

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

**Case No. 2021/AT/04**

**Appellant**

**vs.**

**European Bank for Reconstruction  
And Development**

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**PRELIMINARY DECISION**

**by the Administrative Tribunal in plenum**

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**18 February 2022**

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

1. Appellant began working for the European Bank for Reconstruction and Development (“EBRD,” “Bank” or “Respondent”) on 4 February 2019 as an Analyst in the Cairo Resident Office (RO). Her line manager was the Lead Economist in the Cairo Office.
2. Within a few weeks of starting work, Appellant began complaining about her line manager’s treatment of her, including shouting at her, being overly critical of her work and interfering in her non-Bank activities.
3. On 9 April 2019, Appellant submitted a detailed report of actions by the line manager that she considered harassment, bullying, sexual harassment and abuse of authority. She asserted that these actions had created a hostile work environment.
4. On 1 July 2019, Appellant met with her line manager and, in the course of the meeting, fainted and was admitted to the hospital. She later contended that her hospitalization “stemmed from his aggressive and improper behaviour.” Later in July, supervision of Appellant’s work was transferred from her line manager to the Director of her unit.
5. Upon review of Appellant’s 9 April 2019 allegations, the Managing Director, Human Resources (“MDHR”),<sup>1</sup> referred Appellant’s complaint to the Office of the Chief Compliance Officer (“OCCO”) on 23 August 2019. The referral was taken pursuant to Section IV, Paragraph 1.3(c)(ii) of the Procedure on Harassment-Free and Respectful Workplace (“RWP”), which instructs that, in the event it appears from a complaint that “misconduct may have occurred,” the MDHR “shall refer the matter for initial inquiry under the Conduct and Disciplinary Rules and Procedures [CDRP].”
6. After an initial inquiry, OCCO informed the parties that it would undertake a formal investigation of Appellant’s allegations against her former line manager. It thereafter interviewed Appellant and other staff with whom she worked.
7. On 20 November 2019, the Director to which Appellant reported advised her by email that her work was not satisfactory. He cited 10 different deficiencies on which he based his assessment, including poor drafting skills, failure to properly document data collection and missing deadlines. He also advised her that she had violated Bank rules by not obtaining approval before publishing an article in an online, external publication. Appellant was advised that the Director would recommend her termination if she failed to improve her performance.
8. After completion of its formal investigation into Appellant’s complaint, the OCCO issued a final report on 26 November 2019. The OCCO concluded that “there was insufficient evidence to support a factual finding that [her line manager] had engaged in the alleged

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<sup>1</sup> That office was renamed to Human Resources and Organizational Development, but this decision will continue to refer to “MDHR.”

misconduct.” Appt. Annex 39 (email from HR to Appellant). OCCO summarized these conclusions in a meeting with Appellant on 27 November 2019.

9. On 28 November 2019, Appellant reported allegations of sexual harassment against her line manager to the City of London police. This complaint arose out of an incident on 10 June 2019 when both Appellant and her line manager were in London, and he had allegedly invited her to his hotel room after working hours. In its final report, the OCCO had concluded there were doubts about Appellant’s credibility and that, in the absence of sufficient corroborating information, the evidence did not prove this allegation of sexual harassment.
10. On 20 December 2019, the MDHR informed Appellant of her decision that the line manager’s “alleged improper behaviour was not tantamount to misconduct and that the matter will be referred for managerial action.” Appt. Annex 39. Appellant inquired what form the managerial action might take, but her request for that information was denied for reasons of privacy.
11. Appellant appealed the MDHR decision to the Bank’s Vice President, Human Resources, who confirmed the original decision on 7 April 2020.
12. On 14 May 2020, the Director of Appellant’s unit informed her that he would not recommend confirmation of Appellant’s appointment as a regular staff member. On that same date, Appellant filed a request for administrative review with the President of the Bank under the Directive on the Administrative Review Process (“ARP”). The President referred the case to the Administrative Review Committee (“ARC”) on 4 June 2020 pursuant to Section IV, Paragraph 6.4.1(e) of the Directive on the Administrative Review Process.
13. On 15 May 2020, Appellant tendered her resignation from the Bank.
14. The ARC did not interview any witnesses and did not request the right to review the OCCO investigative report or file. Instead, the ARC asked both the MDHR and the OCCO to provide “written reasons” for their decisions. Both the MDHR and the OCCO complied. The MDHR stated in part that “while the MDHR does not have the authority to refuse or dispute the CCO’s [Chief Compliance Officer’s] conclusion and determination ... the MDHR also had no reason to consider the CCO’s determination as arbitrary ... or irrational.” On behalf of OCCO, the lead investigator assigned to the complaint provided a second extended written statement that explained the Office’s conclusions with respect to each of eight different allegations presented by Appellant.
15. After several extensions, the ARC issued its Report and Recommendation on 6 May 2021. It concluded “that the administrative decision should be confirmed and that no remedies be granted to the staff member.”
16. The Bank’s President issued a decision (the “PARD”) on 8 June 2021 accepting the ARC’s recommendations. The PARD noted that the OCCO “undertook a full

investigation and assessed all the available evidence,” resulting in a finding of “insufficient evidence to support a factual finding of misconduct against your line manager.” The President also rejected Appellant’s request that she be informed of the managerial action imposed on her line manager because “a complainant, such as yourself, does not have a right to be informed of the details of any managerial action.” Lastly, the President awarded Appellant GBP 2,000 “in recognition of the Bank’s commitment to the expeditious resolution of requests submitted through its administrative review and as a good faith gesture to acknowledge the length of time the ARC took to issue its Report in this matter.”

17. Appellant filed an appeal dated 31 August 2021 with this Tribunal, and the Bank filed its response on 5 October 2021.
18. Upon review of the appeal and response, the Tribunal requested on 19 October 2021 that the Bank produce for *in camera* inspection the OCCO investigative report and file. See Section IV, Paragraph 6.03(b) and (c) of the Appeals Process Directive. The Bank produced those documents on 1 November 2021.
19. On 1 December 2021, the Tribunal notified the parties that it would decide this case in plenum.

## II. APPELLANT’S POSITION

20. The following are the principal arguments asserted by Appellant in her Statement of Appeal.
21. The OCCO stated it interviewed 13 witnesses, but the investigators did not interview all relevant witnesses, such as employees of the London hotel where the sexual harassment occurred, colleagues in HR and the many other staff who worked in Cairo. The OCCO also failed to review CCTV videos from the Cairo Regional Office and the hotel in London.
22. The OCCO doubted Appellant’s credibility without reliable evidence. “It is unlawful that the Inquiry Officers/the OCCO consider themselves [to] be in a position of assessor or judges, relying on their own knowledge and their own personal judgements during the investigative process in a case related to physical sexual harassment, bullying, and power abuse.” Statement of Appeal at 25. The OCCO’s conduct was contrary to principles of international human rights law.
23. The MDHR administrative decision of 20 December 2020 was flawed because it failed to “explain the evidentiary basis upon which the impugned decision was taken and provide adequate justification.” *Id.* at 24. The MDHR position that it was obligated to accept the OCCO conclusion violated international law.
24. The PARD and the OCCO conclusions were based on inaccurate, unfair, irrational and prejudicial investigative processes that ignored evidence presented by Appellant. “The

reasons upon which the President and the ARC took their decision aren't informative, lacked factual evidences [sic] and based on personal views, analyses, erroneous facts and these reasons are irrational and obviously breach my rights as Victim and complainant of harassment, sexual harassment, bullying and power abuse." *Id.* at 31.

25. The Bank President and the ARC ignored the evidence of the adverse health consequences suffered by Appellant, including severe anxiety and post-traumatic stress disorder ("PTSD"), as a result of her line manager's actions. Appellant continues to suffer from those medical conditions.
26. Even after Appellant submitted her complaint of harassment, the Bank forced her to continue working in the Cairo office in the presence of the same line manager who had harassed her.
27. "I had no option except to submit my resignation amid COVID-19 outbreak as it would be impossible for me to return to work with the line manager who harassed me sexually and physiologically.... This is obviously breaching all principles of human rights and supporting violence against women and girls in the workplace." *Id.* at 12-13.
28. A complainant's rights under the RWPs include the right to obtain a copy of the OCCO investigative report and to be informed of the managerial action taken against "the offender." This information was necessary so that Appellant could effectively pursue her appeal, but it was denied to Appellant.
29. The ARC report is manifestly erroneous in its findings of fact. The ARC also did not provide justification for the delay in issuance of its report.
30. The Tribunal should conduct an oral proceeding to hear arguments or to rehear evidence. The Tribunal should also invite witnesses to testify.
31. Appellant is entitled to receive "compensatory remedies, and moral compensation ... considering the adverse effects and severe negative consequences of that decision on loss of Job and also on my health as an employee victimised by incidents of sexual harassment, psychological harassment, bullying and power abuse in a work environment full of continued intimidation and humiliation that resulted in submitting my official resignation from the Bank."

### **III. THE BANK'S POSITION**

32. The following are the principal arguments asserted by the Bank in its response to the statement of appeal.
33. This case involves a review of a discretionary decision for which oral argument is not necessary. The Tribunal is required to rely on the ARC's findings of fact unless there is manifest error. Appellant has not provided evidence of manifest error.

34. Appellant has produced with her appeal confidential documents relating to “without prejudice” discussions between the parties. Those documents are not relevant and should be disregarded.
35. Once the OCCO commences a formal investigation, that office retains responsibility for the care and control of the Investigative Process.
36. Under principles of international administrative law, the employing organization is responsible for deciding whether to discipline a staff member for misconduct, and the tribunals do not substitute their own judgment for that of the administration in such matters. A tribunal has a very limited scope of review in such cases and must not micromanage the investigative process.
37. The Tribunal in this case may overrule the Bank’s discretionary decision not to impose discipline on Appellant’s line manager only if it concludes the decision was arbitrary, discriminatory or in violation of applicable procedure.
38. The Bank complied with its obligations under the RWP by adopting factual findings after a “full investigation” that “included a full assessment of all the available information, such as statements by witnesses identified by the Appellant as well as others who were identified as possibly being able to corroborate the allegations made.” Response at 14, ¶¶49, 51. There was a “reasonable and observable basis” for the finding that there was insufficient evidence of misconduct. *Id.* at ¶49.
39. Appellant falsely asserts that the investigators and the administrative review decision disregarded information. Appellant has not submitted evidence showing that her information was ignored by the ARC.
40. Although the Bank normally does not disclose the details of a managerial action to a complainant, Appellant and the ARC were given some details about the action taken against Appellant’s line manager. Although Appellant appears to be dissatisfied with the level of managerial action, “a complainant does not have a right to determine the proportionality of any managerial action taken or to assess whether it is appropriate or not.” *Id.* at 17, ¶59.
41. Appellant is incorrect that she was forced to resign. The Bank had changed her line manager and Appellant was able to work remotely because of the Covid pandemic – steps taken with the support of Occupational Health Assessment. Appellant most likely resigned because her Director had informed her that he intended to recommend the non-confirmation of her appointment. The Bank cannot be held responsible for Appellant’s individual decision.

42. Under Section IV, Article 18.01(b) of the CDRP, Appellant had no right to receive a copy of the OCCO investigative report. Additionally, the ARC and Appellant received a detailed summary of the OCCO findings.
43. Appellant has no right to request modification of the Presidential decision or to receive monetary compensation. Appellant has not proved that any pecuniary or non-pecuniary damage followed from the impugned administrative decision.

#### **IV. THE TRIBUNAL'S CONCLUSIONS**

##### **A. Oral Argument**

44. The Tribunal does not consider oral argument by the parties or witness testimony to be necessary for the purpose of issuing this preliminary decision.

##### **B. The Administrative Decision by the MDHR**

45. Both the MDHR and the ARC misinterpreted their responsibilities under the dispute resolution scheme, thereby depriving Appellant of the due process that she should have been accorded. With regard to the MDHR, the Bank asserted the following position in its presentation to the ARC:

The Bank's disciplinary procedures, i.e. the CDRPs, do not authorise the MDHR to do anything other than confirm the CCO's conclusion when the determination during the Investigative Process is that there is insufficient evidence substantiating a finding of misconduct against the alleged perpetrator. The MDHR only has an option to accept the conclusion, which entails that the MDHR's reasons are related to and predicated on the CCO's conclusion.

It follows from the above that the MDHR is not entitled to review the evidence or findings undertaken by the OCCO as set out in the Investigative Report, unless the CCO recommends that an accusation of misconduct against the staff member may be warranted (Article 6.02 (c) of the CDRPs). Similarly, the MDHR is not empowered to request the OCCO to undertake any further investigation unless there is a recommendation from the CCO to the MDHR that a formal accusation of misconduct should be made against the staff member (Article 7 of CDRPs). In the present matter, the MDHR could not form a view as to whether the alleged perpetrator, i.e. the staff member, has committed misconduct because the CCO did not recommend the commencement of the disciplinary process under Part III of the CDRPs. As such, the MDHR had to confirm the conclusion that the matter be closed on the basis of the CCO's determination at the Investigative Process phase.

46. Appellant challenges the lawfulness of this position, and the Tribunal agrees with Appellant in this respect. As an initial matter, the Tribunal notes the position taken by the Bank's President in a PARD that became Cases No. 2019/AT/07 and 2020/AT/05. The President's PARD in that case stated: "the MDHR is free to impose managerial

action even when the CCO finds that the allegation submitted does not support a finding of misconduct.” Quoted at Preliminary Decision (29 August 2020) at ¶37, p. 14.

47. The Bank now argues that the MDHR is compelled to accept an OCCO finding of no misconduct, whereas it will review the evidentiary record when there is a recommended finding of misconduct. Although the MDHR informed the ARC that she had requested the OCCO Report in this case, there is no indication that she reviewed the underlying witness reports or documents. The MDHR also indicated that she considered her review of the OCCO report in this case to have been an exception to the normal procedures she follows in harassment complaints.
48. The CDRP addresses a multitude of activities that are characterized as “misconduct” (e.g., financial wrong-doing; gross insubordination). Harassment is a subset of “misconduct” that is addressed more particularly in the RWP. The latter procedures state at Section IV, Paragraph 1.6:

#### **Action after investigative process**

The Managing Director, Human Resources & Organisational Development, on the basis of, and within 15 working days of receipt of the outcome of, the investigative process under the CDRPs, shall take one of the following courses of action towards the Bank Personnel who is subjected to improper behaviour and has reported it:

- (i) advise that the allegations are still being dealt with under the CDRPs and that the Bank Personnel shall be notified in due course of the outcome under the CDRPs;
- (ii) advise that the alleged improper behaviour was not tantamount to misconduct but has been referred for managerial action; or
- (iii) advise that the allegations do not warrant any further action and the matter has been closed.

Actions (ii) and (iii) above shall constitute an initial decision for the purposes of the Directive on the Administrative Review Process. [Emphasis added.]

49. The foregoing provision identifies the MDHR as the initial decision-maker under the RWPs – even when the conclusion is reached that “the allegations do not warrant any further action.” The Tribunal holds that a decision-maker, by definition, must undertake a reasoned consideration of the relevant evidence. Without such consideration, there is no due process, something which is owed to both the complainant (i.e., alleged victim of harassment) and the alleged perpetrator.



50. Because the MDHR was responsible for issuing an initial decision on Appellant's complaint of harassment, she could not simply defer to the OCCO without any inquiry into the evidence and findings by the investigators.
51. When the Bank decides to refer a staff member for managerial action following allegations of harassment against that staff member, that decision has a potential impact on the staff member's career in the Bank. The Bank cannot take that action if the decision maker, the MDHR, is uninformed about the evidence that supports the action.
52. Similarly, a finding of no misconduct can have an adverse impact on a complaining staff member's position in the Bank. The Bank is obligated under its own rules and under recognized principles of international administrative law to provide a workplace free of harassment, bullying, etc. The Bank cannot comply with this obligation if the decision-maker who finds no misconduct has refused to review the evidence leading to such a conclusion.
53. The Tribunal concludes that the MDHR decision that Appellant's line manager had not violated the Bank's anti-harassment rules was fatally flawed because of her erroneous belief that she may not review the evidentiary record gathered during the OCCO investigation. The OCCO is an investigatory and recommending office within the Bank; the CCO is not a decision-maker under the Bank's harassment rules. The MDHR may not abdicate her responsibility as a decision-maker under the RWPs by deferring to the OCCO in harassment cases. Because the MDHR acted in violation of Bank law, her administrative decision in this case must be rescinded.
54. In future cases involving allegations of harassment under the RWP, the MDHR must review both the OCCO report and the underlying evidence before rendering any decision – whether the OCCO has recommended a finding of misconduct or a finding that further action is not warranted. Under the Directive on Conduct and Disciplinary Rules and Procedures (Section IV, ¶¶17.01(c), 18.03(a)), the MDHR has a “need to know” the contents of the OCCO file in such circumstances, and the OCCO must provide that documentation to the MDHR.

### **C. The ARC Findings**

55. The procedures followed by the ARC in this case are also flawed for reasons similar to those discussed above. In the course of its consideration of the case, the ARC issued what it labeled “Direction No. 3,” in which it expressed the following concerns regarding the record before it:
  - a. The Staff Member seeks review of the administrative decision of the MDHR of 20 December 2019 (following an investigation of the OCCO) deciding that certain improper behaviour alleged to have been committed by the Staff Member's line manager was not tantamount to misconduct but had been referred for managerial action in terms of Section IV, paragraph 1.6(ii) of the Procedure on Harassment-free and Respectful Workplace (“RWPs”).

- b. In its Response the Bank describes the investigation process preceding the decision to recommend that no disciplinary action be taken against the line manager. However, the Bank fails to deal with the specific allegations made by the Staff Member; does not discuss the evidence or information in relation to them; and furnishes no reasons or explanation making any findings of fact and/or law and explaining why the impugned administrative decision was taken.
- c. The Bank, in effect, requests the ARC to confirm the impugned administrative decision as lawful, rational and procedurally fair.
- d. In accordance with the principles of international administrative law, in order to determine whether an administrative decision is rational, the ARC is obliged to determine whether the administrative decision is rationally connected to: i) the information before the OCCO and the MDHR; ii) the purpose for which the decision was taken; iii) the purpose of the empowering provision; and iv) the reasons given for it by the MDHR.
- e. Hence, the ARC is required to assess whether the conclusion by the OCCO and the MDHR that there was no misconduct on the part of the line manager is supported by the information/evidence upon which that conclusion is based.
- f. As said, the Bank's Response does not disclose the nature and content of the information that was before the OCCO and the MDHR and furnishes no reasons of the MDHR for holding that the alleged behaviour was not tantamount to misconduct and referring it for managerial action. In the absence of the relevant information and appropriate reasons, a review of the impugned administrative decision by the ARC is impracticable.
- g. In the Response the Bank gives a limited procedural account of the investigation into the allegations without discussing the evidence and appears to take the view that it is under no obligation to furnish reasons for the impugned decision. This position is not correct. The giving of reasons is regarded in international administrative law as a fundamental requirement of administrative justice and an important component of procedural fairness. Moreover, reasons for an impugned administrative decision are not reasons unless they are properly informative. They must explain the evidentiary basis upon which the impugned decision was taken and provide adequate justification.
- h. If the ARC were to accept the Bank's approach, it would impact negatively upon the legitimacy of the Administrative Review Process ("ARP"). The ARC is in effect being asked to "rubber stamp" a decision without any insight into the basis for it. The rationale of the Bank seems to be that the ARC should simply accept that because there was an investigative process, it follows *ipso facto* that the decision must be reasonable or rational. That can never be the case. What

happened in the investigation, not the fact of the investigation itself, will be determinative of whether the outcome of the investigation was rational or not.

- i. The notion that a reviewing body should not be given insight into the substantive reasons for an administrative decision is at odds with the fundamental principles and policy purposes of international administrative law. Reasons for an impugned administrative decision give the reviewing body something to work with in deciding whether the decision-maker has pursued improper purposes, taken irrelevant considerations into account, ignored relevant facts or made an error of fact or law.
  - j. Put simply, without reasons for an administrative decision, the task of administrative review normally cannot be done. There may be exceptions to the general rule depending on the nature of the power and the objects of the relevant empowering provision. But here the impugned decision involves a determination of whether a factual substratum or matrix supports the legality or rationality of an administrative decision, it will be impracticable, if not impossible, to review the decision without disclosure by the decision-maker of the factual basis for that decision.
56. Rather than asking for production of the complete investigative file, the ARC instructed the Bank as follows in Direction No. 3:
- a. The OCCO is requested to provide written reasons for its decision: i) that there was insufficient evidence to support a factual finding of misconduct in relation to the allegations of improper behaviour made by the Staff Member; and ii) recommending that no further action be taken and the matter be closed.
  - b. The MDHR is requested to provide written reasons for her decision: i) accepting the finding of the OCCO that the alleged conduct was not tantamount to misconduct and ii) referring the allegations to managerial action.
57. The Tribunal concurs in the ARC's explanation of the due process concerns presented by a case in which it did not have an adequate record upon which to assess the lawfulness of the MDHR's administrative decision. The Tribunal, however, disagrees with the ARC's decision not to request the complete OCCO report and file and to instead request only summaries of the OCCO recommendation and the MDHR decision.
58. The ARC had already been apprised that the MDHR did not consider it her role to review or question the OCCO fact-finding in this case. This position by MDHR made it all the more important that the ARC fulfill its fact-finding function in the administrative review process by reading and evaluating all of the available evidence. Fact-finders must review the evidence in a case and not merely summaries of the evidence prepared by one party. Yet the ARC explicitly made credibility determinations and findings of fact based on the OCCO investigator's summary of the evidence.

59. The Appeals Process Directive requires this Tribunal to defer to the ARC's findings of fact unless they are manifestly erroneous. Section IV, ¶7.01(b). See also EBRDAT Case No. 2017/AT/05, ¶80. That level of deference is appropriate only if the ARC's fact-finding is based on relevant and available evidence. Findings of fact that are based on an OCCO investigator's summary of facts and conclusions, rather than on the underlying OCCO report and evidence, are not something to which the Tribunal can defer. If the ARC's recommended findings of fact are to be adopted by the Tribunal, the ARC must undertake a proper examination of the evidence. It failed to do so in this case.
60. The ARC's failings in this respect are not hypothetical. The investigator's summary of findings provided to the ARC included the comment: "[t]he reliability of [Grievant] and therefore her assertions and interpretations of events, was however, open to question." At another point in his summary, the investigator opined that some of her actions "cast doubt on her credibility as a witness of truth." Lastly, the investigator reported with regard to the line supervisor's denial of allegations of aggressive conduct, bullying or harassment:

Other members of the RO [Resident Office], interviewed as part of the Investigative Process, stated that they had not witnessed any disrespectful behaviour towards [Appellant] by the [line supervisor] and had not been subjected to such behaviour themselves.

The investigator concluded "there was insufficient evidence to corroborate and conclude that ... [the line supervisor] acted aggressively towards [Appellant] as alleged." Unfortunately, in advising the ARC of these findings, the OCCO did not disclose all relevant facts including information that potentially contradicted its conclusions.

61. The Tribunal requested and received a copy of the OCCO report and investigative files. A review of those materials revealed multiple emails from the Deputy Director overseeing Appellant's unit to the Director stating that she had received "plenty of complaints from colleagues" about the line supervisor's behavior. In one email, she stated that six different people had accused him of bullying and/or blaming others for his own mistakes. In another email, she stated that "[t]he general impression of [the line manager] in the office is that he is arrogant and rude." These communications arguably contradict the OCCO investigator's representations to the ARC that other staff in the Cairo office had not witnessed or been subjected to "disrespectful behavior" by the line supervisor.
62. The successor to the above Deputy Director also commented to the OCCO investigator that one of the line manager's communications to his team was "dismissive of their views."<sup>2</sup>

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<sup>2</sup> The documents quoted in Paragraphs 61 and 62 were given to the Tribunal for *in camera* inspection, and they will not be further disclosed. See CDRP Section IV, Article 18.01(b). The limited quotations from those documents are included here because they are essential to convey to the parties and the ARC the basis for the Tribunal's Preliminary Decision. In other words, the parties and the ARC have a need to know this limited information. This decision does not

63. None of the information contained in Paragraphs 61-62 was conveyed to the ARC by the investigator's summary. The Tribunal would take no issue with the ARC if it reasonably decided that the views of these managers are outweighed by other evidence or that the line manager's actions did not rise to the level of harassment, bullying, etc. The Tribunal cannot, however, defer to an ARC process in which this evidence is completely ignored because of reliance on an investigator's summary that fails to mention pertinent evidence.
64. For the foregoing reasons, the Tribunal concludes that the ARC findings of fact are not binding on the Tribunal in this case, because they were not based on a reasoned consideration of all available evidence. The ARC findings and recommendation to the Bank's President were incomplete and deviated from mandatory procedures governing the administrative review process.
65. Although the Tribunal is authorized under the Directive on the Appeals Process to supplement the evidentiary record in a case, the rules clearly place primary responsibility for gathering evidence and issuing findings of fact on the ARC.
66. In light of the procedural failings in both the MDHR and ARC processes, the appropriate remedy at this juncture is to remand the case to the ARC to conduct a proper fact finding. See Directive on the Appeals Process Section IV, ¶ 8.01(d).

#### **D. Remand Instructions**

67. In its Judgment in Case No. 2019/AT/08, this Tribunal held that a staff member's claim of harassment filed in the administrative review process is related to but distinct and separate from the investigative process designed to ascertain whether another staff member is guilty of misconduct (i.e., harassment). Due process is owed to both the complainant and the alleged perpetrator. This Tribunal, now sitting in plenum, reaffirms the principles enunciated in Case No. 2019/AT/08. Both the ARC and the Tribunal must ensure that a staff member filing a harassment complaint is accorded due process in the Administrative Review and Appeals processes.
68. To ensure that Appellant receives due process, the ARC on remand should be provided with the entirety of the OCCO investigative file and report on a need to know basis. It should review that file prior to issuing its recommendation to the President of the Bank. Additionally, the ARC should interview Appellant to assess independently her credibility and to consider whether the following persons should be called as additional witnesses: the current and former Deputy Directors identified at Paragraphs 61-62, *supra*, and the HR Business Partner for Appellant's unit, for whom there is no OCCO interview report notwithstanding multiple emails in the file showing communications with both Appellant

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prejudge Appellant's request for access to the entire OCCO file. The Tribunal defers a decision on that issue until after the ARC completes its process after remand and a new PARD is issued.

and her line manager regarding Appellant's allegations. The ARC may additionally exercise its discretion to call other witnesses.

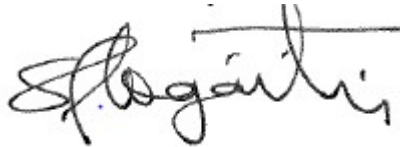
69. In directing this remand, the Tribunal notes that such a procedure is regularly used in international civil service law appeals. See, e.g., *Fogarty v. Secretary-General, International Maritime Organization*, 2021-UNAT-1117; *Barbato v. Secretary-General, International Maritime Organization*, 2021-UNAT-1150. A remand cannot be refused by an advisory or recommendatory body, such as the ARC, on grounds of *functus officio*. The *functus officio* doctrine refers to the expiration of authority to act by an adjudicatory body that has rendered a final decision. The doctrine does not apply to a body that provides advice or recommendations to final decision-makers. These same principles are found in the jurisprudence of various national judicial bodies.
70. The ARC is not a decision-making body within the Bank's structure. Its remit is to make recommendations to the Bank President, who is the decision-maker. The ARC therefore, under established legal authority, has no power to invoke the doctrine of *functus officio* to thwart a remand from the Administrative Tribunal. In addition, it is well recognized that a court's remand to a finder of fact to correct errors is an exception to the doctrine of *functus officio*. See, e.g., *Rolli v. Secretary-General, World Meteorological Organization*, 2019-UNAT-952; *In re Seissau (No. 2)*, ILOAT Judgment 1582 (1997); Kalinowska Vel Kalisz, Beata Gessel, *UNCITRAL Model Law: Composition of the Arbitration Tribunal Re-considering the Case upon Setting Aside of the Original Arbitration Award*, *Journal of International Arbitration* 34, no. 1 (2017) at 22.
71. The Directive on the Appeals Process has since been amended to explicitly grant the Tribunal the authority to remand a case directly to the ARC: "If the Tribunal determines that the Findings of Fact issued by the Administrative Review Committee have material flaws or were the result of procedural deficiencies, it may, in the interest of justice and efficient resolution of the case, set aside the Administrative Review Decision and remand a case to that Committee for further fact finding." Sec. IV, ¶8.01(d). This remand authority is consistent with the rules governing other administrative tribunals that have similarly remanded after finding error in the fact-finding process.
72. Upon remand, the ARC should determine: (a) whether proper investigative procedures were followed, (b) whether the finding that there was insufficient proof of harassment was "arbitrary, discriminatory, or improperly motivated," and (c) whether the finding that the line manager did not harass Appellant was consistent with the Bank's internal law governing harassment, bullying, etc. (including the definitions found at the Guidance Note for Bank Personnel, Rule 2, appended to the CDRP). These determinations should be based on the OCCO investigative materials and any supplementary testimonial or documentary evidence that the ARC obtains.
73. The Tribunal is mindful of the fact that decisions taken in the course of addressing a harassment complaint are discretionary. The Tribunal previously concluded in Case No. 2019/AT/08 that, as with other discretionary decisions, it would not substitute "its views for managerial decisions properly taken." A given set of facts may give rise to multiple

reasonable outcomes, especially in harassment cases where the standards and definitions are necessarily imprecise. As long as a discretionary managerial decision falls within the bounds of reasonableness, is based on a thorough review of the available relevant facts, is not tainted by improper motives or procedures and is consistent with Bank law and international administrative law, then the ARC should not recommend and the Tribunal should not decide that Management's decision needs to be rescinded. In issuing this preliminary decision, the Tribunal is not prejudging the merits of Appellant's appeal or the Bank's response. That final decision cannot be reached until the ARC has completed its fact-finding and the Bank's President has issued a new PARD.

**VI. Preliminary Decision and Remedy**


74. The decision of the Bank's President in this case is rescinded because it is based on a procedurally flawed administrative review process.

75. The case is remanded to the ARC pursuant to the instructions above.



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Spyridon Flogaitis, President



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Chris de Cooker



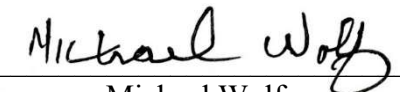
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Thomas Laker



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Maria Vicien-Milburn



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Michael Wolf