

EBRD ADMINISTRATIVE TRIBUNAL

Preliminary hearing on jurisdiction held at EBRD, London, on 2 July 2004

The Appellant(s) (in attendance) represented by Charles Ciumei, Counsel, and Stephen Gummer, Solicitor

The Respondent (in attendance through Hanna Gronkiewicz-Waltz, Vice-President, Human Resources and Administration, and Paolo Gallo, Director of Human Resources) represented by John Cavanagh QC and Lee Marler, Office of the General Counsel

President of the Administrative Tribunal: Professor Roy Lewis
Assessors: Rupert Macey-Dare, Senior Manager, Finance Department
Dilek Macit, Head of Consultancy Services Unit
Secretariat: Patricia Bounds

Extract of Decision on Jurisdiction rendered by the Administrative Tribunal on 3 September 2004 in the case 2004/AT/03. The complete Decision on Jurisdiction is not subject to publication in order to preserve the essential anonymity of the appellant(s) and other staff members.

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The Tribunal's framework for analysing the jurisdictional issue

46. The Tribunal must determine whether, within the meaning of section 1.03(a) of the GAP, the Respondent could be said to have taken "an administrative decision", either "individual" or "regulatory", "in the administration of the staff of the Bank". If the Respondent took an administrative decision, the Tribunal has "competence" to entertain an appeal "in which a staff member claims he has been adversely affected" by that decision: section 4.01 of the GAP. In interpreting sections 1.03(a) and 4.01, the Tribunal will have regard to the purpose of the GAP stated in section 1.01(b), that is, the provision of an effective and efficient procedure by which staff members can seek redress against administrative decisions, the implementation of which will materially affect their private rights.

47. It is to be noted that the definition of regulatory decision in section 1.03(a) is “any rule concerning the terms and conditions of staff employment”. “Rule” is not defined. However, in the specific context of “terms and conditions of employment”, the Tribunal considers that a “rule” is likely to involve a clear element of formal or constitutional decision-taking, or formal or constitutional approval of a decision. In the light of this requirement, it is difficult to see how the alleged conduct in respect of any of the Appellant(s)’ 22 heads of complaint on the part of XX and XX, or indeed the Bank, involved or could have involved a regulatory decision.
48. The question is therefore whether there has been one or more individual administrative decisions taken in the administration of the staff of the Bank. Curiously, the GAP does not provide a definition of an individual administrative decision. There is an express definition of a decision of a discretionary nature, namely, “any decision that constitutes an administrative decision and has been made in the exercise of an officer’s discretionary authority”. The definition of a decision of a discretionary nature is important in the application of the GAP section 4.04 (guiding principles). It does not necessarily equate with an individual decision in every case. However, in practice, most individual administrative decisions are likely to be decisions of a discretionary nature. It may be said, therefore, that an individual administrative decision normally includes a decision of a discretionary nature.
49. In accordance with section 1.03(a), the individual administrative decision must be taken in the administration of staff. The Tribunal considers that a decision taken on a matter of corporate governance, or policy or an operational issue, at least a decision on such matters taken without ulterior motive, would not be a decision taken in the administration of staff. It would normally be highly undesirable and wholly impracticable for the Tribunal to determine matters of corporate policy and banking operations. Further, the Tribunal accepts the Respondent’s submission that a matter of corporate governance etc may be the subject of disagreement between staff members, and further that such disagreements may be articulated in an aggressive and personalised way without necessarily involving the harassment of one member of staff by another. This may be especially so where the leading protagonists have a tendency towards expressing themselves aggressively.
50. However, the Tribunal considers that the phrase “in the administration of the staff of the Bank” does not restrict the subject matter of administrative decision-making to a narrow category of decisions on issues of personnel or human resources management. In any particular case, including cases where overly aggressive language may have been used, the test is whether in the circumstances the purpose or principal purpose of the decision was corporate governance, policy and/or operational matters, in which case the Tribunal will not have jurisdiction, or whether the true purpose or true principal purpose of the decision was to harass, bully, or discriminate against one or

more individual employees. In the latter case, corporate governance, policy and operations provide the mere context for the making of a decision in the administration of staff.

51. At the hearing the parties made submissions as to whether alleged harassment in the form of a purely verbal comment might constitute an administrative decision. It is to be noted that in its written submission the Respondent advanced a general proposition that allegations of bullying and harassment, including in particular the making of derogatory comments, were within the ambit of the PRISM and were necessarily outside the ambit of the GAP. That proposition was not advanced by the Respondent in its oral submissions, during which it was conceded that harassment or bullying in the form of say derogatory racist or sexist remarks could, depending on the context, amount to an administrative decision within the meaning of the GAP. For the avoidance of doubt, the Tribunal rejects the general proposition advanced in the Respondent's written submission. Derogatory comments may fall within the jurisdiction of the Tribunal under the GAP and there is no conceptual difficulty in that regard. Specifically, an officer of the Bank may take a decision to harass one or more members of staff, and such a decision or series of decisions may be taken in relation to each of a number of separate incidents of harassment. The Bank in turn will be liable for the officer's actions unless it has clearly repudiated them.
52. Furthermore, it cannot be said that harassment, if it occurs, is inherently suitable for processing under the PRISM to the exclusion of the GAP. Section 4.02(b) of the PRISM expressly envisages the possibility of ensuing proceedings under either the DP or the GAP. In any event, the stated purpose of the PRISM, with its emphasis on the interests of the Bank, is different from that of the GAP. This is of course without prejudice to the Respondent's separate argument (considered below) that in this case the Tribunal should dismiss the Appellant(s)' complaint for cause pursuant to GAP section 9.02.
53. The final point of general analysis on jurisdiction concerns the adverse affect of a decision on the individual staff member. According to the GAP section 4.01, the Tribunal has competence when a staff member "claims" he has been "adversely affected by an administrative decision". This has to be read in conjunction with section 1.01(b), which states that the purpose of the GAP is to allow staff members to seek redress against an administrative decision, the implementation of which will materially affect the staff member's "private rights". The Tribunal considers that in many cases section 1.01(b) will not significantly raise the threshold for making a claim under the GAP. Thus an allegation of harassment or bullying, in the form of derogatory remarks or otherwise, is likely to involve a related allegation of breach of the express contractual duty, embodied in section 3(b) of the Staff Regulations, that the Bank must "at all times act with fairness and impartiality in its relations with staff

members". A breach of the contract of employment is a breach of the private rights of the staff member.

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Professor Roy Lewis
President
Administrative Tribunal
3 September 2004