the events and provocations from the manager were disregarded. Furthermore, the Appellant alleges MDHR relied on the outcome of a flawed inquiry by the Office of the Chief Compliance Officer (OCCO) into allegations he did not make, could not have made and would never make, while they also ignored a significant amount of information and evidence provided, including his comments. He requests reinstatement in the Bank, but in a different team.

18. The second Request concerned the decision by the CCO to close the investigation into a whistleblowing and misconduct report filed by the Appellant. The Appellant contends that this decision was unlawful because it was possibly not taken by an official with the authority to take such a decision; that the CCO did not review the evidence submitted by him and relied instead on investigators to present the matter to her instead. He requests that a new investigative officer is assigned to examine the issues as reported, and who interacts with him several times to make sure his position and all the provided information are fully understood and considered in the process. He asked, in addition, that necessary safeguards are put in place in order for the process not to be influenced by former investigators and CCO who allegedly had failed at performing their duties, and to be provided with the outcome on the issues he actually raised.

19. In its 30 December 2020 Response, the Bank argues that the termination of the Appellant’s appointment was motivated and justified on the basis of pertinent shortcomings in his standards of performance and behaviour, which were brought to his attention, and that he was afforded an appropriate opportunity to improve his performance and to demonstrate his suitability for continuing employment. The Appellant was thus well aware that, given the significance of the performance shortcomings identified by his line manager, the termination of his appointment would be considered by the Bank. It denies that the staff member was subject to any retaliation and asserts that the whistleblowing complaint was properly and thoroughly investigated. The decision to close the whistleblowing complaint after the initial inquiry stage was undertaken on a reasonable and observable basis and was not tainted by any impropriety, irregularity or abuse of discretion. It adds that the Appellant had not sufficiently discharged his burden of proof to demonstrate that the bank abused its discretion insofar as it relates to either the termination decision or the investigation decision.

The ARC’s findings of fact

20. The ARC summarized the facts as follows:

...

6. The staff member was appointed by the Bank on 2 December 2019 as an Associate Banker within [...]. His appointment included a twelve month probationary period set to end on 1 December 2020. The staff member’s line manager was the Associate Director, Senior Banker, [...] (“the line manager”). The line manager’s supervisor was the Director, [...] (“the Director”).

7. Upon joining the Bank, the staff member undertook various trainings between December 2019 and February 2020 and was assigned to assist on different ongoing projects within the [...]. The relevant projects will be referred to in this report as: Project 1, Project 2 and Project 3.

8. On 20 February 2020, the line manager and staff member met to discuss the setting of objectives for the 2020 performance review. These were confirmed in an email on the same day and were stated to be: (i) work on at least two pipeline projects to be signed off in 2020; (ii) contribute to at least four concept review memorandums (“CRMs”) with target closing during 2020–2021; (iii) proactively seek exposure and contribution to project-related tasks beyond financial modelling to understand EBRD project cycle; (iv) complete core trainings and relevant trainings focused on soft skills development; (v) assist with ad-hoc team tasks, e.g. updating marketing presentations; and (vi) exemplify the six qualities of the EBRD competency framework.

9. Project 1 was a proposal for potential co-investment together with a private equity fund into the acquisition and restructuring of a liquefied petroleum gas distributor. All potential equity proposals handled by the [...] are required to be discussed at the Equity Forum between sector teams and for the Equity Risk Team to decide if the investment is commercially attractive. If the Equity Forum supports the equity proposal then it proceeds to a CRM, which requires approval of Ops Com. Within the first few days of his employment at the Bank the staff member was tasked to undertake a high level review of the financial projections and evaluation proposed by the lead investor (a private equity fund) on Project 1. However, on 19 December 2019, the NRT and the team in the relevant resident office decided not to take the proposal forward to the Equity Forum on the grounds that the proposal posed excessive risks without providing commensurate returns. The contemporaneous correspondence shows that the staff member had some difficulties in presenting his part of the proposal in that he conceded that he was confused not clear about the purposes of his calculations. However, nothing consequential turns on this. Nonetheless, the staff member later claimed that the line manager had wasted Bank resources unnecessarily in relation to this proposal.

10. Project 2 was an equity investment for exploration and development of four natural gas fields. The project passed concept review in September 2018 and then underwent comprehensive due diligence, which included assessing the technical, environmental, health and safety, integrity, financial and legal aspects from the end of 2018 into 2019 with an expected structure review and final review to be undertaken in early 2020. The staff member was assigned to this project with responsibility for working on the financial model and valuation of the project in preparation for the structural review and final review stages. The contemporaneous correspondence indicates that the staff member struggled to comply with requests from the operational leader and feedback and direction from the line manager.

11. On 20 January 2020, the operation leader addressed an email to the staff member to which she attached various templates to assist him conduct the financial analysis and model summary. She gave directions in relation to the assessment of data and requested the staff member to advise when the first draft of the financial analysis/model summary would be available. The staff member replied to this request as follows:

“As discussed, I will send you the latest draft of the model tonight and will keep working on the outstanding points from late Wednesday/Thursday this week, based on the information received by then. All should be done by Friday cob. But we can (and probably should) discuss the current version and my considerations I’ll send you later any time from tomorrow.

Model summary and, hopefully, multiples will come next week. I’m not sure yet what information we have access to and the real peers we should use – need to take a deep dive on this, so multiples make take a while.”

12. Contemporaneous correspondence suggests that the financial analysis and model summary were not completed in accordance with the staff member's proposed time frame. Almost three weeks after her first email, on 7 February 2020, the operation leader addressed an email to the staff member which reads:

“Following our call today, could you please advise what input/feedback you need from the team to finalise financial analysis/model summary, including multiples, that we can use to review the latest draft of the model and valuation?”

It will be helpful also to get the following two lists from you: (1) key data critical for you to finalise the model and write up; (2) data good to have to finalise the model and write up....

Could you please share the above information on Monday so that we can agree on the deadlines?”

13. Later in the evening on the same day the staff member responded to this email (and copied the line manager) in a somewhat intemperate tone. In relevant part the email reads:

“Sure, will work on these. But no, you definitely won't have the answer on Monday. As opposed to previous trainings, I actually truly hope the next one (till Thursday noon) will be helpful at least as a refreshment of my knowledge, and will try to attend most of it.

Before I go into detail on your specific questions (all is below but maybe too long and not relevant for some people), please please please try to get me involved in any further internal discussions... I'm even happy to stay completely silent if I annoy you too much, but **whether I will keep working on this project or not depends on the outcome of this discussion. As of now, I am extremely uncomfortable with what you personally are suggesting.** As far as I am aware, the rest of the team has views different to yours, so please lets try figure this out as soon as practical.

You wanted to have it all in writing, you've got it:... I will send most of the questions to the relevant parties... hopefully, by the end of next week. Only after this I'll be able to tell you which of those are critical or just helpful (will try to outline this to external parties as well). As mentioned before, there are a lot of separate questions I need to formalise/make sure I've reviewed and understood all the available data and answers before I actually send them out. If it was that easy, I would have done it already!”

14. The staff member then went on in the email to set out certain steps he proposed to take to gather and analyse data. He concluded the email as follows:

“And as for the deadlines, while I'm doing the above, please think about what our aspirational targets (for) this project are and what really drives the timing here. All I've heard so far is 'I don't want to delay it till June' or, waaaaay worse, 'it all depends on when you're done with your job'. Clearly, to date I have been rushing and stretching myself for absolutely no reason, so that's not going to work anymore. Let's please try to be reasonable and practical from now on. And when you have this in mind, I am more than happy to agree to some deadlines later. Let me know if you have any further questions or anything...

Have a great weekend all!!”

15. The staff member added smiling emojis in the email.

16. The line manager, who was copied in the email, responded the next day as follows:

“There are lots of smiles and three dots in the email. It is difficult to understand if it is a professional email or an emotional one.

For the record, we spoke on Friday and I said that for the time being we need to separate the ‘gas/oil’ discussion (which I am taking offline now) from the modelling exercise. I told exactly the same to (the operational leader) hence her request to you.

(The operational leader) is now updating the project timeline and will circulate to all team asap.”

17. The staff member responded to the line manager’s email on 9 February 2020 as follows:

“Please get someone else to work on this project from now on.

Next week I will focus on my remaining trainings and other existing projects; and will start taking on new ones later on.”

18. The line manager responded to this email on the same day as follows:

“I’m afraid we do not have the luxury of cherry picking what projects/tasks we are working on. Also the team does not have spare resources to assign another team member to this project.

We agreed that you and I will be meeting regularly (at least weekly) to discuss any questions/issues that you have.... Please send me a list of projects/tasks you are currently working on.”

19. On 18 February 2020, the Director and line manager met with the staff member to discuss issues concerning his performance, behaviour and attitude. On 24 February 2020, the Director set out his version of the meeting in an email addressed to the line manager. In relevant part the email reads:

“NC joined the [...] team December 2019 as an Associate Banker. He has completed various introductory trainings and was mentored by (the line manager), Senior Banker.

(The line manager) had booked a follow up meeting on 19 February¹ with NC and invited me to join. The meeting was prompted by a few observations:

- NC had written several emails to colleagues. Some emails appeared abrupt or erratic in message and contained an unusual use of ‘smiley’ type of symbols.
- Team members had been talking of NC’s impromptu fondness of (T) at a Christmas lunch event. NC displayed his emotions with an attempted kiss on a surprised (T), while other team members were present. The incident gave rise to unflattering gossip about NC.
- NC had written a long (thirteen pages) email to (the line manager). The email raised allegations that (the operation leader) lacks transparency and that she will not disclose a... company might end up finding oil in one of its potential future exploration programmes.
- (The operation leader) had expressed frustrations that NC would not use the Bank’s standard financial model based on ‘FAST’ standards and insisted developers own recommended version of a financial model.

¹ The actual date of the meeting was 18 February 2020.

The main purpose of the meeting was to better understand from NC his frustration in working with (the operation leader) on (Project 2).

NC explained that he had been asked by (the operation leader) to hide the fact that the ... project might discover oil in one of its future exploration programmes. We asked NC how one could resolve such a technical oil issue. Initially NC did not seem to grasp the question, so he was asked if EBRD could for example insert a covenant on any future transaction with the... company, so it would refrain from pursuing this specific exploration site, where oil might be present. NC agreed that this would resolve the matter....

NC was then asked, why he wrote the main emails and if he thought the style was good. NC was defensive about the professionalism of his emails but eventually appeared to agree that the style was probably not typical for EBRD.

NC explained that he considers (the operational leader) unprofessional and hysterical. He added that the latter is what one can expect from a woman, so he was not concerned about it.

NC was asked if any personal emotional connection or a rejection of a kiss etc. has played a role in frustrating the working relationship. NC made it clear that was not the case. This subtle hint was deemed necessary to make NC aware that gossip exists but also to test if any embarrassment might have been projected onto (the operation leader) and a source of resentment. NC made it clear that his allegations concerned dishonesty and the lack of professionalism on the part of (the operational leader). He then added that he is a 'Russian man' and he is therefore indifferent to what people think of him. He was asked, if he actually does not generally consider feedback from colleagues on behaviour or actions... NC repeated in a laconic manner that he is indifferent to feedback.

NC was asked, if the conversation with (the operation leader) was at times unpleasant and if it had made him feel pressurised and/or humiliated. NC replied that (the operation leader) had been pushy to get the financial model ready and that she also fails to be grateful for work done by other people. He then added that he is somewhat introvert but he used to be an important advisor to several boards of large companies. He mentioned that several boards sometimes had called on his advice specifically because he had a better grasp of analysis and a reputation for being honest.

NC was asked how the upset in the working relationship with (the operation leader) could be resolved. NC replied that he should be free of working with (the operation leader) and work with other team members. (The Director) explained that a permanent exclusion is not a viable measure. NC then agreed to a two month cool off period in working with (the operation leader) and that he would be replaced on the project lead with the.... company.

Conclusion: NC was genuinely concerned with what he saw as insufficient disclosure of the 'oil' issue in the project with the...company. His overreaction could have been avoided by communicating in a less confrontational manner and by seeking early advice from his mentor. It is clear that NC is new at the Bank and unadjusted but there seems also to be an issue of undeveloped social skills. Albeit it is too early to judge, NC gives the impression of being an introvert and perfectionist and having some degree of concern relative to his social skills. The latter could make him avoid (or abruptly disengage from) situations, where he might see himself inferior or not being sufficiently appreciated. Time will tell, if he can learn to take feedback and adapt his behaviour to a better fit in the team. His mentor continues to monitor developments and is available to help. We agreed to speak again in a few months."

20. Given the decision that the staff member would no longer be involved in Project 2, the staff member was requested to prepare a handover within five days and to walk the team member who would be taking over the responsibilities through the model evaluation he had already prepared. Insofar as the staff member had concerns about upstream activities in the oil sector, the line manager addressed an email to the staff member explaining the Bank's policy. He pointed out that the lead company working on Project 2 operated in both upstream oil and gas sectors. EBRD policy in regard to financing of upstream oil activities only allowed such in rare and exceptional

circumstances and financing of upstream oil exploration was not allowed at all. He pointed out though that the scope of Project 2 was upstream gas business. He reassured the staff member that as was customary for all projects financed by the Bank, appropriate safeguards and covenants would be introduced into the term sheet and legal documentation to ensure that the project was compliant with Bank strategies, policies and procedures.

21. Following further developments, in June 2020, a decision was taken to abandon Project 2 due to certain issues that arose with the shareholders of the company. The project was then closed.

22. Project 3 was a proposal for an equity investment in a UK listed company with operations in Eastern Europe. The proposal for this project passed the Equity Forum in February 2020 and concept review at Ops Com in July 2020. The project is currently pending due diligence. The staff member was tasked to assist with the Equity Forum note and on other elements for the concept review memorandum, specifically with the integrity checklist and financial model. The correspondence in relation to this project again indicates that the staff member was inclined to be defensive and problematic in the tone he adopted.

23. On 26 March 2020, the operation leader on Project 2 (“the operation leader 2”) addressed an email to the staff member which read:

“We had a call with the company to get the most recent update on the UNESCO and the virus impact. Please see attached the company’s responses.

We need to accelerate our work on the CRM and the model. The next date for Ops Com submission is 9 April (back up 24 April).

Can you please finalise the model by Friday cob, 3 April? Note nobody expects that the model for the CRM will be ideal.”

24. On 26 March 2020, the staff member responded to this email as follows:

“Yes, sure, we’ll send the model by Friday cob. I’m not sure whether the first version will be final though, as mentioned earlier, it’s challenging to properly estimate the valuation in this environment, so we may have to debate it for some time. But let’s discuss it when I am done, I’ll try to reflect my own understanding for now in any case.

Also is there any reason why I wasn’t invited to this call?”

25. This latter email was copied to the line manager, who then responded as follows:

“Please send an intermediate version by next Wednesday close of business (or Thursday morning if you prefer) so we can see where you stand.

If you have questions as you progress, please send as they arise. We can also have a call at short notice.

As an aside, we are not in Parliament to debate. We will discuss. You do not need to put caveats as to how challenging it is to estimate valuation now.

Any questions as this stage?”

26. In response, the staff member stated as follows:

“Thanks, I don’t have any questions on the model itself...apologies for my English, I’m used to talking to native speakers...”

27. The staff member’s tone remained problematic in ongoing correspondence addressed to the Director, the line manager and the operation leader 2 throughout April and May 2020.

28. Various emails attest to the fact that the staff member was struggling to meet deadlines. Thus on 2 April 2020, the line manager wrote to the staff member in this regard and said:

“We spoke a month ago or so and agreed that in case you are not able to meet set deadlines you would be informing the team in advance.

This has not happened in respect of (C) model. I have allocated time this morning to review your draft model but did not receive neither the model nor any communication from you that you are unable to share it.

This is not the teamwork that is expected. The CRM date of 17 April is now at risk.

Please make sure that this does not happen again.”

29. On 6 April 2020, the operation leader 2 addressed an email to the staff member requesting information. The staff member replied, copying the line manager, as follows:

“You too have always been talking about ‘very simple model for CRM’ with ‘the same valuation approaches as in EF’, i.e. completely made up numbers with no backup and one chart. I’m really sorry that the first draft of the model that I have prepared is so good that it’s difficult for you to understand it.

Obviously, as already mentioned, I was going to make certain improvements to the model and work on the way to present it to the committee... you said last Monday we don’t even need this. So please stop disturbing me for no reason.

I’ll update you on timing in the next couple of days when I have more visibility. We can debate the economics when I’m done. FYI, I’m working on something else at the moment, will continue on this project only tomorrow.”

30. The line manager replied to this email as follows:

“I was surprised and rather disappointed reading your response in the below email, both the tone and the choice of words. I can understand that the current pandemic situation, coupled with having to work remotely puts pressure on everyone, and it may be difficult to cope at times... However the expectation that we all should maintain the team spirit, work collaboratively and paying attention the guidance and requirements of the OL does not change. The OL, as well as I, consider your tone and the choice of words disrespectful and inappropriate and unacceptable as it goes against the values of the EBRD. In this team, trust and being able to rely on colleagues to work together to the benefit of all, is of paramount importance. Your reaction this time, as well as on previous occasions which we discussed earlier and also in the context of my email of 2 April on the importance of communicating regarding the deadlines, is of great concern. You seem to put your view and understanding of what you are required to do in confrontation with the instructions from the OL.

I would like to be very clear: as a team member you are expected to comply with the Bank’s standards of work and documents, listen to the feedback, follow the guidance, ask questions to make sure that you understand what is required, regularly communicate with OL’s and other colleagues, meet the deadlines and inform the project team of any potential delays and reasons for them so that they can support you and plan accordingly. I also need to remind you that you are currently in the

probationary period and are being assessed on your suitability for a long-term employment at the Bank. It is therefore important that you heed the advice and show sustained improvement on all the points mentioned.

I do not expect you to respond to this immediately and shall call you in the coming days to reiterate your role in the project work and answer any questions you may have on the above.”

31. Given the general style of the staff member’s communication and the concern that he was not improving, the Director, the line manager and the staff member had a discussion on 16 April 2020. During the conversation, the Director attempted to understand the challenges that the staff member appeared to be facing and asked him what could be done to resolve them. The staff member indicated that he felt that the line manager’s involvement was not needed and that apparently his frustration was caused by the questions posed by operation leader 2 in respect of Project 3. During this discussion, the staff member was again reminded of the competencies he needed to adopt and that he was on a probationary period.

32. In the period between 20 April and 4 May 2020, the line manager addressed a number of emails to the staff member asking him to provide an update of his workload so that he could assess capacity. The staff member did not provide an update or respond to any of the emails.

33. On 12 May 2020, the Director spoke to the staff member on the phone. During this discussion, the staff member requested to change his line manager. The Director refused this request and provided feedback to the staff member in an attempt to guide and encourage him to engage with his line manager in a more constructive manner. Subsequent to the telephone call, the Director addressed the following email to the staff member:

“As discussed on the phone, I cannot support your request to change line manager for the reasons explained, notable I have not seen any evidence which indicates that (the line manager) has not behaved as per the expectations of a manager at the EBRD. (The line manager) is a professional Associate Director, who has years of experience in successful people management and he is known for conducting objective and fair staff appraisals. (The line manager) is concerned that you are not accepting feedback no matter how neutral in tone and style he tries to communicate. I share that concern and would encourage you to engage with (the line manager) in a business-like manner.

Secondly, as discussed, please remember that (the line manager) and (the staff member) have both certain responsibilities as respectively the line manager and of the reporting employee for achieving the required standards....”

34. In the same email, the Director informed the staff member that he would set up an HR facilitated meeting between the staff member, the line manager and the HR business partner (“the HRBP”) to discuss the best ways forward and expectations of working together. The meeting was later scheduled for 14 May 2020. On 13 May 2020, the staff member responded to the Director’s email. The email is lengthy and covers several topics. However, once again, it contains a number of intemperate, defensive and unacceptable statements. Thus, he said:

“At this stage, in order for us to discuss ‘the best way forward/expectations in terms of working together’, first, we all need to get on the same page in terms of what’s actually been happening and the reasons for my request. Hence, it’s necessary to discuss both (the line manager’s) and my professionalism and his qualifications as a ‘line manager’.

We've covered most of this several times already, including on the call from 16 April when (the line manager) literally didn't have a position and couldn't explain anything. But you mentioned yesterday that now, four weeks later, he's been able to come up with some excuses and new interpretations of his behaviour, somehow masking it all as 'feedback', that apparently I'm not receptive to, which makes both of you concerned.

As I've spent almost 80% of my time here having to deal with the nonsense of his creation, lets please try to make this call the final one, so that I can finally focus on contributing to the team without any unnecessary distractions, which you know I can do. In order to achieve this and cover all the points at the same time, lets just go through the projects I've worked on with (the line manager) to date. But as I've already made my position very clear and justified it, (the line manager) is the one who needs to provide his interpretation and recollection of the events.... But please just think about it again, I'm only asking for a tiny bit of help! Only you are able to solve this situation quietly and peacefully. All I need is to make sure that (the line manager) is not my manager anymore, doesn't have any power in the decision making process regarding my performance and stops disturbing me all the time.

To achieve this, you don't need to say that e.g. '(the line manager) is undermining me', 'he's not delivering on his duties' or anything else similar, in order to justify it in any 'systems', future conversations and so on. You can use the same generic comments, like 'he's the best banker this world has ever seen, there's no better manager etc.', but 'he's so busy delivering for the [...] team, that just doesn't have enough time to provide mentorship to someone as energetic and curious as Nikita'.

I truly don't care how it's phrased as long as it doesn't hurt me in any way and he finally leaves me alone for good. In any case, the only thing other people will ever hear from me if I'm ever asked to comment is 'it just happened, feel free to ask (the director/the line manager) for details'. Exactly the same way I commented on a separate issue we'd solved together.

I don't see literally any issues with this approach – am I missing something?"

35. In the same email, the staff member undertook that he would prove to everyone that the line manager was: "useless as a banker, especially a senior one"; "toxic as a manager"; and didn't "fit to be an EBRD employee according to the behaviour competences".

36. The HR facilitated meeting on 14 May 2020 proved to be inconclusive.

37. An email of 17 May 2020 addressed by the staff member to the Director, line manager and operation leader 2 is further illustrative of the problem:

"My overall reaction to your 'comments' is that I can't comprehend why you are trying to demand from me the things you didn't do yourselves in precedent processes despite the fact that I have clearly already done way more than required. As far as I am aware there is no 'EBRD standard' on presenting valuation in the CRM annex – it's not even in the template. But it's helpful to look at your previous work that you told me to refer to – please go through these once again and elaborate for me on the reasons for your comments. They cannot be the cause for delaying the CRM even further."

38. Later in the same email, directly addressing the operational leader 2, the staff member said:

"(The line manager) said that you'd send consolidated questions so I hoped he'd already explained to you my views of most of your comments. As that clearly didn't happen, I've had to answer them now and try to be gentle – but it's really hard man.

So please try not to take it personally – I have nothing against you.” The staff member then addressed the line manager as follows:

“As a senior banker and line manager, it’s high time you learnt how to give specific feedback so that people would know what actions to take – I’m only more confused now.”

39. On 20 May 2020, the operation leader 2 sent the following email to the line manager:

“Apologies for the late response. As discussed, please see my observations on the below based on my experience working with Nikita over the last three-four months:

On the positive side, Nikita has excellent technical skills (excel, charts etc.) and competent understanding of finance. Seems to have a strong interest in the Bank’s mandate.

However, I would like to point out several worrying matters:

Poor communication: Nikita will listen to instructions, arrive at his own conclusions without asking any questions and subsequently deliver very different work to requirements. In addition, there were instances when he disappeared – didn’t respond to reminders for a long time without any communication. As a result, the work is delayed and to be redone.

- In early February 2020 I and Nikita agreed that he would start working on the first draft CRM, integrity checklist and financial model. The first draft CRM and integrity checklist were delivered within the set deadlines in early March. I asked him (verbally) that he should start working on the financial model. In late March when requested on the status of the model, Nikita denied such instructions on the model were given at all.
- On 27 March the new deadline for the first version of the model (via email) was agreed with Nikita based on his feedback on the timing and his workload. I also shared a couple of the models from the previous transactions to show what he was expected to do. No questions were asked by Nikita.
- On 5 April Nikita shared his first draft model. I shared my comments on 6 April asking Nikita certain clarifications/confirmations and to make certain amendments. However the responses were ‘all answers are obvious there’ and he would make certain improvements next week (in mid-April).
- Following that I sent at least four reminders to Nikita over the next three weeks to get updates on the status of the model or at least on the delivery timing. However no responses were provided by Nikita until 4 May when he sent the updated model and valuation note to me. Nikita made some improvements to the model however several comments were not addressed/clarified.

Non-cooperative approach/team work: Nikita has applied approach different from what I could expect from a project team member at the Bank. My experience with him suggests that he doesn’t seem to be a natural team player and his previous working background... might have impacted on his cooperation skills negatively. Nikita seems to have an exaggerated sense of his own capabilities and doesn’t seem to listen to other opinions/comments on his work. He easily goes into a defensive mode with following comments: “I’m comfortable with my assumptions” or “I’ll be able to justify”. His responses (sarcastic) could be considered rude and not within the EBRD culture.”

40. Shortly after the staff member submitted the requested valuation model and annex in relation to Project 3, his involvement in Project 3 ceased.

41. On 21 May 2020, the line manager sent an email to the staff member requesting feedback. The email reads:

“Hope you are doing well. From your recent email on (Project 3) I note you disagree with most of the comments, questions put by (the operation leader 2) or I. I also note colloquial and casual manner of your communication. I should say it is not the first time I come across this in correspondence from you. Such communication and attitude are unusual for the collaborative style of work in respectful communication style we are proud of at the EBRD in general and natural resources team in particular. This is also discomfoting. This makes me think you are angry at your colleagues, myself included, despite all the welcoming attitude extended to you as a new joiner. Is my assessment correct? What are your thoughts on the matter please?”

42. On 26 May 2020, a second HR facilitated discussion was arranged to continue with the discussions that had been inconclusive on 14 May 2020. The staff member refused to attend the meeting. The Director, the line manager and HRBP decided that it will be best to postpone any further discussions as a performance review meeting was due to take place at the end of May 2020.

43. On 28 May 2020, in light of the staff member’s refusal to attend the second facilitated discussion a few days earlier, the HRBP called the staff member. The staff member informed the HRBP that he had not attended the second facilitated meeting because he did not consider the first one useful.

44. As the line manager had not received any information about the staff member’s workload, despite his various requests in that regard, on learning that the staff member was not busy, on 3 June 2020, the line manager addressed another email to the staff member requesting the information. The email reads:

“I have learnt... that you were not currently busy. At the same time, I am aware that you had rejected at least one request for assistance on the basis of your business with other projects.

This is surprising since I had asked you on numerous occasions to provide information on your workload and your assessment of capacity utilisation exactly to make sure you have tasks to do. You have never provided such information. Please can you get back to me on this?”

45. There is no response to this email on record.

46. On 22 June 2020, the line manager, the Director, the HRBP and the staff member had a meeting. The staff member secretly recorded the meeting without the knowledge of consent of any of the participants. The purpose of the meeting was to inform the staff member of the line manager’s decision to recommend termination of his employment during the probationary period. The staff member was informed that a written recommendation to terminate his employment would be sent to him and that he would be requested to give comments before it would be sent to the MDHR for consideration and decision. On 29 June 2020, the staff member provided extensive comments and response to their recommendation. On the same day, the line manager sent to the MDHR the recommendation to terminate together with a copy of the staff member’s response and recommendation.

...

54. However, before the MDHR could take a decision on the recommendation to terminate his employment, on 7 July 2020, the staff member submitted a report of misconduct against his line manager and the Director to the Chief Compliance Officer (“the CCO”), the MDHR, the President and the general whistleblowing account. On 19 July 2020, the MDHR sent the staff member an email indicating that she had received

the recommendation to terminate his employment but noted that because he had submitted a subsequent complaint to the CCO setting out allegations of misconduct against his managers under the whistleblowing policy, it was decided to wait for the CCO's assessment before taking a decision on the recommendation to terminate. Accordingly, given that there had been a breakdown in his relationship with his line manager, the staff member was placed on administrative leave.

55. The staff member's complaint of misconduct and retaliation sets out several detailed allegations of misconduct on the part of the line manager, the operational leader and to some extent the Director. The relevant governing provisions provide that the CCO, once it is determined that the matter falls within the ambit of the rules shall open a confidential file pursuant to Section IV, Article 2.2 of the Bank's Directive on the Conduct and Disciplinary Rules and Procedures ("the CDRPs") and appoint an inquiry officer for the purpose of conducting an initial inquiry in line with Section IV, Article 2.3(a) of the CDRPs. Upon conclusion of the initial inquiry, in terms of Section IV Article 4 of the CDRPs, it may be decided that the matter should proceed to a formal investigation as contemplated in Section IV, Article 5 of the CDRPs or the CCO may decide that no further action will be taken and the file will be closed. If the matter proceeds to a formal investigation, the CCO is required to prepare an investigative report setting out a summary of the alleged misconduct, the applicable rules or standards of conduct, a description of the available evidence and conclusions about whether the evidence substantiated the alleged misconduct.

56. After an initial inquiry, the staff member was informed on 1 October 2020 that a decision had been taken to close the file without taking further action.

The ARC's considerations

21. In its report the ARC considered regarding the termination of employment decision:

...

48. Section IV, paragraph 2.6 of the Directive on Entering Employment provides that upon entering employment with the Bank a staff member shall be subject to a probationary period for the purpose of assessing suitability of employment of the staff member by the bank. The duration of the staff member's probationary period in this case was 12 months. At any point during or at the end of the probationary period, the staff member's line manager may recommend termination of the staff member's employment by non-confirmation of appointment and, as a result, the staff member's employment may be terminated in accordance with the Directive on Ending Employment. Section IV, paragraph 5 of the Directive on Ending Employment provides that the Bank may terminate the employment of a staff member who is on probation and who fails to demonstrate suitability to continue employment with the Bank. Section IV, paragraph 3 of the Procedure on Ending Employment provides that at any time during a staff member's probationary period, the MDHR may take a reasoned decision to terminate the staff member's employment, following a recommendation in writing by the line manager.

49. The purpose of probation is to enable an employer to assess an employee's suitability for a position. An employer has a wide discretion regarding decisions concerning probationary matters including the confirmation of appointment, any extensions of the probation period, and the identification of the employer's own interests and requirements. Tribunals generally are cautious not to substitute their own

judgment for that of the employer as to a staff member's suitability for longer term employment, otherwise probation will fail to serve as a period of trial.

50. The purpose of the probation is to ensure that new staff members not only are well qualified, but also that they are suitable and compatible, in the sense that they fit into the ethos of the organisation. Fit and compatibility of a probationary staff member is always a central consideration. In making this assessment, the line manager is afforded a wide measure of discretion and is best positioned to assess and balance the positive and negative factors of the staff member's conduct and performance.

51. The ability of a staff member to work harmoniously and to good effect with his or her supervisor and other staff members is also highly relevant. While technical proficiency is important, that alone does not exhaust the relevant considerations in assessing a probationary employee's performance and behaviour. Staff members are sometimes unsuited for a particular employment because their disposition or character causes them not to fit in with the working environment or to relate poorly to colleagues and clients. Incompatibility invariably gives rise to problems and undermines workplace harmony and trust. Provided there is a factual foundation to conclude that a situation of incompatibility exists, it will usually be a sufficient ground to terminate a staff member on probation.

52. The chain of correspondence set out in detail above, gives a very clear indication that the staff member was unable to work harmoniously with his line manager and the two operational leaders. Within the few short months of his employment, the staff member: i) failed to meet deadlines; ii) refused to continuing working on Project 2; iii) failed to reply to emails from the line manager; iv) neglected to comply with instructions to provide information about his workload; v) was rude to and about the operation leaders on the projects he worked on; vi) demanded not to be subject to the authority of his line manager; vii) refused to attend the meeting facilitated by the HRBP; and viii) secretly recorded a meeting without informing the other participants. His tone in much of his correspondence was at times belligerent, sarcastic, arrogant, condescending and disrespectful. This was pointed out to him more than once, but to no avail. He simply persisted without heeding or internalising the objections of his colleagues. His arrogant persistence discloses that he was unable to take feedback, follow guidance and abide the instructions given to him by his superiors. His continuing disrespectful and aggressive tone and outright insubordination reveal that he lacked insight into his own contribution to the tensions that were arising within the teams on which he worked. That alone amounts to professional misconduct and was more than adequate reason for his probation not to be confirmed.

53. The staff member has offered conflicting accounts and interpretations of the differences that arose and has sought to provide justifications for his conduct and frustration. There is no need to assess these in any detail or to make any findings in relation to them. The staff member's emails speak for themselves. Their problematic tone displays a remarkable lack of collegiality, respect and self-insight. His unacceptable attitude was evident from the get go, almost immediately upon his assuming employment. His temperament made him wholly unsuitable for the position to which he was appointed. The manner in which he responded to feedback left little hope for improvement and confirmed unequivocally that there was a problem of fit and compatibility that could not be remedied. The decision not to confirm his probation on grounds of unsuitability was accordingly reasonable in the circumstances.

22. Regarding the CCO decision to close the investigation the ARC considered:

...

57. Section IV, Article 18.01(b) of the CDRPs provides that any person who reported

the suspected misconduct shall not be entitled to review the investigative report. This provision, expressly, by necessary implication and *ex consequentibus*, in effect provides that any determination by the CCO pursuant to the initial inquiry to close the file or not to proceed with discipline for misconduct is not reviewable under the ARP Directive. In addition, the decision not to proceed with disciplinary action against a staff member following a complaint of misconduct by another staff member is not an administrative decision as contemplated in Section IV, paragraph 3(a) of the ARP Directive. Staff members may only seek review of decisions “which allegedly alter, in an adverse manner, or allegedly are in breach of, the terms and conditions of employment of a Staff Member.” The decision by the CCO pursuant to the inquiry or investigation into the allegations of misconduct against the line manager, the Director and operational leader did not adversely alter or breach the contract of the staff member. He accordingly has no standing to seek review of the decision of the CCO and MDHR to take no action and close the file and the ARC has no jurisdiction to determine this part of his request. There is accordingly no legal basis for affording the staff member relief directing disciplinary action against the line manager or the Director.

58. With regard to the matter of retaliation, the Bank’s Whistle-blowing Policy prohibits retaliation against a whistle-blower that makes or has made, or is believed to be about to make a report of suspected misconduct. Section IV, paragraph 6(d) of the Whistleblowing Policy provides that a whistle-blower who believes that retaliation has occurred or will likely occur can request the adoption of protection measures. Such measures may include suspension of the effect of any Bank decision alleged to have involved retaliation. Should it be shown that the termination of the staff member’s employment (an occupational detriment) was made in retaliation for making a protected disclosure such termination (administrative decision) would be unlawful and unreasonable.

59. Retaliation will only be established when actions are taken against a staff member who makes, has made or is about to make a report of suspected misconduct. The onus is on the staff member making the allegation of retaliation to demonstrate that a decision was not taken in good faith or was taken for an improper purpose. The staff member must establish a factual basis establishing a direct link in motive between the disclosure and an adverse action or occupational detriment. There must be a causal link (factual and legal) between the protected disclosure and the occupational detriment. The enquiry is whether but for the disclosure the staff member would not have been dismissed and where there is more than one reason for dismissal whether the disclosure was the proximate or predominant reason. In this case, the misconduct alleged by the staff member related to Project 2 during February 2020. However, it was only after the submission of the recommendation to terminate the staff member’s employment by the line manager in June 2020 that the staff member filed his misconduct report. There is no evidence that the staff member prior to that ever intended to report misconduct during his involvement with Project 2, or any of the other projects, or that he attempted at any point to formally denounce the actions of his line manager. The report was in response to a well-made case that the staff member was unsuitable for continued employment. This suggests that the complaint of retaliation was more likely than not opportunistic.

60. Accordingly, the Bank’s submission that there is no reasonable or adequate link between the line manager’s recommendation and any protected disclosure made by the staff member is well-founded. The proximate reason for the staff member’s dismissal was his disposition, attitude, insubordination, evident lack of fit and inability to adapt his temperament. His subsequent allegations of misconduct on the part of his line manager are insufficiently causally linked to the decision to terminate his employment on grounds of incompatibility. Whatever the merit (if any) of his allegations against his colleagues, his behaviour during his probationary period, as reflected in the contemporaneous correspondence, provided a reasonable basis to conclude that he was

not suitable for continuing employment.

23. The ARC concluded that the decision of MDHR issued on 16 October 2020 informing the staff member that his employment with the Bank was terminated during the probationary period was lawful, reasonable and procedurally fair. The ARC accordingly recommended to the President that the decision be confirmed and no remedies be afforded to the staff member.

The Administrative Review Decision (PARD)

24. On 8 June 2021 the Bank's President took the Administrative Review Decision (PARD) as follows:

1. I refer to the Report and Recommendation ("**Report**") by the Administrative Review Committee ("**ARC**"), issued on 6 May 2021 in the matter of your Requests for Review, Case No. ARC67/2020.

2. I have considered the findings and conclusions of the Report in relation to your Requests for Review challenging the following: (i) the decision by the Managing Director, Human Resources and Organisational Development ("**MD, HR&OD**") of 16 October 2020 to terminate your employment with the Bank during the probationary period and; (ii) the decision by the Chief Compliance Officer ("**CCO**") of 29 September 2020 to close the matter with no further action with respect to your complaint of alleged misconduct, as reported by you under the Bank's Whistleblowing Policy.

3. The ARC's Report confirmed that the termination of your appointment with the Bank during the probationary period was lawful, reasonable and procedurally fair.

4. I note that the findings and conclusions in the ARC's Report were based on the submissions you made and the available information provided. In this regard, I confirm the following findings as set out in the ARC's Report:

a. The decision to terminate your appointment with the Bank was supported by the contemporaneous correspondence demonstrating that you struggled to work harmoniously with colleagues even when given feedback and direction. The ARC found that your reaction and response to colleagues and line manager lacked collegiality and respect and that your temperament made you wholly unsuitable for the position to which you were appointed.

b. There was no evidence of retaliation and "*no reasonable or adequate link*" between your report under the Bank's Whistleblowing Policy and the decision by your line manager to recommend the termination of your employment during the probationary period.

c. Under the provisions of the Directive on the Administrative Review Process, a staff member only has a right of review of administrative decisions which allegedly alter, in an adverse manner or allegedly are in breach of the terms and conditions of employment of a Staff Member. Accordingly, there is no legal basis in your request to review the CCO's decision to close the matter with respect to your report under the Bank's Whistleblowing Policy.

5. I have therefore taken the decision to accept the ARC's Report and its

recommendation that no remedies be afforded to you.

6. Pursuant to Section IV, paragraph 6.4.3 (b) of the Directive on the Administrative Review Process, this Decision now exhausts the Administrative Review Process.

25. This is the impugned decision.

IV. The Appellant's position

26. The Appellant requests the Tribunal to make a determination that the ARC's Findings of Fact contain a manifest error and are reached in breach of applicable law. He claims that the ARC did not act impartially and independently and that his position was not considered. He adds that the ARC as late as on 29 April 2021 requested additional documentation and that it missed deadlines.

27. He explains that his use of excessive language was unusual since he was confronted with unusual and unacceptable behaviour in his team.

28. He asks the Tribunal to examine the whole situation and suspend the PARD not to confirm his probation given that it happened due to his refusal to commit fraud and subsequent abuse of authority and harassment from the line manager, creating causes to terminate his employment.

29. He considers the termination decision to be unlawful, since it was taken in violation of applicable procedures in a manner that affected the outcome. Specifically, MDHR did not consider the comments he provided as a response to the line manager's recommendation not to confirm my probation. Moreover, it was based on erroneous facts and MDHR disregarded essential facts. Specifically, it was based on deliberate false statements from the line manager, while his comments, context of events (orders to commit fraud, harassment, abuse of authority, etc.) and provocations from the line manager were disregarded. He underlines that he fired for his refusal to commit fraud and speaking up. Furthermore, MDHR relied on the outcome of a flawed OCCO inquiry into the allegations he did not make, could not have made and would never make, while they also disregarded virtually all the information and evidence provided, including his comments on the Recommendation to terminate.

30. He considers the OCCO decision to close the investigation unlawful as it was taken in violation of applicable procedures in a manner that affected the outcome. He refers in this respect to paragraph 4.01 of the Bank's Directive on the Conduct and Disciplinary Rules and Procedures (CDRP), which provides that the inquiry officer shall determine whether the conduct would amount to misconduct for the purposes of these Rules and whether the matter may be properly investigated taking into account the reliability of the information received, the gravity of the suspected misconduct and the availability of relevant evidence. He submits to have reported specific cases of misconduct, which as per CDRP, had to be acknowledged and then examined. Instead, however, OCCO made up their own allegations which he did not, could not have and would never make, and attributed them to him without any basis and "examined" those instead. He provided a Whistleblowing Complaint in a written document and there was virtually no support for OCCO's made-up allegations. OCCO failed to indicate where in his document the allegations could be found that were investigated. Furthermore, the decision was based on erroneous facts and OCCO disregarded essential facts. It completely disregarded the written document with hard evidence provided therein. This

behaviour by OCCO and the Decision by CCO not to examine or even acknowledge the issues as reported directly breach the terms and conditions of his employment since the CDRP and the Whistleblowing Policy specify some of the terms of his contract and were not followed through by OCCO, the Bank's policies prohibit abuse of authority, harassment, and orders to commit fraud that he was not supposed to be subjected to. The cases of misconduct were the exact reasons leading to the line manager's recommendation not to confirm his probation, which directly affected his employment.

31. The Appellant requests the Tribunal:

- To restore his employment in the Bank at headquarters in London starting from 16 October 2020 with the repayment of lost income, but in a different team;
- To examine the whole situation and request the Bank to investigate his original Whistleblowing and Misconduct Report,
- To assign a new team of investigative officers to examine the issues as reported, ideally from outside the Bank, and to request them to interact with him several times to make sure that his position and all the provided information are fully understood and considered in the process this time;
- To ensure that the necessary safeguards are put in place for the process not to be influenced by former investigators and CCO; and
- Once the process is complete, to provide him with the outcome on the issues actually reported.

V. **The Respondent's position**

32. The Respondent contends that the PARD was taken on a reasonable and observable basis, in compliance with the Bank's internal law as confirmed by the Findings of Fact established in the ARC'S Report. It was lawful, rational and procedurally fair as confirmed by the ARC. The Respondent considers that the termination decision during the probationary period was a legitimate exercise of managerial discretion and supported by the well-documented unsuitability for continued employment with the Bank. It underlines that, in any event, pursuant to Section IV, paragraph 3.03 (a) of the Appeals Directive, the Tribunal shall uphold any decision not to confirm a staff member's appointment during the probationary period unless the following criteria are met: (i) an express assurance was given that the appointment would be confirmed; (ii) the Staff Member changes their position in reliance on the assurance; and (iii) the assurance was unqualified or the staff member met all the qualifications. The Bank submits that these criteria do not apply in the present case and that the Appellant does not allege that they do.

33. The Respondent further submits that the report by the Appellant as made under the Bank's Whistleblowing Policy was properly assessed and thoroughly investigated. It adds that the Appellant does not have a right to contest the outcome of the assessment of his report made under the Whistleblowing Policy, which alleged that his managers engaged in "consistent misrepresentation of projects with surprisingly causal attitude to deception." The Appellant's main allegations (i.e. "systemic issue in the management of the team and misrepresentation of projects") do not impact the Appellant's terms and conditions of

employment and as such, he has no right to a specific outcome.

34. The Appellant's allegations of retaliation were thoroughly looked into, even though he had not made out a *prima facie* case of retaliation. The conclusion of the inquiry into the Appellant's retaliation claim demonstrated by clear and convincing evidence that the termination decision was not retaliatory nor was there any causal connection between the Appellant's engagement in a Protected Activity (as defined in the Bank's Whistleblowing Policy) and the decision to terminate the Appellant's appointment during the probationary period.

35. The Respondent requests the Tribunal to reject the Appeal in full without any award of the requested remedies.

VI. The Tribunal's evaluation

a. Oral Hearing

36. The Tribunal recalls that Section IV, paragraph 7.02, of the Directive on the Appeals Process (DIR/2019/14) provides that in exceptional cases the Tribunal may 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.

37. The Appellant believes that his position is presented rather clearly in the provided documentation, including the Statement of Appeal, with supporting evidence. He therefore "not necessarily requests" an oral hearing.

38. The Bank does not request an oral hearing. It observes that the Appeal raises issues that relate to an exercise of discretionary authority and the lawfulness of the President's Decision. As such, the Bank's position is that these matters can be adjudicated on the basis of the written submissions, through which the Appellant and the Bank have articulated their arguments.

39. On the basis of the foregoing and no exceptional circumstances being established, the Tribunal does not deem it appropriate to hold an oral hearing.

b. Anonymity

40. The Appellant notes that he does not require anonymity.

41. The Respondent, taking note of the Appellant's request, observes that it is the Tribunal's approach to limit, to the maximum extent possible, the exposure of facts or descriptions that may identify participants in the matter pertaining to the appeal process and requests the Tribunal to adopt such an approach also in this case.

42. In view of this, the Tribunal grants the Respondent's request for the names of staff members of the Bank, including the line manager, the Director and the Inquiry Officer not to be made public by the Tribunal.

c. The Merits

43. It is useful to emphasize at the outset that an international administrative tribunal makes its assessment in law on the basis of established facts and evidence. It is also appropriate to recall in this respect that paragraph 7 of the Directive on the Appeals Process stipulates that the Tribunal shall take full account of the Findings of Fact made by the ARC, unless the Tribunal determines, on application of either party, that the Findings of Fact contain a manifest error on the face of the written materials before it or the Tribunal grants a request of either party to present new evidence not available to that party before the ARC. The Tribunal understands that the ARC did not conduct an evidentiary hearing and that the Appellant was not given the opportunity to present his case in person. This is regrettable as the case concerns the termination of the Appellant's employment, but the Tribunal concludes that the case file with its many annexes was sufficient to convey both parties' factual and legal positions to the ARC and properly formed the basis for the ARC's Findings of Fact.

44. The Appellant contends, first, that the ARC findings are manifestly erroneous as they are based on an incomplete consideration of the facts and did not take into account his position. The Appellant thus requests that the Tribunal considers the facts anew and to order that a new investigation is undertaken.

45. The Tribunal recalls that it is incumbent on the Appellant to bring forward detailed supporting evidence in support of his claims. He has not convincingly done so. He has in the present appeal reiterated arguments presented in the RARDs. The Appellant may well have a different understanding of some of the facts. There is no indication, however, not to mention proof, that the ARC did not consider the entire case file. After having itself analysed the complete file, the Tribunal finds that the ARC Findings of Facts are thorough and balanced.

46. Before assessing the substance of the Appellant's submissions, the Tribunal deems it appropriate to recall that the two underlying decisions that are being challenged, i.e. the termination of appointment decision and the OCCO decision to close the investigation, are of a discretionary nature. It is constant that the review of such cases by an international administrative tribunal is limited. In this respect also paragraph 3.03 of the Directive on the Appeals Process provides that the Tribunal is guided by the following principles:

...

(b) When the Administrative Decision complained of is a decision of a Discretionary Nature, the Tribunal shall uphold the Appeal only if it finds that the decision was arbitrary, or discriminated in an improper manner against the Staff Member or the class of staff members to which the Staff Member belongs, or was carried out in violation of the applicable procedure.

47. The review by a tribunal of decisions not to confirm an appointment of a staff member on probation is even more restricted. Paragraph 3.03(a) of the Directive on the Appeals Process in this respect provides:

(a) Notwithstanding any other provision of this paragraph 3.03, an Appeal by a Staff Member on probation against a decision not to confirm their appointment, or by a Staff Member on a fixed term contract not to renew or extend the term or convert their fixed term appointment to a regular one, shall normally be upheld only if it is

established:

(i) that the Staff Member was given an express assurance by an officer of the Bank whom the Staff Member was entitled to consider as having authority to give such assurance, that their appointment would be confirmed or regularised, or their contract renewed, or extended, as the case may be;

(ii) that the Staff Member changed their position in reliance on this assurance; and

(iii) that the assurance was unqualified, or that the Staff Member subsequently met all the qualifications attached to it.

48. The Tribunal reiterates what it held in EBRDAT Case No. 2018/AT/06:

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

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

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

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

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

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

49. The Tribunal underlines, however, that, while the assessment of the Bank's managerial discretion falls outside the scope of the Tribunal's review, the limited review by the Tribunal does imply an evaluation of whether the procedure followed by the Bank in exercising its discretion and the decision taken were in compliance with the applicable law. In this respect, it is to be noted that the Bank's internal law provides that at any time during a staff member's probationary period, the MDHR may take a reasoned decision to terminate the staff member's employment, following a recommendation in writing by the line manager (*cf.* the Procedure on Ending Employment states at Section IV, Paragraph 3). Moreover, the Bank has a duty to respect the principles of due process and to not abuse its powers. All staff

members, but staff on probation in particular, must be informed of their shortcomings and weaknesses. As the Findings of Fact above show, the Appellant was timely and regularly made aware of the shortcomings in his performance. He may disagree with them, but the Tribunal repeats that management has a large discretion in these matters.

50. The Tribunal recalls, as also the ARC did, that Section IV, paragraph 2.6 of the Directive on Entering Employment, provides that upon entering employment with the Bank a staff member shall be subject to a probationary period for the purpose of assessing suitability of employment of the staff member by the Bank. The duration of the staff member's probationary period in this case was 12 months. At any point during or at the end of the probationary period, the staff member's line manager may recommend termination of the staff member's employment by non-confirmation of appointment and, as a result, the staff member's employment may be terminated in accordance with the Directive on Ending Employment. Section IV, paragraph 5 of the Directive on Ending Employment, which provides that the Bank may terminate the employment of a staff member who is on probation and who fails to demonstrate suitability to continue employment with the Bank. Lastly, and as noted *supra* in paragraph 49, the Procedure on Ending Employment provides that at any time during a staff member's probationary period, the MDHR may take a reasoned decision to terminate the staff member's employment, following a recommendation in writing by the line manager. The Bank thus has two obligations: it must demonstrate lack of suitability for continued employment and the decision to terminate must be reasoned.

51. This was scrupulously followed. The Appellant joined the Bank in December 2019. Already in February 2020 were the first remarks made about his shortcomings. Many meetings were held since then to discuss matters. This culminated in a recommendation dated 22 June 2020 to terminate the appointment. The Appellant commented thereon on 29 June 2020. He was subsequently informed of the termination of appointment in a reasoned decision. The Tribunal concludes that the Appellant received adequate feedback on his performance shortcomings and was adequately put in a position to comment thereon. The Respondent's duties towards Appellant have thus been fulfilled. The Appellant was thus adequately put in a situation to understand the reasons why his appointment was not confirmed and his employment terminated. The Appellant may disagree with them and he has indeed offered differing accounts and interpretations. The Tribunal's role, as well that of the ARC, is limited, however, to determine whether discretionary powers were abused or not in this respect. The Tribunal holds that this was not the case. The Tribunal concurs with the ARC that the Bank's decision to terminate the Appellant's appointment was regular, reasonable, logical, reasoned and thus lawful.

52. It is also to be added that the final decision to terminate the contract was suspended pending the CCO's assessment of the Appellant's allegations of misconduct against his managers. This constitutes a proper exercise of the duty of care that the Bank had vis-à-vis the Appellant.

53. It is settled jurisprudence that when an official makes allegations of misconduct, s/he is entitled to have them dealt with in accordance with the rules and procedures in force (*cf.* EBRDAT Case No. 2019/AT/08, paragraph 106 and ILOAT Judgment 3365 (2014), under 26).

54. Bank staff have the right, and indeed as in most organizations the duty, to report misconduct and they may expect that their reports are taken seriously and receive prompt attention, and that they are informed of the progress and outcome of the inquiry and/or

investigation. Non-respect by the organization thereof may be challenged. Appellant can, however, only challenge the legality of the process followed and the decision of MDHR informing him about its conclusions (*cf.* EBRDAT Case No. 2019/AT/08, paragraph 105). In the case under consideration the Bank correctly applied its internal law. It promptly paid attention to the Appellant’s report. The matter was referred to OCCO and the procedures under the CDRP were followed, i.e. a confidential file was opened and an inquiry officer was appointed for the purpose of conducting an initial inquiry. The Appellant was interviewed. The CDRP provide that, upon conclusion of the initial inquiry, it must then be decided by the CCO whether the matter should proceed to a formal investigation or that no further action will be taken and to close the file. The latter was decided by the CCO in the exercise of her discretionary power in this respect and the Appellant was informed thereof. The Tribunal concludes that the procedure followed was regular.

55. It must, however, be emphasized that the Appellant is not the addressee of this decision. Section IV, Article 18.01(b) of the CDRP, in fact, provides that any person who reported the suspected misconduct shall not be entitled to review the investigative report. Although the Appellant undoubtedly has an interest in the overall outcome of the case, he is not the subject of the inquiry and is not the addressee of the decision to further investigate or not (*cf.* EBRDAT Case No. 2019/AT/08, paragraph 68). The decision not to proceed with an investigation or a disciplinary action against a staff member following a complaint of misconduct by another staff member is a matter of concern of the alleged perpetrator but is not subject to challenge by the reporting officer. As a consequence, a decision not to investigate another staff member does not constitute an administrative decision addressed to the reporting officer and it does not alter in a material adverse manner the reporting officer’s terms and conditions of employment. As also the ARC observed, in this particular case the decision by the CCO pursuant to the initial inquiry into the allegations of misconduct against the line manager, the Director and operational leader did not adversely alter or breach the contract of the Appellant (*cf.* EBRDAT Case No. 2019/AT/08, paragraph 105). He accordingly has no standing to seek review of the decision of the CCO and the MDHR to take no action and close the file. The Tribunal has no jurisdiction to determine this part of the Appeal and cannot grant the remedies requested.

56. Lastly, the Appellant submits that the termination of his appointment was a retaliation for his report of alleged misconduct.

57. Paragraph 3.03(d) of the Directive on the Appeals Process (“*Guiding Principles*”) provides with respect to retaliation:

...

(d) In the course of the proceedings before the Tribunal brought by a Staff Member:

...

(ii) where a Staff Member indicates retaliation as a result of their engagement in a Protected Activity, the Bank shall be required to show by clear and convincing evidence that the Administrative Decision which the Staff Member alleges was retaliatory was not retaliatory.

The Tribunal recalls (*cf.* paragraph 47 *supra*) that paragraph 3.03(a) of the Directive on the Appeals Process provides:

Notwithstanding any other provision of this paragraph 3.03, an Appeal by a Staff Member on probation against a decision not to confirm their appointment, or by a Staff

Member on a fixed term contract not to renew or extend the term or convert their fixed term appointment to a regular one, shall normally be upheld only if it is established:

- (i) that the Staff Member was given an express assurance by an officer of the Bank whom the Staff Member was entitled to consider as having authority to give such assurance, that their appointment would be confirmed or regularised, or their contract renewed, or extended, as the case may be;
- (ii) that the Staff Member changed their position in reliance on this assurance; and
- (iii) that the assurance was unqualified, or that the Staff Member subsequently met all the qualifications attached to it.

These two subparagraphs read together cannot *a contrario* be interpreted as allowing the Bank to retaliate during the probationary period and the Bank and this Tribunal must thus take a retaliation claim also during the probationary period seriously.

58. However, in order for the Bank to make a proper assessment of an alleged retaliation the staff member concerned must provide *prima facie* evidence in support of his claim.

59. It is to be noted that the Administrative Review Process does not contain the same “*Guiding principles*” as laid down in the Directive on the Appeals process. The ARC did, however, analyse the retaliation claim in detail and concluded:

59. ...The staff member must establish a factual basis establishing a direct link in motive between the disclosure and an adverse action or occupational detriment. There must be a causal link (factual and legal) between the protected disclosure and the occupational detriment. The enquiry is whether but for the disclosure the staff member would not have been dismissed and where there is more than one reason for dismissal whether the disclosure was the proximate or predominant reason. In this case, the misconduct alleged by the staff member related to Project 2 during February 2020. However, it was only after the submission of the recommendation to terminate the staff member’s employment by the line manager in June 2020 that the staff member filed his misconduct report. There is no evidence that the staff member prior to that ever intended to report misconduct during his involvement with Project 2, or any of the other projects, or that he attempted at any point to formally denounce the actions of his line manager. The report was in response to a well-made case that the staff member was unsuitable for continued employment. This suggests that the complaint of retaliation was more likely than not opportunistic.

60. Accordingly, the Bank’s submission that there is no reasonable or adequate link between the line manager’s recommendation and any protected disclosure made by the staff member is well-founded. The proximate reason for the staff member’s dismissal was his disposition, attitude, insubordination, evident lack of fit and inability to adapt his temperament. His subsequent allegations of misconduct on the part of his line manager are insufficiently causally linked to the decision to terminate his employment on grounds of incompatibility. Whatever the merit (if any) of his allegations against his colleagues, his behaviour during his probationary period, as reflected in the contemporaneous correspondence, provided a reasonable basis to conclude that he was not suitable for continuing employment.

60. The Tribunal concurs with the ARC that the case file does not contain evidence that the Appellant intended to report the alleged misconduct prior to his receipt of the

recommendation to terminate his employment. It also finds that the Appellant has failed to establish *prima facie* evidence in support of his claim of retaliation. Even if he had, the case file contains clear and convincing evidence that there was an observable and reasoned basis for the termination of appointment that was untainted by retaliatory motive. The Bank's evidence therefore effectively rebutted Appellant's retaliation allegations. As a consequence, the claim of retaliation cannot be upheld.

61. The Tribunal concludes that the Appeal must be rejected in its entirety.

VII. Costs

62. 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.

63. The Tribunal does not uphold the Appeal. The Tribunal further sees no reason to order that the Respondent pay exceptionally all or some part of the Appellant's legal costs, if any, where the Appeal has not succeeded.

VIII. Decision

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

8 November 2021
For the Administrative Tribunal



Chris de Cooker
Chair of the Panel