IN THE APPEAL BEFORE THE
EBRD ADMINSTRATIVE TRIBUNAL

Jeff Jeter and Lawrence Sherwin
Appellants

v.

European Bank for Reconstruction and Development
Respondent

Decision by the Tribunal

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15 November 2014

Procedural history

1. On 8 May 2014 Mr Jeff Jeter and Mr Larry Sherwin (the "Appellant" and together the "Appellants") filed a Staff Member's Statement of Appeal (the "Statement of Appeal") under the Appeals Procedures established pursuant to Resolution No. 102 of the Board of Governors and Section 10 of the staff Regulations (the "Appeals Procedures") against the European Bank for Reconstruction and Development (the "Bank" or the "Respondent"), challenging an Administrative Review Decision in the form of a decision made by the President on 11 February 2014 (the "President's Decision").

2. The President's Decision was rendered in relation to the grievance GC/05/2011, initiated by the Appellants on 19 October 2011 under the Grievance Procedures. The Grievance Committee issued a Report and Recommendation to the President dated 20 January 2014 (the "Grievance Committee's Report"). The President considered the Report and Recommendation but did not follow them.

3. In the Statement of Appeal, the Appellants requested inter alia that the Respondent be ordered to produce certain documents relating to the remuneration practice of the Bank's Representation Office in Tunis, and that an oral hearing be held. The Appellants further requested that their respective appeals be joined in one single proceeding pursuant to article 7.03(a) of the Appeal Procedures.

4. On 16 June 2014 the Respondent submitted its Response to the Statements of Appeal (the "Bank's Response"). The Respondent inter alia objected to the Appellants' request that documentation on the remuneration practice of the Tunis office be produced, and deemed an oral hearing not to be necessary. The Respondent did not object to joining the Appellants' proceedings into a single proceeding, and submitted a single response to both appeals.

5. The Administrative Tribunal found that the conditions for filing an appeal pursuant to the Appeals Procedures are satisfied.

6. The Tribunal examined the Parties' submissions, the President's Decision, the Grievance Committee's Report and the transcripts from the oral hearing held before the Grievance Committee on 1, 2 and 3 July 2013. On the basis of this examination and of internal deliberations, the Tribunal deemed it necessary to receive further documentation and some clarifications, before making a decision on the need to hold an oral hearing. Inter alia, the Arbitral Tribunal, having noted that the Bank's Response affirmed that the Bank does not practice any salary enhancement or grossing up in the Tunis office or in the Bratislava office,

deemed it advisable to ask the Bank to confirm and substantiate its statements in this respect.

7. On the basis of the foregoing, on 9 July 2014 the Tribunal issued a Procedural Order No 1 (the "Procedural Order No 1"), ordering that each of the Appellant's proceedings be joined in one single proceeding and that certain clarifications and substantiations be made by the Parties (inter alia, that the Bank substantiate its statements on the remuneration practice of its Bratislava and Tunis offices).

8. On 13 August 2014 the Appellants submitted the clarifications as requested by Procedural Order No 1 (the "Appellant's Clarifications"), mainly regarding the costs of this appeal; on 29 August 2014 the Respondent submitted the requested documentation and the clarifications as requested by Procedural Order No 1 (the "Respondent's Clarifications"); and on 14 October 2014 the Appellants submitted their Response to the Respondent's Clarifications (the "Appellants' Response").

9. The Tribunal examined the Parties' submissions and the documentation produced, and held internal deliberations. The Tribunal considered article 7.01 of the Appeals Procedures, stating that the Tribunal shall decide an appeal on the basis of the appeal documents and the finding of facts made by the Grievance Committee in the Grievance Committee's Report. The Tribunal considered that the issues in dispute had been thoroughly discussed in the written submissions; the Tribunal has had access to the transcripts from the three day-oral hearing held before the Grievance Committee. The Tribunal also considered the Appellants' request in their Response that an oral hearing would be even more necessary as a consequence of their having introduced additional documents and witness statements following substantiation by the Bank of the Bank's statements relating to the remuneration practice in the Tunis office, as was requested in Procedural Order No 1.

10. The Tribunal is of the opinion that the Bank's remuneration practice in the Tunis office does not have a bearing on the issues in dispute. The Tribunal has also considered that according to Rule 7.02 (a) of the Appeals Procedures an oral hearing is to be held only in exceptional cases. The Tribunal decided that it was not necessary to hold an oral hearing.

11. On 29 October 2014 the Tribunal notified the Parties that an oral hearing would not be held.

The dispute

12. The dispute concerns the Appellants' request that the remuneration they receive from the Bank compensate for the fact that their salaries are

subject to taxation in the Appellants' home country, the United States of America.

13. According to article 53(6)[1] of the Agreement Establishing the Bank of 28 March 1991 (the "AEB"), the Bank shall levy an internal tax for the benefit of the Bank on salaries and emoluments paid by the Bank to its directors, officers and employees. Article 53(6) of the AEB further provides that from the date on which the Bank's internal tax is levied, these salaries shall be exempt from national income tax. The basis for this dispute arises from article 53(7) of the AEB.[2] This provides that a member State may, notwithstanding article 53(6), retain the right to tax salaries and emoluments paid by the Bank to citizens of that State. The last sentence of article 53(7) provides expressly that the Bank shall not make any reimbursement of such national taxes. The US retained the right to tax salaries and emoluments paid by the Bank to employees who are US citizens. The Appellants are US citizens. Therefore, the Appellants' salaries are subject to two taxes: the Bank's internal tax pursuant to article 53(6) of the AEB, and the US income tax pursuant to article 53(7). The Appellants seek to obtain compensation for this double taxation.

14. The Grievance Committee followed the Respondent's line of reasoning regarding the absence of any obligation to compensate for national tax and the unlawfulness under article 53(7) of the AEB of any reimbursement by the Bank of national tax, including grossing up, salary enhancement or other mechanism having the same function. The Grievance Committee found that there had been a practice of salary enhancement in the Bratislava office and pointed out that this practice violated article 53(7) of the AEB. As it was an unlawful practice, under article 3.02(e) of the Appeals Procedures it could not be invoked as a basis for ordering the Respondent to extend that practice to employees who are US citizens. However, the Grievance Committee considered that the imposition of both the internal tax and national tax is discriminatory against the employees subject to such a regime, and recommended that the Bank reimburse the internal tax already paid by US employees and that the Bank cease to impose internal tax on the salaries of these employees.

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[1] Article 53(6) reads: «Directors, Alternate Directors, officers and employees of the Bank Shall be subject to an internal effective tax for the benefit of the Bank on salaries and emoluments paid by the Bank, subject to conditions to be laid down and rules to be adopted by the Board of Governors witihn a period of one year from the date of entry into force of this Agreement. From the date on which this tax is apllied, such salaries and emoluments shall be exempt from national income tax. The members may, however, take into account the salaries and emoluments thus exempt when assessing the amount of tax to be applied to income from other sources.»

[2] Article 53(7) reads: « Notwithstanding the provision of paragraph 6 of this Article, a member may deposit with its instrument of ratification, acceptance or approval, a declaration that such member retains for itself, its political subdivisions or its local authorities the right to tax salaries and emoluments paid by the Bank to citizens or nationals of such member. The Bank shall be exempt from any obligation for the payment, withholding or collection of such taxes. The Bank shall not make any reimbursement of such taxes.»

15. The President did not accept the Grievance Committee's recommendation.

Summary of the Appellants' position

16. The Appellants challenge the President's Decision on two grounds: procedural and substantive. Their procedural challenge arises from an alleged violation of article 1.03(a) of the Appeals Procedures. This provides that a decision of the President taken at the end of an Administrative Review process should be made on the basis of the Grievance Committee's Report. The Appellants argue that the President did not sufficiently take into consideration the recommendations contained in the Grievance Committee's Report.

17. The Appellants substantive challenge refers, inter alia, to the fundamental principle of equal pay for equal work, as well as to the Bank's remuneration practice in the Bratislava and Tunis offices, and argues that the President's Decision is unlawful and constitutes a breach of the Appellants' contracts of employment.

18. The Appellants refer to the fundamental principle of international administrative law, requiring equal pay for equal work. The Appellants interpret this principle as applying not only to gross, but also to net pay. There should not merely be formal equality but equality of outcomes. Applying this reasoning, the Appellants argue that it is a fundamental principle that the Bank's remuneration system ensure that its employees are paid equally when they carry out comparable work, and that the equality of pay be assessed not on the basis of the gross salary, but on the basis of the net salary, after all taxes have been deducted. Since the salaries of US employees are subject both to the Bank's internal tax and to the US national tax, the net pay received by US employees is lower than the net pay received by the other employees whose salaries are only subject to the internal tax.

19. The Appellants point out that the Slovak Republic and Tunisia have, like the US, retained the right to tax salaries and emoluments paid by the Bank to employees who are their citizens. The Appellants argue that the Respondent has established equalization schemes that permit its employees from the Slovak Republic and from Tunisia to receive the same net pay as if their salaries had not been subject to national taxation. The Appellants argue that this constitutes unlawful discrimination of US employees, who are in the same situation of having to pay national tax, but who do not benefit from any equalization scheme. The Appellants argue that the Bank has in the past practised salary enhancement in the Bratislava office and that the Bank has recently implemented a similar

practice in the Tunis office. The Appellants allege that the Respondent has given misleading and false explanations regarding its remuneration practice in the Tunis office. The Appellants produced written evidence, including written witness statements, designed to show that the Respondent knowingly and willingly practices salary enhancement in the newly established Tunis office, and has attempted to conceal this practice.

20. The Appellants do not consider article 53(7) to be an obstacle to their requests. Firstly, they contend that the AEB does not form part of the law applicable in this dispute as it is not referred to in article 3.02 of the Appeals Procedures. Secondly, relying on the aforementioned understanding of the fundamental principle of equal net pay for equal work, as well as on the principle against discrimination, the Appellants argue that article 53(7) of the AEB prohibits reimbursement of national tax, but not grossing up, enhancement of salary or other forms for equalization schemes. The Appellants argue that grossing up or salary enhancement should be allowed under article 53 (7) of the AEB if this provision is interpreted so as to be consistent with the fundamental principle of equal net pay for equal work and the fundamental principle against discrimination.

21. The Appellants seek compensation for the double taxation, primarily by requesting that the Bank increase their salaries, so that their net salary, after the US tax has been applied, corresponds to the level of salary that the Appellants would have had if the US had not imposed national tax pursuant to article 53(7) of the AEB. Alternatively, the Appellants request that the Bank reimburse the internal tax paid to the Bank by US employees and cease to impose internal tax on the salary paid to US employees.

22. The Appellants also argue that the calculation of the internal tax is made according to a system that, due to inadequate consideration of currency fluctuations, leads to discrimination. This argument was made in the Appellants' Response as a comment to the Respondent's clarification regarding the rate of the internal tax as requested in Procedural Order No 1. The Tribunal notes that the Appellants do not seem to link this argument to any specific request for relief.

23. The Appellants seek an award of full reasonable expenses and legal costs incurred in presenting the appeal. They rely on article 8.06(a) of the Appeals Procedures, and request that full costs be awarded irrespective of whether the appeal is successful or not.

Summary of the Respondent's position

24. The Respondent rejects both lines of arguments made by the Appellants. The procedural challenge has no merit as the President is required to consider the recommendations made in the Grievance Committee's Report, but these are not binding.

25. Regarding the substantive challenge, the Respondent disagrees with the Appellants' interpretation of the principle of equal pay for equal work. The Respondent argues that the principle of international administrative law applies to pre-tax pay and not to net pay. As long as the gross salaries paid for comparable work are equal, the fundamental principle of equal pay for equal work is complied with. The Respondent further argues that there is no rule in the Bank's internal law establishing a right to equal net pay.

26. The Respondent rejects that any grossing up or other form for compensation for national tax is due or even lawful under article 53 of the AEB. The Respondent argues that article 53(7) of the AEB, which prohibits the Bank from reimbursing national tax paid pursuant to article 53(7), is meant to prevent the Bank's financial resources being used to reimburse national income tax and thus subsidise the Members that do levy income tax on its citizens. According to the Respondent, grossing up the salary of employees who are required to pay national tax, so that their net salary is equal to the salary they would have received if no national tax was imposed, has the same function as reimbursing national tax. This is prohibited under article 53(7) of the AEB.

27. Regarding the salary enhancement practice applied in the Bratislava office, the Respondent does not deny that it has taken place, but it contends that this practice has ceased and it provided evidence to substantiate this. Regarding the Tunis office, the Respondent accepts that salary enhancement has been practised in respect of external consultants who were not employees of the Bank. These consultants do not fall within the scope of the prohibition contained in article 53(6) of the AEB. However, the Bank submits that, when these external consultants acquired the status of Bank employees, their salaries became subject to the regime of article 53(6) of the AEB and there was no salary enhancement as alleged by the Appellants.

28. The Respondent argues that under article 53(6) of the AEB it has no authority to exempt any of its employees from the internal tax. Article 53(6) obliges the Bank to impose the internal tax and there is no basis for the Bank to waive the internal tax or grant any exemption from it. Pursuant to this provision, salaries shall be exempt from national tax when the Bank has established the internal tax. However, the reverse does not apply, i.e. that the Bank shall exempt an employee from being liable to the internal tax if a State imposes national tax according to article 53(7) of the AEB.

29. The Tribunal, based on certain comments made in the Grievance Committee's Report, sought clarification of how the aforementioned obligatory character of the internal tax may be reconciled with the practice of deducting from the basis for calculating the internal tax the lump sums paid to retirees. The Respondent explained that lump sums paid under the Bank's retirement plan are considered to be emoluments under article 53(6) of the AEB; their deduction from the basis for calculating the internal tax nevertheless does not violate article 53(6), because this provision applies to emoluments in their entirety, and not to part of emoluments, such as the lump sums paid under the retirement plan.

30. As regards the costs connected with the appeal, the Respondent requests the Tribunal to calculate the costs that the Respondent shall be ordered to pay pursuant to article 8.06 of the Appeals Procedures taking into account the reasonableness of the amount in view of, inter alia, the complexity of the case and the extent to which the Appellants were successful in their appeal.

The Tribunal's evaluation

31. The Tribunal shares the Grievance Committee's evaluation regarding the scope of the principle of international administrative law of equal pay for equal work. In particular, the Tribunal is satisfied that this principle does not imply that tax reimbursement is a fundamental principle of international administrative law. Thus, the Tribunal is of the opinion that, absent a specific rule in the Bank's internal law establishing a right to equal net pay, a remuneration system whereby the Bank imposes its internal tax and a member State that has retained such right imposes its national tax, does not violate international administrative law, even though the system does not provide for equalization schemes such as grossing up or salary enhancement.

32. The Tribunal turns now to the question whether the internal law of the Bank contains a rule entitling the employees to tax reimbursement. Not only there is no such express rule, article 53(7) of the AEB expressly prohibits any reimbursement of national tax. The Tribunal has no doubt that the AEB needs to be taken into consideration when evaluating the ability of the Bank to reimburse national tax, as this is the very instrument that determines the Bank's power and competence. This is no different from what a constitution is for a government or the articles of association are for a company. An action undertaken by the Bank in violation of the AEB would exceed the Bank's powers and would be ultra vires.

33. Article 53(7) of the AEB prohibits reimbursement of national tax. The Tribunal is satisfied that such prohibition must be interpreted so as to include practices that, though not directly consisting in reimbursement, have the same purpose and effect as reimbursement and, particularly, have the same impact on the budget of the Bank as reimbursement. Grossing up and salary enhancement have obviously the same function and economic impact as tax reimbursement, and must therefore be deemed to violate the prohibition in article 53(7) of the AEB.

34. The Tribunal now turns to the Appellants' request that the Bank exempt the US employees from the internal tax. This request corresponds to the recommendation made in the Grievance Committee's Report, and in this respect the Tribunal's evaluation deviates from the Grievance Committee's evaluation. Having established in paragraph 31 that such a request may not be founded on the international administrative law principle of equal pay for equal work, as this principle applies to pre-tax remuneration, it would be necessary to find a foundation for this request in the Bank's internal law.

35. Even assuming that the prohibition of tax reimbursement contained in article 53(7) does not cover exemption from internal tax (which, as seen in para 33, shall be denied), a systematic interpretation of the AEB shows that article 53(7) was structured so as to ensure that the Bank is not deprived of the proceeds from the internal tax even when a member State retained the right to impose national tax. The same is shown by an interpretation based on the purpose of the AEB, as confirmed by its preparatory works.

36. In particular, the wording of article 53(6) does not imply that a necessary condition for the Bank levying its internal tax is that a State has not made a reservation pursuant to article 53(7). The provision says that the exemption from national tax is predicated on the Bank levying the internal tax. The Tribunal does not find it a necessary implication that also the opposite shall apply, i.e. that no internal tax shall be levied if a State makes a reservation under article 53(7) and imposes national tax.

37. Furthermore, the last sentence of 53(7) prohibiting tax reimbursement of national tax has the function of excluding that the circumstance that a State retained the right to impose national tax has a negative impact on the Bank's economy. Evidence of some of the written records of the negotiations surrounding the drafting of the AEB demonstrates that there were two very different approaches to how taxation should be treated: certain delegations proposed that the internal tax should be solely for the benefit of the Bank, whereas others proposed that member States should retain the competence to tax the Bank's employees. Sub-sections (6) and (7) of article 53 are the result of a compromise between these two approaches. Core to these provisions is a) that the Bank is required to impose an internal tax, which accrues to the Bank without exemption, and

b) that member States are required to exempt Bank employees from national income tax once the Bank imposed its internal tax.

38. Those States who desire to impose their national tax notwithstanding the Bank's internal tax are requested to reserve their right to do so. The Bank is not allowed to reimburse such national tax. The preservation of these States' right to impose their national tax contradicts the principles relating to the Bank's internal tax, but it does not exclude imposition of the Bank's internal tax. That this was the intended result is unambiguous. This compromise is confirmed in a fax from the Secretariat of the conference discussing the draft of the AEB, dated 19 March 1990. This fax also confirms that the last sentence of article 53(7), prohibiting tax reimbursement, was meant to avoid that the Bank should be "worse off" as a consequence of a State imposing national tax. If the Bank does not levy its internal tax as a consequence of a State imposing national tax, the revenues for the Bank would decrease. The Bank would be worse off as a consequence of the State imposing national tax and this would run counter the purpose of the provision.

39. Article 53(6) and (7) of the AEB, when interpreted systematically, shows that the member States agreed that if a member State were to impose national income tax, the adverse consequences would have to be borne by the citizens of that State and not by the Bank. This is confirmed by the preparatory negotiations as discussed in paragraphs 37 and 38.

40. On its analysis of the purpose of article 53(6) and (7), the Tribunal concludes that the Bank has no authority to exempt from internal tax the salaries that are subject to national tax under article 53(7) of the AEB.

41. As set forth in paragraph 29, the Grievance Committee's Report questioned that the aforementioned obligatory character of the internal tax may be reconciled with the practice of deducting the lump sums paid to retirees from the basis for calculating the internal tax. The Respondent explained that lump sums paid under the Bank's retirement plan are to be considered emoluments under article 53(6) of the AEB; their deduction from the basis for calculating the internal tax nevertheless does not violate article 53(6), because this provision applies to emoluments in their entirety, and not to part of emoluments, such as the lump sums paid under the retirement plan. The Tribunal finds this explanation unconvincing, and is inclined to consider that the lump sums connected with the retirement plan should be considered to fall within the scope of article 53(8) of the AEB.[3] Pursuant to this provision, the internal tax shall not apply to pensions and annuities paid by the Bank. If interpreted in this way, deducting the retirement plan lump sum from the base for the internal tax does not contradict the obligatory character of the internal tax.

[3] Article 53(8) reads: « Paragraph 6 of this Article shall not apply to pensions and annuities paid by the Bank. »

42. The Tribunal turns to the question whether the Bank's past salary enhancement practice in the Bratislava office, or the Bank's continuing salary enhancement practice in the Tunis office (if any), provide a sufficient basis to invoke breach of the principle against discrimination and to request that the practice be extended to US citizens. The Tribunal shares the Grievance Committee's opinion that any such practice would be inconsistent with article 53(7) of the AEB. An unlawful practice may not be considered as part of the applicable law according to article 3.02(e) of the Appeals Procedures. Therefore, any past practice of salary enhancement applied in the Bratislava office and any alleged practice of salary enhancement applied in the Tunis office are not relevant to these proceedings.

43. The Tribunal is mindful that if a practice of salary enhancement is implemented by the Bank in the Bratislava or Tunis office, the Tribunal would not have the jurisdiction to rule on it within the scope of the cause of action on which the present dispute is based. However, the Tribunal is of the opinion that it should not ignore the contention that unlawful practices were applied by the Bank. In the light of these considerations, the Tribunal requested the Respondent, in Procedural Order No 1, to substantiate the submissions contained in the Bank's Response, namely that salary enhancement is not practiced in the Bratislava or the Tunis office.

44. On the basis of the substantiation made in the Respondent's clarifications, the Tribunal is satisfied that the past practice of salary enhancement in the Bratislava office has fallen away.

45. Regarding the Tunis office, the Tribunal acknowledges the Respondent's explanation of its remuneration policy, and that this does not amount to salary enhancement. The Tribunal also acknowledges that the Appellants have tendered evidence that tends to show that the Respondent is indeed practicing salary enhancement in the Tunis office, and is trying to conceal it.

46. The Tribunal is mindful of the seriousness of the Appellants' allegations regarding the Respondent's conduct, if the Appellants' allegations are true. The Tribunal is also aware that the most significant parts of the evidence presented by the Appellants stem from a source that has a vested interest in the outcome of these proceedings, and that the credibility of the evidence has not been tested.

47. However, the matter falls outside the scope of the Tribunal's competence in this case. Even if it was established that the Tunis office practices salary enhancement, such a practice would violate article 53(7) of the AEB. As unlawful practices cannot constitute a source of the law applicable by the Tribunal under article 3.02 of the Appeals Procedures, any salary

enhancement practice would not be relevant to the subject matter of this dispute.

48. Although the past practice of salary enhancement in the Bratislava office and the alleged practice of salary enhancement in the Tunis office are not relevant to this dispute, the Tribunal expects that the Bank is mindful of its duty to comply with its internal law and to respect the authority and the role of the Tribunal, and that therefore it acts in good faith and complies consistently with the principles underlying the Bank's internal legislation and international law.

49. As for the costs, the Tribunal refers to the last sentence of article 8.06(a) of the Appeals Procedures, pursuant to which under exceptional circumstances the respondent may be ordered to pay the appellant's legal costs even when the appeal is not successful. This is such a case.

50. The Appellants have not quantified the costs that they have incurred. The Tribunal directs the Parties to conclude an agreement on the reasonable costs, taking into consideration the complexity of the case, the amount of work carried out and good billing practice. Should the Parties not reach an agreement on the legal costs, the Appellants may submit a detailed statement of costs to the Tribunal; the Respondent will be given the possibility to present its comments, and on the basis of these submissions, the Tribunal will decide the legal costs.

Decision

On the basis of the foregoing, the Tribunal, acting by a panel composed of Judges Sarah Christie, Giuditta Cordero-Moss (President) and Stanislaw Sołtysiński, hereby decides that the Appellants' claim that the Respondent violated the international administrative law principle of equal pay for equal work and discriminated against them on grounds of nationality by refusing to compensate for US national tax, is not well founded and is dismissed.

The Respondent is ordered to pay the Appellants' reasonable legal costs.

15 November 2014

For the Administrative Tribunal

Giuditta Cordero-Moss
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