

**EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT**

**Annual Report for 2021**  
**of the President of the EBRD Administrative Tribunal,**  
**Professor Spyridon Flogaitis**

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## **PART I INTRODUCTION**

1. Under Section IV, 9.04(a) of the Appeals Process Directive dated 9 November 2021 (DIR/2021/28), the President of the Administrative Tribunal is required to submit an annual report addressed to the President of the Bank. The report is to be made available to the Board of Directors and staff of the Bank.

### *9.04 Annual Report*

*(a) The President of the Tribunal shall prepare an annual report indicating, in summary form, the appeals brought before it in the past year, the decisions taken, and the actions of the Bank in implementing those decisions.*

*(b) Subject to paragraph 9.03 above, the report shall maintain the essential confidentiality of all parties involved in appeals brought before the Tribunal. The report shall be addressed to the President and shall be made available to the Board of Directors as well as to staff members of the Bank.*

2. In accordance with Section IV, 9.03 (a) all case decisions are published in full (and where applicable anonymised at the request of one of the parties or both) on the Bank's website in line with the Bank's commitment to enhancing good governance, openness, transparency and accountability. The link for ease of reference is <http://www.ebrd.com/who-we-are/corporate-governance/administrative-tribunal.html>.

3. The table in part II presents a schematic overview of cases submitted during 2021 – the request for an appeal, the decision and the actions carried out by the Bank. A more detailed summary of each case follows the table.

**PART II      REPORT ON APPEALS BROUGHT BEFORE THE TRIBUNAL IN 2021 AND ACTIONS OF THE BANK IN IMPLEMENTING THE DECISIONS**

Case Reference / Decision rendered date	Composition of the Tribunal	Details of the request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken and confirmed by the Bank	Full summary in paras :
<p><b>2021/AT/01</b> <b>Decision dated: 13 April 2021</b></p>	<p>Chris de Cooker (chair), Maria Vicien-Milburn and Thomas Laker</p>	<p>Following a decision taken by the Managing Director, Human Resources and Operational Development (MD, HR &amp; OD) to terminate the Appellant’s employment on the grounds of sub-standard performance, the Appellant submitted a Request for Review of an Administrative Decision (RRAD) to the Administrative Review Committee (ARC) alleging the decision to terminate employment was arbitrary, discriminatory and improperly motivated. The ARC Report upheld the MD, HR &amp; OD’s decision as legal, reasonable and procedurally fair. The Acting President in his President’s Administrative Decision (PARD) concurred with the ARC Report.</p> <p>The Appellant contested the PARD alleging procedural errors by the ARC had taken place which affected their due process right, and that the ARC Report and the PARD were based on errors of fact and law.</p> <p>The Appellant sought 1) rescission of the impugned decision; 2) reinstatement and appropriate compensation; 3) alternatively, compensation equivalent to three years’ emoluments; 4) damages for depression and anxiety allegedly caused by the Bank; 5) payment of reasonable legal costs; 6) anonymity; and 7) an oral hearing.</p>	<p>The Tribunal determined the ARC made a complete and balanced assessment of the matter and that the Report was neither flawed nor biased.</p> <p>The Tribunal rejected the Appeal in its entirety.</p>	<p>None required.</p>	<p>4-16</p>

RESTRICTED

Case Reference / Decision rendered date	Composition of the Tribunal	Details of the request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken and confirmed by the Bank	Full summary in paras :
<p><b>2021/AT/02</b> <b>Decision dated: 26 August 2021</b></p>	<p>Thomas Laker (chair), Chris de Cooker and Spyridon Flogaitis</p>	<p>The Appellant submitted a RRAD regarding the decision rendered by the MD, HR &amp; OD rejecting the Appellant’s views about the amount of surrogacy leave to which they were entitled.</p> <p>The MD, HR &amp; OD stated the Bank’s internal law on surrogacy leave had been properly applied. In the PARD, the President determined the RRAD did not meet the requirements of the Administrative Review Procedures (ARPs) and was therefore inadmissible.</p> <p>The Appellant’s Appeal alleged 1) that the President erred when she said the RRAD was inadmissible; 2) the MD, HR &amp; OD’s response was in breach of the terms and conditions of employment which entitled the Appellant the right to equal employment in accordance with the Staff Handbook; and 3) the MD, HR &amp; OD’s response constituted a challengeable decision.</p> <p>The Appellant requested the Tribunal to 1) overturn the contested PARD and to direct the President to refer their case to the ARC, and 2) grant anonymity.</p>	<p>The Tribunal in considering the admissibility of the RRAD determined that the actual subject of the Appeal concerned the interpretation of specific provisions of the Bank’s directive on leave and therefore constituted a Regulatory Decision.</p> <p>Pursuant to Section IV, para 3 (c) of the Directive for the Administrative Review Process (DIR/2019/16), the Regulatory Decision at stake is not subject to the ARP.</p> <p>The Tribunal concluded that therefore any referral to the ARC was excluded and that the contested PARD rightfully rejected the Appellant’s RRAD.</p> <p>The Tribunal granted anonymity.</p> <p>As the Appeal was limited to the request for referral to the ARC, the Tribunal dismissed the Appeal in its entirety and no remedy was awarded.</p>	<p>None required.</p>	<p>17-33</p>

RESTRICTED

Case Reference / Decision rendered date	Composition of the Tribunal	Details of the request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken and confirmed by the Bank	Full summary in paras :
<p><b>2021/AT/03</b></p> <p><b>Decision dated: 8 November 2021</b></p>	<p>Chris de Cooker (chair), Mike Wolf and Spyridon Flogaitis</p>	<p>The Appellant’s Appeal followed submission of two RRADs. The first RRAD concerned the decision by the MD, HR &amp; OD to terminate the Appellant’s employment during the probationary period. The second RRAD followed the filing of a whistleblowing and misconduct report by the Appellant against their Line Manager.</p> <p>The ARC concluded the decision to terminate the Appellant’s employment was lawful.</p> <p>The Appellant’s allegations of misconduct, which the Appellant maintained were an act of retaliation by the manager were referred to OCCO. Following an initial enquiry, the CCO decided not to proceed with a formal investigation and the matter was closed.</p> <p>The Appellant’s Appeal sought the annulment of the PARD which confirmed 1) the administrative decision to terminate the Appellant’s employment during their probationary period; and 2) there was no legal basis in the Appellant’s request to review the decision of the CCO.</p> <p>The Appellant requested an oral hearing but did not request anonymity.</p>	<p>The Tribunal concurred with the ARC that the Bank’s decision to terminate the Appellant’s appointment was regular, reasonable, logical and lawful.</p> <p>The Tribunal also concluded that the procedure followed by OCCO was in accordance with the correct application by the Bank of its internal law and agreed with the ARC report, which concluded the proximate reasons for the staff member’s dismissal were the shortcomings in standards of performance and behaviour and were not tainted by retaliatory motive.</p> <p>The Tribunal’s decision rejected the Appeal in its entirety.</p>	<p>None required.</p>	<p>34-46</p>

Case Reference / Decision rendered date	Composition of the Tribunal	Details of the request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken and confirmed by the Bank	Full summary in paras :
<p><b>2021/AT/04</b></p> <p><b>Preliminary Decision dated: 18 February 2022</b></p>	<p>Plenum:</p> <p>Mike Wolf (Chair/Rapporteur)</p> <p>Chris de Cooker</p> <p>Spyridon Flogaitis</p> <p>Thomas Laker</p> <p>Maria Vicien-Milburn</p>	<p>Following submission of a report by the Appellant alleging improper behaviour by the Line Manager, the MD, HR &amp; OD referred the Appellant's complaint to OCCO, who after an initial enquiry undertook a formal investigation and reported that there was insufficient evidence to support the Appellant's allegations. The MD, HR &amp; OD subsequently informed the Appellant of her decision that the alleged improper behaviour by the Appellant's Line Manager was not tantamount to misconduct. The Appellant filed a RRAD against the MD, HR &amp; OD's decision which was referred to the ARC.</p> <p>The ARC Report concluded the MD, HR &amp; OD's administrative decision should be confirmed and no remedies granted to the staff member. The PARD accepted the ARC's recommendation.</p> <p>The Appellant's Statement of Appeal submitted to the Tribunal maintained that the OCCO investigation was inadequate and the Appellant contested the MD, HR &amp; OD's decision. The Appellant also considered the ARC report to be erroneous in its findings of fact.</p> <p>The Appellant requested the Tribunal to hold an oral hearing and claimed entitlement to receive compensatory remedies following victimisation which had had severe negative consequences on their job and health.</p>	<p>Upon review of the Appellant's Statement of Appeal and the Bank's Response, the Tribunal required that the Bank produce for <i>in camera</i> inspection the OCCO investigative report and file.</p> <p>The Tribunal determined that both the MD, HR &amp; OD and the ARC had misinterpreted their responsibilities under the dispute resolution scheme, which had deprived the Appellant of the due process that should have been accorded.</p> <p>The Tribunal concluded that 1) the MD, HR &amp; OD's decision was flawed and because she had acted in violation of Bank law that the administrative decision in this case be rescinded; 2) the procedures followed by the ARC were also flawed as the findings of fact were based on an OCCO investigator's summary and not the underlying OCCO report and evidence.</p> <p>The Tribunal found that the ARC's findings of fact were not binding on the Tribunal because they were not based on a consideration of all available evidence. The Tribunal remanded the case to the ARC on 18 February 2022 to conduct a proper fact finding based on the entirety of the OCCO investigation file.</p> <p>The Tribunal concluded that the PARD be rescinded because it was based on a procedurally flawed administrative process.</p> <p>The Tribunal did not consider an oral hearing necessary for the purpose of issuing its preliminary decision.</p>	<p>The case was remanded to the ARC pursuant to the Tribunal's instructions above on 26 February 2022</p>	<p>47-65</p>

RESTRICTED

Case Reference / Decision rendered date	Composition of the Tribunal	Details of the request for Appeal by the Appellant against the EBRD (the Respondent)	Tribunal Decision	Action taken and confirmed by the Bank	Full summary in paras :
<p><b>2021/AT/05</b></p> <p><b>Decision dated: 3 May 2022</b></p>	<p>Spyridon Flogaitis (chair), Chris de Cooker and Maria Vicien-Milburn</p>	<p>In the Statement of Appeal, the Appellant requested the Tribunal to overturn the decision taken by the President that their RRAD of 1 June 2021 was time-barred, and to direct her to refer the case to the ARC.</p> <p>The Appellant had submitted to the MD, HR &amp; OD two separate RRADs which contested the 2019 performance review rating, referred to discriminative actions by the Line Manager, as well as the decision to only extend the Appellant’s contract by three months alleging that the decision was improperly motivated.</p> <p>The MD, HR &amp; OD stayed the administrative review process pending the outcome of an assessment by OCCO of the allegations raised in the Appellant’s complaint against the Line Manager.</p> <p>In February 2021, the MD, HR &amp; OD informed the Appellant that the complaint had been investigated and appropriate measures taken. The stays were therefore lifted. On 5 March 2021, the MD, HR &amp; OD rejected both RRADs.</p> <p>The Appellant registered by email on 21 April 2021 their disagreement to certain aspects of the MD, HR &amp; OD’s response. The MD, HR &amp; OD replied on 28 April 2021 informing the Appellant that if they disagreed, they should request a review no later 5 May 2021.</p> <p>The Appellant requested on 1 June 2021 a review of the MD, HR &amp; OD’s response of 21 April. However the reference date to request such a review was 5 May 2021 and was time barred.</p>	<p>The Tribunal found the decision of the President to be correct and substantiated according to the law of the Bank. The Appellant had misunderstood the Staff Handbook and had missed the deadline to challenge the two MD, HR &amp; OD decisions in a timely manner.</p> <p>The Tribunal considered the Appeal as time-barred and rejected it in its entirety.</p>	<p>None required.</p>	<p>66-75</p>

**EBRDAT 2020/AT/01**

4. On 29 May 2020, the Appellant submitted to the Administrative Review Committee (ARC) and the President of the Bank a Request for Review of an Administrative Decision (RRAD) following an administrative decision taken by the Managing Director of Human Resources & Operational Development (MD, HR&OD), to terminate the Appellant's employment at the Bank on the grounds of sub-standard performance. On 7 September 2020, the ARC submitted its report, which was not immediately forwarded to the Appellant. Without knowing that the ARC Report had already been issued, the Appellant, on 23 September 2020, submitted comments to the Bank's Response, provided further evidence and alleged that the feedback during the performance management exercise had been tampered with. The ARC Chair deemed the ARC was not in a position to receive additional evidence or alter the recommendation.

5. On 5 October 2020 the Acting President of the Bank issued his Administrative Review Decision (PARD). Having considered the ARC Report and the ARC Chair's subsequent position in relation to the Appellant's further submissions, the Acting President agreed with the ARC Chair's position in relation to the further submissions and did not consider that the Appellant's due process rights had been adversely affected by the fact of not having received the ARC Report from the ARC Secretariat at the same time as the Bank. He also upheld the Administrative Decision as he concurred with the ARC Report's findings and recommendations that the administrative decision taken by the MD, HR & OD to terminate the Appellant's employment at the Bank on the grounds of sub-standard performance was legal, reasonable and procedurally fair.

6. In the email communicating the PARD, the Acting President of the Bank also informed the Appellant that the "Fraud Allegations" would be referred to the Office of the Chief Compliance Officer (OCCO) for investigation in accordance with the Directive on the Conduct and Disciplinary Rules and Procedures (DIR/2019/12).

7. The Appellant's Statement of Appeal was lodged on 18 December 2020. The Bank's Response was received on 28 January 2021 and on 3 February 2021 the Appellant requested to submit a short pleading in reply to the Bank's Response, which allegedly contained a number of incorrect or inaccurate points. On 5 February 2021, the Tribunal, recalling that the Appeals Process does not provide for a second exchange of written submissions,



exceptionally granted the Appellant's request to submit a brief document limited to the facts. On 17 February 2021, the Appellant submitted a lengthy document with "Additional Comments to the Bank's Response" and two Exhibits. The Tribunal noted that the Appellant, contrary to the Tribunal's instructions, had extensively commented on the Respondent's Response and had communicated documents that were already in the Appellant's possession when lodging the appeal. The Tribunal determined that these additional comments could therefore not constitute part of the case file.

8. The Appellant's Appeal argued that the ARC had committed a procedural error when it did not provide directives to the Appellant as to the opportunity and timing to file a rejoinder or comments to the Bank's Response. The Tribunal observed the review process provides for a request for review and a response only and the ARP Directive (DIR/2019/16) does not give a staff member a right to reply to the Bank's Response. The argument that the ARC committed a procedural error in this respect therefore failed.

9. The Appellant further contended that the ARC committed a procedural error when it did not copy to the Appellant the ARC Report issued on 7 September 2020 to the Bank. This was "as a result of an administrative error", which resulted in the Appellant's due process rights being adversely affected. The Tribunal concluded that the Appellant did not convincingly establish to what extent the due process rights had been adversely affected and therefore concluded that this argument failed.

10. The Appellant maintained that the ARC underestimated the impact of the medical condition on this case. The Tribunal found the ARC correctly considered the medical issue in light of the evidence before it. The Tribunal considered the Appellant's allegation that the ARC had failed to consider additional more detailed documentation provided to the ARC during the review process and concluded that the medical evidence provided by the Appellant was not convincing enough to arrive at a different conclusion to the ARC.

11. The Appellant furthermore contends that the ARC Report and the subsequent PARD were based on errors of fact and law as they did not consider that the decision to terminate the employment was tainted by abuse of discretion, was arbitrary, discriminatory and improperly motivated as based on erroneous facts, lack of managerial planning and support, and tampered performance feedback. The Tribunal determined the ARC made a complete and balanced assessment of the matter before it and that the Appellant has not successfully established that

the ARC report was flawed or biased. The Appellant's "Further Submissions" did not alter this conclusion.

12. The Appellant sought payment of performance-based compensation for 2019 (PBC). The ARC had concluded the Appellant was eligible but not entitled to payment of PBC. The Appellant had been awarded a PBC of 0% based on the performance rating for 2019, which the ARC maintained was consistent with the recommendation that the employment should be terminated for sub-standard performance. The Tribunal confirmed the conclusions of the ARC and the request to order payment of the PBC was denied.

13. The Appellant requested reimbursement of reasonable legal costs incurred in the ARC process and in the submission of the present Appeal. The ARC recommended that the contested administrative decision of the MD, HR & OD terminating the Appellant's employment be confirmed and no relief be granted. The Tribunal saw no reason to overrule the ARC in this matter. Regarding the costs of the proceedings before the Tribunal itself, the Tribunal noted that the Directive on the Appeals Process provides that it may grant reimbursement of costs if it upholds the Appeal, which is not the case here. Moreover, it did not see exceptional circumstances justifying such an order.

14. The Tribunal agreed to the Appellant's request for anonymity but denied an oral hearing.

15. The Tribunal in its Decision of 13 April 2021 rejected the Appeal in its entirety. No remedy was awarded.

16. Actions of the Bank in implementing the Decision: None required.

#### **EBRDAT 2021/AT/02**

17. The Appellant's Statement of Appeal contested the decision of the President's PARD dated 5 May 2021, which deemed that the Appellant's RRAD to the President of 14 April 2021 was inadmissible. The dispute concerned the scope of the Appellant's entitlement to surrogacy leave.

18. The Appellant's RRAD to the President concerned the decision of the MD, HR & OD dated 17 February 2021, which rejected the Appellant's views about entitlement to the amount of surrogacy leave. The MD, HR & OD's decision stated that the Appellant's request did not meet the requirements of the Bank's ARP Directive, since the Bank's internal law on surrogacy leave, as laid down in the Bank's Leave Directive (DIR/2020/1) had been properly applied. Furthermore, the MD, HR & OD argued that she did not have the authority to change or deviate from the stipulated terms of surrogacy leave.

19. The PARD dated 5 May 2021 confirmed the MD, HR & OD's decision that the Appellant's request did not meet the requirements of the ARP Directive and declined the Appellant's suggestion to grant a deviation from the provisions of the Leave Directive.

20. The Statement of Appeal before the Tribunal was lodged on 11 June 2021. The Tribunal directed the Bank to provide its Response to the Statement of Appeal by 15 July 2021. The Response was received on 15 July 2021.

21. The Appellant's Appeal held that the President erred when she determined that the Appellant's request for administrative review, submitted on 14 April 2021 was inadmissible. In the Appellant's view, by not granting their leave request of 18 January 2021, the MD, HR & OD's negative response constituted a challengeable administrative decision.

22. In addition, the Appellant claimed that the MD, HR & OD's response was in breach of the terms and conditions of their employment. As pointed out in the Appellant's RRAD, the right of a staff member not to be the subject of unjustified unequal treatment follows the EBRD Staff Regulations, which stipulate in Section 3 a) that "[t]he Bank shall at all times act with fairness (...) in its relations with staff members." Hence, the Appellant's claims that the MD, HR & OD's decision not to grant the requested leave constituted a breach of the terms and conditions of employment.

23. The Appellant concluded that the MD, HR & OD's response of 17 February 2021 constituted a challengeable decision, which the President should have referred to the ARC, in accordance with Section IV 6.4.1 (e) of the Bank's ARP Directive.

24. The Appellant requested the Tribunal to overturn the contested decision taken by the President and to direct her to refer the case to the ARC. The Appellant also requested that the

publication of any Tribunal decision preserve their anonymity since their reputation might be adversely affected by such publication.

25. The Tribunal took note that the parties disagreed about the question whether the rejection of the Appellant's request for extended surrogacy leave amounts to an administrative decision within the meaning of the ARP Directive. It concluded that the case in question did not deal with an allegedly wrongful application or interpretation of a provision of the Bank's internal law, but the substantial content of certain rules on parental leave were the subject of this dispute. The Appellant maintained that the regulatory content of the Leave Directive breached higher human resources norms and the recognised principles of international administrative law.

26. The Tribunal considered the Appellant's reference to Section V of the Leave Directive, stipulating that the "President may grant a deviation from a requirement of this Directive." However, the Tribunal notes that the Appellant's Statement of Appeal did not apply for a deviation from the Leave Directive in their individual case but rather for a general change of its provisions.

27. In considering the admissibility of the RRAD, the Tribunal determined that the subject of dispute in the current case is the Bank's internal rules on parental leave, namely the distinctions drawn between paid maternity leave and surrogacy leave, as incorporated in the Bank's Leave Directive, and therefore concerns a Regulatory Decision. Pursuant to Section IV, paragraph 3 (c) of the ARP Directive such type of Regulatory Decision is not subject to the ARP. Therefore, the provisions of the Leave Directive are not subject to the ARP and any request for such a review is inadmissible.

28. The Tribunal concluded that the contested PARD of 5 May 2021 rightfully rejected the Appellant's RRAD as inadmissible and a referral to the ARC as an integral part of the ARP was excluded. The Appellant's request therefore failed.

29. The Tribunal noted its awareness of its competence to review the provisions of the Bank's Directives, including the Leave Directive, as foreseen in Section IV, paragraph 3 (d) of the ARP Directive. However, the Appellant did not submit any such request. By contrast, as reiterated above, the Appellant's request was limited to a procedural measure, without asking the Tribunal to look into the substantial merits of their complaint of allegedly being

treated unequally without justification. It is not possible for a tribunal to go beyond the pleadings of a party when considering a case and since the Appellant's unambiguous request did not cover an inquiry into the substantial merits, the Tribunal is prevented from any respective review.

30. The Appellant requested to remain anonymous. The Tribunal granted this request, recalling that it is inherent to an appeal process that certain facts and opinions become known, both inside and outside the Bank. This being said, it is the Tribunal's established approach to limit to the maximum extent possible, *inter alia*, the exposure of facts or descriptions that may identify participants of the process.

31. Finally, the Tribunal noted with concern that the Appellant was twice misinformed and misled about the correct way to express their disagreement. The Bank wrongly advised in both messages of 5 January 2021 and of 17 February 2021 to make use of the ARP although this channel was not open to the Appellant. However, it was the Appellant's choice to limit the requests before the Tribunal, and it was not for the Tribunal to go further *ex officio*.

32. The Tribunal's Decision of 26 August 2021 dismissed the Appeal in its entirety. No remedy was awarded.

33. Actions of the Bank in implementing the Decision: None required.

### **EBRDAT 2020/AT/03**

34. The Appellant filed on 1 September 2021 a Statement of Appeal, which sought the annulment of the PARD dated 8 June 2021, which confirmed 1) the administrative decision taken on 16 October 2020 by the MD, HR & OD to terminate the Appellant's employment at the Bank during the probationary period, and (2) held that there was 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. In its decision dated 8 November 2021, the Tribunal rejected the Appeal in its entirety.

35. The Appellant was appointed by the Bank on 2 December 2019. The appointment included a twelve-month probationary period. Following several months of discussions, on

29 June 2020 the Line Manager sent a written recommendation to the MD, HR & OD that the Appellant's appointment be terminated, for reasons including serious shortcomings in standards of performance and behavior. On 7 July 2020 the Appellant filed a whistleblowing and misconduct reported against the Line Manager. On 19 July 2020 the MD, HR & OD informed the Appellant that she had received the recommendation to terminate the employment but that she would wait for the CCO's assessment before taking any decision. After an initial enquiry, the Appellant was informed on 1 October 2020 that the decision had been taken to close the file and that no further action would be taken.

36. The Appellant submitted two RRADs respectively on 17 and 20 November 2020. The first Request concerned the decision to terminate the Appellant's employment during the probationary period. The second Request concerned the decision by the CCO to close the investigation into a whistleblowing and misconduct report as filed by the Appellant. These were referred to the ARC who on 6 May 2021 issued its Report, concluding that the decision of MD, HR & OD issued on 16 October 2020 informing the staff member that the employment with the Bank was terminated on the grounds of unsuitability during the probationary period was lawful, reasonable and procedurally fair.

37. On 8 June 2021, the President issued her PARD informing the Appellant of her decision to accept the ARC's findings as set out in its Report, together with the recommendation that no remedies be afforded to the Appellant.

38. The Appellant's Statement of Appeal sought the annulment of the decision of the President of the Bank dated 8 June 2021 with regard to:

- (1) The administrative decision taken on 16 October 2020 by the MD, HR & OD to terminate the Appellant's employment at the Bank during the probationary period, and
- (2) The fact that there was no legal basis in the Appellant's request to review the decision taken on 26 September 2020 by the CCO to close the matter with respect to the Appellant's report under the Bank's Whistleblowing Policy.

39. The Tribunal did not deem it necessary to hold an oral hearing and although the Appellant did not request anonymity, the Tribunal granted the Respondent's request for the names of staff members of the Bank not to be made public by the Tribunal.

40. The ARC did not conduct an evidentiary hearing, which the Tribunal noted was regrettable as the case concerns the termination of the Appellant's employment, but the Tribunal concluded 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.

41. The Appellant requested the Tribunal to consider the facts anew and order a new investigation contending that the ARC findings were manifestly erroneous as they were based on an incomplete consideration of the facts and did not take into account the Appellant's position. After having itself analysed the complete file, the Tribunal found that the ARC Findings of Facts were thorough and balanced.

42. The Tribunal evaluated whether the procedure followed by the Bank and the decision taken by the MD, HR & OD to terminate the Appellant's appointment during their probationary period complied with the applicable internal law. The Tribunal concluded the MD, HR & OD had taken a reasoned decision to terminate the staff member's employment, following a recommendation in writing by the Line Manager and that throughout the process the Bank had informed the Appellant of weaknesses in their performance and had demonstrated adequately the Appellant's lack of suitability for continued employment. The Tribunal concluded there had been no abuse of discretionary powers and concurred with the ARC that the Bank's decision to terminate the appointment was regular, reasonable, logical, reasoned and thus lawful.

43. The Tribunal noted that the final decision to terminate the contract was suspended pending the CCO's assessment of the Appellant's allegations of misconduct against their managers. The matter was referred to OCCO and the procedures under the CDRP were followed. Following an initial enquiry, the CCO decided not to proceed with a formal investigation, to take no further action and the file was closed. The Tribunal concluded that the procedure followed was regular and that the Bank had correctly applied its internal law.

44. The Appellant's Appeal reported that the dismissal was an act of retaliation following report of alleged misconduct. The Tribunal found that the Appellant had failed to establish prima facie evidence to support the claim of retaliation. The ARC report contained a detailed analysis of the retaliation claim, which concluded the proximate reason for the staff member's dismissal was their disposition, attitude, insubordination, evident lack of fit and inability to

adapt their temperament. There was therefore an observable and reasoned basis for the termination of appointment that was untainted by retaliatory motive. As a consequence, the claim of retaliation could not be upheld.

45. The Tribunal's decision of 8 November 2021 rejected the Appeal in its entirety.

46. Actions of the Bank in implementing the Decision: None required.

#### **EBRDAT 2021/AT/04 (Preliminary Decision)**

47. The Appellant filed on 31 August 2021 a Statement of Appeal against the PARD dated 8 June 2021. The Bank's Response was submitted to the Tribunal on 5 October 2021. 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. The Bank produced those documents on 1 November 2021. On 1 December 2021, the Tribunal notified the parties that it would decide this case in plenum. The Tribunal issued a Preliminary Decision on 18 February 2022 remanding the case to the ARC.

48. The case background: On 4 February 2021 the Appellant began working for the EBRD as an Analyst in Cairo Resident Office. The Appellant complained about the Line Manager's treatment and on 9 April 2021 submitted a detailed report of actions by the Line Manager that the Appellant considered harassment, bullying, sexual harassment and abuse of authority.

49. The MD, HR & OD referred the Appellant's complaint to OCCO on 23 August 2019, which, after an initial enquiry, informed the parties that it would undertake a formal investigation of the Appellant's allegations against the Line Manager. In its report dated 26 November 2019, OCCO concluded that there was insufficient evidence to support a factual finding that the Appellant's Line Manager had engaged in the alleged misconduct.

50. On 28 November 2019 the Appellant reported allegations of sexual harassment against the Line Manager to the City of London police. This complaint arose out of an incident on 10 June 2019 when both the Appellant and the Line Manager were in London, and the Line Manager had allegedly invited the Appellant to a hotel room after working hours.



51. On 20 December 2019, the MD, HR & OD informed the Appellant of her decision that the Line Manager's alleged improper behavior was not tantamount to misconduct and that the matter would be referred for managerial action. The Appellant appealed the MD, HR & OD's decision to the Bank's Vice President, Human Resources, who on 7 April 2020 confirmed the original decision of 20 December 2019 taken by the MD, HR & OD.

52. On 14 May 2020, the Appellant was informed by the Director of the Appellant's unit that they would not recommend confirmation of Appellant's appointment as a regular staff member. On that same date 14 May 2020, the Appellant filed a request for administrative review with the President of the Bank under the ARP Directive. The President referred the case to the ARC on 4 June 2020 pursuant to Section IV, Paragraph 6.4.1(e) of the ARP.

53. On 15 May 2020, the Appellant tendered resignation from the Bank.

54. 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 MD, HR & OD and OCCO to provide "written reasons" for their decisions. 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.

55. The Bank's President issued a decision (the "PARD") on 8 June 2021 accepting the ARC's recommendations. The PARD noted that 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 the Appellant's Line Manager. The President awarded the 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.

56. The Appellant filed an Appeal dated 31 August 2021 with the Tribunal, and the Bank filed its Response on 5 October 2021.

57. The Appellant's Statement of Appeal maintained *inter alia* that the investigation by OCCO did not interview all relevant witness, it had failed to review CCTV recordings and OCCO had doubted the Appellant's credibility without reliable evidence. The Appellant contended that the MD, HR & OD's 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.

58. The Appellant considered the ARC report as manifestly erroneous in its findings of fact. The ARC also did not provide justification for the delay in issuance of its report. The Appellant requested the Tribunal to conduct an oral proceeding to hear arguments or to rehear evidence and claimed entitlement to receive compensatory remedies as an employee victimised by incidents of sexual and psychological harassment, bullying and power abuse in a work environment, which had had severe negative consequences on both job and health.

59. The Tribunal did not consider oral argument by the parties or witness testimony to be necessary for the purpose of issuing this preliminary decision. It determined that both the MD, HR & OD and the ARC misinterpreted their responsibilities under the dispute resolution scheme, thereby depriving the Appellant of the due process that she should have been accorded.

60. The Tribunal concluded that the MD, HR & OD's decision that the 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 MD, HR & OD may not abdicate her responsibility as a decision-maker under the RWPs by deferring to the OCCO in harassment cases. Because the MD, HR & OD acted in violation of Bank law, her administrative decision in this case had to be rescinded.

61. The procedures followed by the ARC in this case were also flawed. The ARC expressed due process concerns presented by a case in which it did not have an adequate record upon which to assess the lawfulness of the MD, HR & OD's administrative decision. The ARC requested OCCO to provide written reasons for its decision and asked the MD, HR & OD to provide written reasons for her decision. The Tribunal agreed with the ARC that further information was required but disagreed 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 MD, HR & OD decision.

62. The Tribunal noted that the Bank's Appeals Process Directive (DIR/2021/28) requires this Tribunal to defer to the ARC's findings of fact unless they are manifestly erroneous. In this case findings of fact were based on an OCCO investigator's summary of facts and conclusions, rather than on the underlying OCCO report and evidence. The Tribunal maintained that 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, and it had failed to do so in this case. Therefore, the ARC findings of fact were not binding on the Tribunal in this case, because they were not based on a 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.

63. The Tribunal remanded the case to the ARC to conduct proper fact finding. It directed that the ARC on remand 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 Tribunal said the ARC should interview the Appellant to assess independently the Appellant's credibility and to consider calling additional witnesses as well as determining: (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.

64. The Tribunal concluded that the decision of the Bank's President in this case be rescinded because it is based on a procedurally flawed administrative review process. The case was remanded to the ARC pursuant to the instructions above on 26 February 2020.

65. Actions of the Bank in implementing the Decision: The case was remanded to the ARC pursuant to the Tribunal's instructions above on 26 February 2022.

#### **EBRDAT 2021/AT/05**

66. The Appellant was appointed on 14 July 2016 to the Bank's staff with a two year fixed term contract, which was extended twice with an expiration date of 19 May 2020. The Appellant was notified on 23 April 2020 that on an exceptional basis arising from the

COVID-19 pandemic, the contract would be extended until 31 July 2020 at which point their contract with the Bank would end in light of continuing performance issues.

67. The Appellant submitted to the MD, HR & OD on 10 February 2020 their first RRAD a) contesting the 2019 Performance Review rating of “performing below requirements” and b) referred to discriminative actions by the Line Manager. The RRAD was stayed by the MD, HR & OD on 24 February 2020 pending the outcome of an assessment by OCCO of the allegations raised in the Appellant’s complaint of improper behaviour by the Line Manager pursuant to the Procedure on Harassment-free and Respectful Workplace (PRO/2019/17).

68. On 4 May 2020, the Appellant submitted to the MD, HR & OD a second RRAD which a) contested the decision by the Line Manager to only extend their contract by 3 months; b) alleged that the decision was improperly motivated due to the concerns raised in the first RRAD; and c) requested that as a remedy the contract be renewed until 31 December 2020. On 18 May 2020, the MD, HR & OD communicated the administrative review process would be stayed pending OCCO’s assessment.

69. The Appellant’s employment with the Bank ended on 31 July 2020.

70. On 9 February 2021 the MD, HR & OD informed the Appellant that the complaint made by the Appellant had been investigated with appropriate measures having been taken and the matter was now closed. The MD, HR & OD also referenced that the stays on the first and second RRAD would be lifted. On 5 March 2021 the MD, HR & OD wrote to the Appellant and in her responses rejected both the first and second RRADs. The Appellant was informed in the case of disagreement with the MD, HR & OD’s responses, further review by the President pursuant to Section IV, paragraph 6.4 of the ARP Directive could be sought.

71. On 21 April 2021 the Appellant emailed the MD, HR & OD with a further request noting their disagreement with particular aspects of the second MD, HR & OD response and requested additional remedies. The MD, HR & OD sent an email on 29 April 2021 to the Appellant clarifying should they wish to challenge her second response, the Appellant should request a review from the President no later than 5 May 2021. The Appellant however understood they could challenge the MD, HR & OD’s email of 29 April 2021 and on 1 June 2021, the Vice-President Human Resources (VPHR) received an administrative review request under the ARP Directive from the Appellant stating that they viewed the MD, HR &

OD clarification of 29 April 2021 as a new reviewable administrative decision. The VPHR provided his response on 29 June 2021 determining the VPHR request was not admissible with the clarification that it did not constitute a new reviewable administrative decision and any disagreement to the MD, HR & OD's response dated 5 March 2021 should have been submitted by 5 May 2021. On 28 July 2021 the Appellant submitted a RRAD to the President of the Bank. In her PARD dated 16 August 2022, the President determined the Appellant's request to be inadmissible.

72. The Tribunal received the present Appeal against the PARD on 1 November 2021. The Appellant requested the Tribunal to overturn the contested decision taken by the President that they were out of time, and to direct the Bank to refer the case to the Administrative Review Committee.

73. The Tribunal found the decision of the President to be regular and substantiated according to the law of the Bank. The Appellant had misunderstood the Staff Regulations and had missed the deadline to challenge the two MD, HR & OD decisions in a timely manner.

74. The Tribunal in its Decision of 3 May 2022 considered the Appeal as time-barred and rejected it in its entirety.

75. Actions of the Bank in implementing the Decision: None required.

### **PART III INFORMATION REGARDING THE ADMINISTRATIVE TRIBUNAL, ITS COMPOSITION AND ITS ACTIVITIES IN 2021**

76. On 23 March 2006, the Board of Directors approved the *Review of the Grievance and Appeals Procedures (BDS06-039 final)*, and on 25 July 2006 it approved the implementation of the Appeals Procedures (BDS06-132 and BDS06-132(rev1)). The Appeals Procedures became effective on 3 December 2007 upon the appointment of the judges of the Administrative Tribunal. As of 1 April 2019, the Appeals Procedures were transposed into the new “directive” template and became the Appeals Process Directive (DIR/2019/14).

77. Effective from 9 November 2021 the Directive on the Appeals Process (DIR/2021/28) was amended, in accordance with the terms of the Appeals Process, following consultation with the Chair of the Budget and Administrative Affairs Committee (BAAC), the Staff Council and the President of the EBRD Administrative Tribunal (EBRDAT).

78. The amendments to the Directive are summarised as follows:

- a change to enable the EBRDAT to decide appeals in plenum with all five judges sitting for an appeal (instead of three judges);
- a change to expressly allow the EBRDAT to remand a case back to the ARC for further fact finding where the EBRDAT considers that this is in the interest of justice and efficient resolution of a case; and
- certain consequential changes to reflect the cessation of the role of Vice President, Human Resources in the Bank's top structure.

79. Section 2.02 of the Appeals Process Directive provides as follows:

- (a) The Tribunal shall consist of five members, all of whom shall be nationals of different member states of the Bank.*
- (b) The members shall be persons of high moral character and possess the qualifications required for appointment to high judicial office or be lawyers or arbitrators expert in the areas of employment relations, international civil service or the administration of international organisations.*
- (c) No member shall be a current or former staff member or officer or current or former member of the Board of Directors or the Board of Governors.*
- (d) The members of the Tribunal shall be appointed by the Board of Directors on*

*recommendation of the President after consultation with the Vice President, Human Resources and Corporate Services & Chief Administrative Officer, the General Counsel and the Staff Council. The President may also appoint a selection committee to assist him to identify the recommended appointees. The members of the Tribunal shall serve for a term of three years (except for the first five members whose terms will be staggered as follows: three for two years and two for three years) and may be re-appointed. A member of the Tribunal may only be removed from office by the Board of Directors based on a recommendation of the President (in consultation with other members of the Tribunal) that the member in question is unsuited for further service.*

80. Appointments and re-appointments are submitted to the Board of Directors for approval – details of the documentation can be found in Annex 1.

81. Since the last Annual Report of the President of the Administrative Tribunal, dated April 2020, the Letters of Appointment for Chris de Cooker and Maria Vicien-Milburn have been extended for a further three years.

82. The composition of the Administrative Tribunal is :

- Professor Spyridon Flogaitis was appointed on 3 December 2016. His current appointment end date is 2 December 2022. Professor Flogaitis was elected President of the Tribunal on 10 December 2020.
- Michael Wolf was appointed on 3 December 2016. His current appointment end date is 2 December 2022.
- Chris de Cooker was appointed on 3 December 2018. His current appointment end date is 2 December 2024.
- Maria Vicien Milburn was appointed on 3 December 2018. Her current appointment end date is 2 December 2024.
- Thomas Laker was appointed on 3 December 2020. His current appointment end date is 2 December 2023.

83. Professor Flogaitis attended the BAAC virtually on 5 May 2021 to present his 2020 Annual Report to Board Members. The following topics *inter alia* were discussed: the workload of the Administrative Tribunal and the average length of cases, the quality of the

Bank's administrative processes and the Tribunal's suggested improvements to the Bank's Appeals Process Directive.

84. The Administrative Tribunal met in a hybrid format in November 2021 for their Annual Meeting with representatives of stakeholders in the administrative review process (officers of the Bank, the Staff Council and the Staff Legal Advisor).

85. In this meeting, the Tribunal expressed its agreement to accept an invitation by the Staff Council to attend in person, as soon as the Bank's pandemic travel guidance allows, a Townhall, where Judges could be available to interact with staff on questions about the Administrative Review Process and the Appeals Process.

86. The Administrative Tribunal is assisted in its work by the AT Secretariat, who is appointed by the President of the Bank. The function of the AT Secretariat is documented in the Appeals Process Directive and its Rules of Procedure.

#### **PART IV CONCLUSION**

87. During 2021, the Tribunal received five new appeals. Two joined appeals from 2019 and 2020 remain pending. This compares with six appeals in 2020 and nine appeals in 2019. The appeals of 2021 have presented a variety of issues including those of a procedural nature, e.g. jurisdiction and admissibility as well as appeals related to performance rating issues and alleged abuse of authority, which were referred to OCCO.



**ANNEX 1 BOARD DOCUMENTATION ON APPOINTMENTS AND RE-APPOINTMENTS OF JUDGES SERVING ON THE ADMINISTRATIVE TRIBUNAL DURING 2021**

28/10/2019 BDS19-162 [Appointment of two members of the Administrative Tribunal:](#)  
Michael Wolf and Professor Spyridon Flogaitis (3 December 2019 - 2 December 2022)

10/11/2020 BDS20-186 [Appointment of a member of the Administrative Tribunal](#)  
Thomas Laker (3 December 2020 – 2 December 2023)

01/11/2021 BDS21 -148 [Reappointment of two members of the Administrative Tribunal \(ebrd.com\)](#)  
Christopher De Cooker and Maria Vicien-Milburn (3 December 2021 - 2 December 2024)

## ANNEX 2 CURRICULA VITAE OF JUDGES SERVING ON THE ADMINISTRATIVE TRIBUNAL DURING 2021

**Professor Spyridon Flogaitis, President of the EBRD Administrative Tribunal** (Greek) is Professor of Administrative Law at the Faculty of Law, University of Athens, Director of the European Public Law Organization, Athens, Greece and Honorary Fellow at Wolfson College, University of Cambridge. He currently is Vice-President of the European Space Agency's Appeals Board, a member of the European Organisation for the Exploitation of Meteorological Satellites' Appeals Board as well as a member of the European Centre for Medium-Range Weather Forecasts' Appeals Board. He is a former President of the United Nations Administrative Tribunal. Also, Professor Flogaitis is Attorney at Law at the High Court and the Council of State, Greece and Academic Bencher of the Inner Temple, London. He has served three times as Minister of Interior or Alternate Minister of Foreign Affairs in electoral periods in his country.

**Mr Chris de Cooker** (Dutch) has more than forty years of direct experience in international administrative law. He was an academic for nine years at the University of Leiden, where he developed a special course on international administration. Between 1984 and 2011 (when he retired), Mr. de Cooker worked at the European Space Agency in a number of posts, including Head of Staff Regulations and Central Support Division and Head of International Relations Department. Since 2010, he has been a judge at a number of international arbitration and administrative tribunals. He is President of the NATO Administrative Tribunal and a judge at the Asian Development Bank Administrative Tribunal, the GAVI Appeals Tribunal and the OECD Administrative Tribunal. He was Chair of the Appeal Board of the Global Fund from 2016-2020 and is at present Chair of the BIPM Appeals Committee and Mediator in ITER. He has been advising many international organisations, in particular on their respective internal justice systems.

**Mr Thomas Laker** (German) has over 30 years of experience as a Judge of administrative law courts. For the past 11 years, Mr Laker has served as a Judge on various international administrative tribunals for several different international organisations, among them, the United Nations, the United Nations Relief and Works Agency for Palestine Refugees, the Organization for Security and Co-operation in Europe, the Technical Centre for Agricultural and Rural Cooperation, the International Tribunal for the Law of the Sea and the Kosovo Specialist Chambers. Mr Laker was among the first generation of judges to have established

the new system of administration of justice at the United Nations and served as the President of the United Nations Dispute Tribunal twice, from 2010-2011 and from 2013-2014.

**Ms Maria Vicien-Milburn** (Spanish and Argentinian) is an independent international arbitrator in commercial and investment disputes, and a specialist in public international law. She is a member of the World Bank Sanctions Board, a judge of the Administrative Tribunals of the Inter-American Development Bank, and serves on the Independent Advisory Oversight Committee (IAOC) of the World Intellectual Property Organisation (WIPO). She has over 30 years' experience as a senior international civil servant at the United Nations. She was General Counsel of the United Nations Economic, Social and Cultural Organisation (UNESCO) between 2009 and 2014, and prior thereto between 1999 and 2009 Director and Deputy of the General Legal Division, Office of the Legal Advisor of the United Nations She served for 14 years as the Registrar of the United Nations Administrative Tribunal. She has also been engaged by the International Criminal Court on a short term assignment as a dispute resolution expert.

**Mr Michael Wolf** (American) has been an arbitrator and mediator since 1995, specializing in labour, employment and pension benefit disputes. He currently serves as the Chair of the International Monetary Fund Grievance Committee and as Chair of the Board of Appeal for the Pan American Health Organization. He is also a member of the Administrative Tribunal for GAVI (formerly the Global Alliance for Vaccines and Immunization). He was previously Chair of the US Government Accountability Office Personnel Appeals Board and a member of the District of Columbia Employee Appeals Board. Prior to his service as an arbitrator, Mr. Wolf was in the private practice of law, specializing in labour, employment and securities litigation; he also served six years with the US Department of Justice supervising the prosecution of Nazi war criminals. He is the co-author of the book Religion in the Workplace: A Comprehensive Guide to Legal Rights and Responsibilities.

**ANNEX 3 GLOSSARY OF TERMS**

Appeal	Statement of Appeal
ARC	Administrative Review Committee
ARP	Administrative Review Process
ARP Directive	The Bank's Directive on the Administrative Review Process (DIR/2022/1 and DIR/2019/16)
AP Directive	The Bank's Directive on the Appeals Process (DIR/2021/28 and DIR/2019/14)
CCO	Chief Compliance Officer
CDRP	The Bank's Directive on Conduct and Disciplinary Rules and Procedures (DIR/2019/12 and DIR/2021/29)
EBRD	European Bank for Reconstruction and Development
EBRDAT	EBRD Administrative Tribunal
Leave Directive	The Bank's Directive on Leave (DIR/2020/1)
MD, HR & OD	Managing Director, Human Resources & Operational Development
OCCO	Office of the Chief Compliance Officer
PARD	President's Administrative Review Decision
RRAD	Request for Review of an Administrative Decision
Tribunal	EBRD Administrative Tribunal