

**EUROPEAN BANK FOR RECONSTRUCTION AND
DEVELOPMENT**

ADMINISTRATIVE TRIBUNAL

Appellant v EBRD (Respondent)

DECISION ON LIABILITY AND JUDGMENT

HEARING held at EBRD, London Headquarters, on 8 days: 9, 12-16 June and 12-13 October 2006

APPELLANT (in attendance) assisted by Charles Ciumei, Counsel, and Ceri Lawrence, Solicitor

RESPONDENT (in attendance through Brigita Schmognerova, Vice President, Human Resources & Administration and Sheila Bates, Client Manager, Human Resources) assisted by John Cavanagh QC, Mathew Harvey, Counsel, Office of the General Counsel (OGC) and Alba Bozo, Associate, OGC

ADMINISTRATIVE TRIBUNAL

President:

Professor Roy Lewis

Assessors:

Frank Ryan, Manager, Business Information Centre

Dilek Macit, Director, Consultancy Services Unit

Secretariat:

Anne Dickinson, Lucie Newman, Angela Golding and Cecilia Russell

Pursuant to section 6.01 of the Grievance and Appeals Procedures (“the GAP”) the President of the Tribunal consulted the Assessors during the hearing and by telephone conference on 5 January 2007.

DECISION ON LIABILITY

As regards the Respondent's decision (a) to transfer the position of [Position 1, Part A] from [Office 1] to [Office 2] and (b) to reassign the Appellant from the position of [Position 1, Part A] and [Position 1, Part B] to [Position 2](retaining the title of [Position 1, Part A]) :

- (1) The Appellant's claim that the Respondent's decision discriminated against him in an improper manner within the meaning of section 4.04(b) of the GAP is dismissed.**
- (2) For the avoidance of doubt, to the extent that the Appellant has any basis other than discrimination in an improper manner for claiming that the Respondent's decision victimised him because he raised staff concerns over the Respondent's pension provision, the Respondent's decision was not taken on the grounds that the Appellant so acted and was not in any way related to the pension issue.**
- (3) The Appellant's claim that the Respondent's decision was arbitrary within the meaning of section 4.04(b) of the GAP is dismissed.**
- (4) The Appellant's claim that the Respondent's decision was carried out in violation of the applicable procedure within the meaning of section 4.04(b) of the GAP is upheld.**
- (5) The Appellant was demoted by virtue of the Respondent's decision.**
- (6) A remedies hearing is listed for Monday 26 February 2007.**

**Professor Roy Lewis
President
Administrative Tribunal
5 January 2007**

JUDGMENT

SECTION 1 - INTRODUCTION

Witnesses and documentation

1. Evidence on behalf of the Appellant was given by the Appellant and the following persons, whose [relevant] job titles are those applicable at the material time:

[Employee 1], Director of Team 1;
[Employee 2];
[Employee 3].

2. Evidence on behalf of the Respondent was given by the following, whose [relevant] job titles are those applicable at the material time:

[Employee 4], Director of [Team 1] [following Employee 1];
[Employee 5], Director of [Group 1];
[Employee 6], [Head of Department 2] and [Head of Department 1 following Employee 9];
[Employee 7], Director of [Group 2];
[Employee 8], Human Resources;
[Employee 9], [Head of Department 1].

3. In addition, [Employee 10], was summoned by the Tribunal to attend as a witness under Rule 19 of the Administrative Tribunal's Rules of Procedure. He was thus the Tribunal's witness and not a witness for the Appellant or the Respondent.
4. In advance of the hearing the Panel was provided with two substantial bundles of documents. These were supplemented with extra papers during the course of the hearing. There was also a third bundle containing witness statements.
5. In response to an application from the Appellant for one or more members of the Staff Council to attend the hearing as observers, the Tribunal directed that [Employee 11] and [Employee 12] could attend on the condition that they respected the confidentiality of the proceedings.

Clarification of issues

6. This case arose from the Appellant's dissatisfaction with the Respondent's decision (a) to transfer the position of [Position 1, Part A] from [Office 1] to [Office 2] and (b) to reassign the Appellant from the position of [Position 1, Part A] and [Position 1, Part B] to [Position 2] retaining the title of [Position 1, Part A]).
7. The issues in dispute were clarified by the parties at a pre-hearing conference on 17 February 2006. The issues were whether the Respondent's decision amounted to a demotion of the Appellant; victimised him on the grounds that he had played a role in articulating the concerns of staff over the Bank's pension provision; was arbitrary, or discriminated against him in an improper manner, or was carried out in violation of the applicable procedure.

Contribution of parties' legal teams

8. The Tribunal expresses its thanks to Charles Ciumei and John Cavanagh QC and to the parties' respective legal teams, whose efforts contributed significantly to the Tribunal's understanding of the evidential and legal issues.

SECTION 2 - FINDINGS OF FACT

9. The Tribunal makes the following findings of fact based on the oral evidence it heard and the documentary evidence.

The Appellant's position in [Position 1 Part A] and [Position 1 Part B]

10. The Appellant joined the Bank in [Year X]. Prior to 1 September [Year X+15] he was [in] both (a) [Position 1, Part A] and (b) [Position 1, Part B]. He had been in [Position 1, Part A] since [Year X+5] and [Position 1, Part B] since [Year X+10]. The Appellant's [Position 1, Part A] role took up about 75% of his time and his [Position 1, Part B] roles about 25%.
11. The Appellant was a [Level A in Department 1]. However, from its inception in [Year X+5] the position of [Position 1, Part A] required him to play an active role in the management of the

Team, which was [one of] the Bank's largest single team[s]. Furthermore, it involved him in playing this role from the Bank's [Office 1], while the Director of [Team 1], to whom the Appellant reported, was based in [Office 2]. In addition to [Office 2], at the material time the Bank also had Resident Offices in other [Country 1] locations. A [Team 1] organisational chart and responsibility matrix dated 25 January [Year X+15] showed (a) main reporting lines and (b) selective reporting lines. While the main reporting lines went to [Employee 4] as [Team 1] Director, selective reporting lines went from the Heads of the Resident Offices outside [Office 2] and the Deputy Head of [Office 2] to the Appellant as [Position 1, Part A].

12. As [Position 1, Part A], the Appellant's tasks that were carried out in conjunction with the Team Director included the following:
 - (1) Formulating and participating in the implementation of the Bank's overall strategy for [Country 1].
 - (2) Drafting the [Team 1]'s business plan and monitoring its implementation.
 - (3) Co-ordinating the [Team 1]'s strategy by providing guidance on projects and by reviewing transactions.
 - (4) Assisting [Team 1] team members in preparing and presenting their projects through the Bank's internal approval processes and participating in the Bank's Operations Committee ("OpsCom") and Board meetings for [Team 1] projects.
13. In addition, he deputised for the [Team 1] Director particularly in relation to meetings taking place in [Office 1] with representatives of [Country 1]'s government, the business community and international sponsors.
14. The Appellant had the formal authority of a designated [Position 1, Part A] to sign written instruments on behalf of the Bank. This was set out in a document entitled *Signature of Written Instruments: Designation of Officers*, as amended. The range of instruments that could be signed by the Appellant in his capacity as a designated [Position 1, Part A] – and in practice was signed by him - was extensive.

15. In relation to his [Position 1, Part B] role, the Appellant reported to the [Group 1] Director, as did the Director of [Team 1]. The Appellant's [Position 1, Part B] duties included [Position 2 type] duties] and supervising 4 [Office 1]-based staff.
16. It is noteworthy that in respect of both his [Position 1, Part A] and [Position 1, Part B] roles the Appellant was based in [Office 1]. This was not simply a function of these roles. For family health reasons [Office 1] was his most suitable work location. The senior management of the Bank was aware of this.

The pension issue

17. [Employee 13], [Position 2], died on 14 March [Year X+15].
18. [Employee 13] had played a prominent role in the articulation of the concerns of "early joiners" about the Bank's pension provision. On his death the Appellant took up this baton. On 7 April [Year X+15] he forwarded a paper drafted by [Employee 13] to 200 early joiners in order to ascertain the level of support that existed for the statement to be sent to the Staff Council.
19. Some 5 minutes after sending the email [Employee 14], and a recipient of the email, entered the Appellant's office. He was in an emotional state and said that it – without specifying what "it" was – was not worth talking about. He then walked out of the office. The Appellant sent him an email saying that he ([Employee 14]) wanted to talk about something and that he should let him know when he was available. [Employee 14] replied: "Forget about it. Too depressing and I am very tired".
20. On 19 April [Year X+15] the Appellant sent [Employee 13]'s paper to the Staff Council, which forwarded it to the Bank's senior management, the Board, and all staff. The Bank's senior management included [Employee 6], who was the senior manager with the closest involvement in seeking a resolution to the pension issue. Among the Bank's senior managers, a group that included some early joiners, the reaction to the paper was mixed: some were sympathetic to its content and others were not.
21. On 22 April [Year X+15] the Appellant became aware that he was not invited to attend the Bank's AGM in Belgrade. He had

attended all previous AGMs. The Appellant asked [Employee 5] for an explanation. Shortage of accommodation and the need to concentrate on marketing, which was not the Appellant's specialism, were cited by [Employee 5] in an email of 29 April [Year X+15] as the reasons for the Appellant's non-inclusion.

Decision to transfer the [Position 1, Part A] post to [Office 2]

22. For the last few years the Bank has had the strategic objective of moving "east and south". At the same time it has sought to strengthen its local presence in its areas of operation. In [Country 1] this has meant an effort to recruit staff to the Resident Offices and to open new Resident Offices. In addition to this overall strategy, the senior management of the Bank considered that the [Team 1] was not performing as well as might be expected, even allowing for the difficult market in which it operated. It concluded that more needed to be done to ensure the effective management of its [Country 1]-based staff and projects, the latter including co-ordination with [Country 1] authorities and other interested parties. This, the Bank reasoned, could be achieved by increasing the presence of senior employees in [Office 2].
23. Discussions of this nature about [Team 1] had been taking place among the Bank's senior managers since [Year X+13]. In the winter of [Year X+14]-[Year X+15] and spring of [Year X+15] the discussion focussed on specific ideas and proposals about introducing one or more new [Office 2]-based Directors, in addition to the existing Team Director, and the relocation to [Office 2] of [Position 1, Part A] then filled by the Appellant.
24. In terms of the documentary evidence, the first specific mention of a suggested transfer of the [Position 1, Part A] to [Office 2] was in an attachment to an email dated 12 May [Year X+15] from [Employee 5] to Group Directors. However, as was made explicitly clear in [Employee 9]'s evidence to the Tribunal, the effective decision to move the [Position 1, Part A] position to [Office 2] was made by [Employee 9] probably in early May [Year X+15] and certainly by no later than 17 May. In making this decision [Employee 9] was aware that for private reasons the Appellant was most unlikely to agree that he could transfer to [Office 2] with the post.

Need to fill the vacant [Position 2] post

25. While the discussions about reorganising [Team 1] were ensuing a new element was introduced into the situation. As noted above, [Employee 13] died on 14 March [Year X+15]. He had held the position of [Position 2]. The Bank – and in particular [Employee 7] – needed to fill the vacancy. [Employee 7] discussed this with [Employee 9], who was [Employee 7]’s line manager. They concluded that the Appellant would be the most suitable candidate to fill [Employee 13]’s position.

26. Their conclusion was based on a number of considerations. First, in relation to the transfer of the Appellant’s existing [Position 1, Part A] position to [Office 2], it was anticipated that he would be very unlikely to agree to transfer with the post. Second, the [Position 2] vacancy was based in [Office 1], which it was anticipated was where the Appellant would wish to remain. Third, the [Position 2] post would utilise and develop the Appellant’s known skills in [Position 2 related duties]. Fourth, a change of job would be consistent with the Bank’s policy of encouraging mobility among staff, as set out in its policy document *Staff Mobility*.

Events between May and September [Year X+15]

27. On 3 May [Year X+15] [Employee 7], on [Employee 9]’s suggestion, invited the Appellant to an informal meeting. [Employee 7] indicated that [Employee 13]’s death had created a vacancy for the position of [Position 2] and [Employee 7] asked the Appellant if he would be interested in taking up this role. [Employee 7] also indicated that there could be changes in the organisation of [Team 1] but did not go into any details. The Appellant’s response was non-committal.

28. On 18 May [Year X+15] [Employee 9] met with the Appellant. [Employee 9] indicated that his current [Position 1, Part A] post was to be transferred to [Office 2]. This was the first time that the Appellant had been informed of this. He confirmed that he would be unable to transfer with the post. [Employee 9] strongly encouraged him to accept [Position 2]. He indicated that he was not enthusiastic about the [Position 2] position.

29. The Appellant’s confirmation that he would not go to [Office 2], which [Employee 9] had anticipated, prompted [Employee 9] to decide that the Appellant would have to be reassigned to the

[Position 2] post. Although the written communication of this decision would eventually be put in the form of “an offer” to the Appellant from [Employee 15], [in] Human Resources (see below), the effective decision to reassign the Appellant to the [Position 2] post was made by [Employee 9] on 18 May [Year X+15] following [Employee 9’s] meeting with him.

30. [Employee 9] summarised in note form [Employee 9]’s conversation with the Appellant in an email of the same date to [Employee 15], [Employee 5] and [Employee 8]. The email included the point that [Employee 9] had told the Appellant that the “[Position 1, Part A] considered to be moved”.
31. On 26 May [Year X+15] the Appellant spoke to [Employee 7] again. Following this meeting the Appellant emailed [Employee 9], with a copy to [Employee 7], stating that he considered that the [Position 2] role would be a “demotion for me in all senses of the word”. He added that his existing [Position 1, Part A] role took up 80% of his working time. [Employee 9] understood this email to denote the Appellant’s non-agreement to his impending reassignment.
32. [Employee 9] forwarded the Appellant’s email to [Employee 15] and [Employee 8] stating that it was unsatisfactory since the Bank needed to move [Position 1, Part A] to [Office 2]. On 6 June [Year X+15] [Employee 15] replied that the Appellant had a choice between transferring to [Office 2] or accepting the [Position 2] post and that he should be given 2-3 days to make his choice.
33. On 8 June [Year X+15] the Appellant met with [Employee 9] and [Employee 8]. [Employee 9] confirmed that the decision to transfer the [Position 1, Part A] post to [Office 2] was made. The Appellant was given 48 hours to indicate whether he would move to [Office 2] or accept the [Position 2] position. He was assured that the latter position would not involve any change in his terms and conditions of employment and that he could retain the title of [Position 1, Part A].
34. On 9 June the Appellant had a meeting with [Employee 8] and [Employee 16], in HR. The issue of a redundancy package was raised. After discussing the issue with [Employee 9] and [Employee 21], [Employee 8] emailed the Appellant on 10 June. [Employee 8] informed him that a package was not on offer as

the Bank still had a requirement for the Appellant's skills, either [in] [Position 1, Part A] in [Office 2] or [in] [Position 2] in [Office 1].

35. On 10 June [Year X+15] the Appellant emailed [Employee 9]. He explained why he considered that the [Position 2] post would amount to a demotion. He suggested that if the existing [Position 1, Part A] post was abolished, there might be further opportunities at [Office 1] involving managerial responsibilities.
36. By email dated 15 June [Year X+15] [Employee 8] advised [Employee 9] not to respond to the Appellant's email of 10 June. [Employee 8] advised further that the Bank should move ahead on the transfer with a suggested implementation date of 1 September, and that in the meantime a body such as ExCom should formally approve the new structure for [Office 2]. [Employee 9] also favoured the 1 September implementation date primarily because it fitted in with the Bank's cycle of planning and budgeting.
37. On 21 June [Year X+15] [Employee 9] sent a memo to ExCom describing a new office structure in [Office 2], including the creation of a second post of Director based in [Office 2] and the transfer of the [Position 1, Part A] post to [Office 2]. On 23 June ExCom endorsed the transfer of [Position 1, Part A] to [Office 2] but did not endorse the new Director position. This was because Jean Lemierre, the President of the Bank who chaired ExCom, wanted more thought to be given to how the additional Director would work with the existing Director.
38. On 29 June [Year X+15] there was a meeting of Directors and Heads of Resident Offices organised by [Employee 9]'s office. The Appellant was not invited to this meeting, which dismayed him and surprised [Employee 4]. [Employee 4] took the matter up with [Employee 5], who referred it to [Employee 9]. According to [Employee 5], [Employee 9]'s explanation was that [Position 1, Part A employees] were not invited. The Tribunal finds that the true explanation for the Appellant's non-inclusion was that by 29 June [Year X+15] the Appellant was seen as someone who was on his way out of [Team 1].
39. On 4 July [Year X+15] [Employee 15] emailed [Employee 7], [Employee 5], [Employee 9], and [Employee 22], a Group Director, who was by then assuming overall responsibility for

[Team 1]. He stated that the Appellant had been informed of his options of relocating to [Office 2] or accepting [Position 2] in advance of any public announcement on the instructions of the President of the Bank. [Employee 15] recommended that the Appellant be given until the end of the week to choose. He added that if he did not accept either of the options there would be no mutually agreed separation or financial incentive.

40. On 7 July [Year X+15] [Employee 9] handed the Appellant a letter signed by [Employee 15]. The letter stated that, as was communicated to the Appellant on 18 May [Year X+15], the Bank had decided to relocate the [Position 1, Part A] to [Office 2]. In order to accommodate the Appellant's personal needs, the letter continued, the Bank was offering him the position of [Position 2], with the retention of his [Position 1, Part A] and his current salary and other terms and conditions. It added that the reassignment would take effect on 1 September [Year X+15].
41. On 8 July [Year X+15] the Appellant telephoned [Employee 4] his [Team 1] line manager. [Employee 4] informed him that he had not been involved in the decision to transfer the [Position 1, Part A] position to [Office 2]. It was a fact that [Employee 4] had not been involved.
42. On 11 July [Year X+15] the Appellant met with [Employee 7], who agreed to supply him with various documents relevant to the [Position 2] job and sought to persuade him that the job was an important one.
43. On 20 July [Year X+15] the Appellant met with [Employee 8]. The focus of their conversation was about the mechanics of the Appellant raising a grievance through the GAP.
44. By an email dated 28 July [Year X+15] to the Appellant [Employee 9] indicated that, although an announcement about the transfer of [Position 1, Part A] to [Office 2] and the Appellant's move to [Position 2] was imminent, no other decisions had at that time been made about the possible restructuring of [Office 2]. The Appellant replied by email of the same date making it clear that, as far as he was concerned, he was being railroaded into [Position 2] at a time when the possible reorganisation of [Office 2] had not been finalised. By email of 1 August [Year X+15] [Employee 9] replied that the

objective was to increase the seniority in [Country 1] and that this would be achieved through a step-by-step approach.

45. On 3 August [Year X+15] there was an email announcement to [Department 1] that the [Position 1, Part A] post in [Team 1] was to be based in [Office 2] with effect from 1 September [Year X+15] and that the Appellant would transfer to [Position 2] on that day. The transfer of [Position 1, Part A] to [Office 2] was described as being “consistent with the Bank’s decision to strengthen its management team in [Office 2]”.
46. In response to the announcement the Appellant emailed [Employee 9] stating that his objections had been swept aside and that the [Position 2] post was an effective demotion in terms of both loss of status and reduction in the scope of work to be undertaken.
47. On 4 August [Year X+15] [Employee 7] emailed the Appellant informing him of the room he was to have as his office from 1 September. The Appellant replied pointing out that his new office was much smaller than his current one.
48. By email dated 16 August [Year X+15] to the Appellant [Employee 8] denied that the Appellant’s objections had been swept aside and that the Appellant’s reassignment to [Position 2] was a demotion. [Employee 8] pointed out that he would retain the title of [Position 1, Part A] and stated that his new responsibilities would be of comparable scope to his existing job.
49. On 1 September [Year X+15] the Appellant took up [Position 2] while retaining his title of [Position 1, Part A].

The Appellant’s position in [Position 2]

50. The Appellant’s duties in [Position 2] were not dissimilar to those he had carried out in the 25% of his previous job that was taken up with being in [Position 1, Part B], subject to certain qualifications. There were more countries [involved in Position 2] and therefore more [Team] Directors who needed assistance. Also in April [Year X+16] [Position 2] was enlarged through the inclusion of the [Country 2] Team (previously part of [Group 1]) and [another Team].

51. Although the title of [Position 1, Part A] had been retained, the Appellant's duties were substantially those that had been carried out by [Employee 13], who (like the Appellant) was a [Level A in Department 1] but who (unlike the Appellant) did not have the title or duties of a [person in Position 1, Part A]. It was, however, true that certain aspects of the job carried a potential for a degree of involvement at the managerial level. For example, it was possible for the Appellant to involve himself in the formulation of strategy for the countries within [Group 2] and it was conceivable that he could be appointed to the boards of the Bank's investee companies.
52. As regards his supervision of [Office 1]-based staff, in the [Position 2] post he had 2 direct reports, whereas in the [Position 1, Part B] position he had had 4.

Reorganisation of [Team 1] in practice

53. The position previously occupied by the Appellant of [Position 1, Part A] but based in [Office 2] rather than [Office 1] was not filled and there was no attempt to fill it. For a further five months after 1 September [Year X+15] no decisions were made in respect of the reorganisation of [Office 2]. It was thus clear that the decision to move the Appellant's [Position 1, Part A] to [Office 2] was taken in advance of any broader reorganisation of [Team 1]. On 1 September this had become [Employee 6]'s responsibility and [Employee 6] felt that the broader reorganisation required more time and thought.
54. Eventually, on 9 February [Year X+16] the Bank announced that, with a view to broadening the management of [Team 1], there were to be three new [Position 1, Part A] positions based in [Office 2]. None of these posts corresponded with the position previously filled by the Appellant. In addition, it was announced that there was to be a new post of Head of the [Office 1] Team in relation to [Country 1].

Appeal to the Tribunal

55. The Appellant took the necessary steps to pursue his grievance through the procedure set out in the GAP. On 24 August [Year X+15] he sent an email to [Employee 6] summarising his grievance. On 28 September [Year X+15] [Employee 6] responded by stating that [Employee 9] had fully considered the

Appellant's concerns and confirming that he had exhausted normal administrative channels.

56. On 5 October [Year X+15] the Appellant wrote to [Employee 17] in order to seek an administrative review in accordance with Tier 2 of the GAP. On 28 October [Year X+15] [Employee 17] issued a decision rejecting the Appellant's grievance, although she acknowledged that the Bank's decision might have been "better communicated" to the Appellant.
57. On 22 December [Year X+15] the Appellant filed a Statement of Appeal with the Administrative Tribunal. He claimed inter alia that his reassignment was a demotion and that it victimised him because of the role he had played in connection with the pension issue.

The Appellant's salary

58. By letter dated 7 March [Year X+16] [Employee 7] informed the Appellant of his [Year X+16] salary and bonus increases. In percentage terms, his salary increase was 1.9% and his bonus award was 6.34%. The average salary increase and bonus award in the Group 2 for [Year X+16] was 4.7% and 14.8% respectively.

Report by the Office of the Chief Compliance Officer ("OCCO")

59. On 7 April [Year X+16] the Appellant lodged a document with the Tribunal indicating that he proposed to include in his appeal a further act of victimisation. He alleged that the Respondent had penalised him for bringing his claim to the Tribunal by awarding him relatively low salary and bonus increases for [Year X+16].
60. If the Bank had acted in this way it would have been in breach of section 10.02 of the GAP and [Employee 7] – who made the relevant decisions – would personally have committed misconduct. On 13 April [Year X+16] [Employee 17] referred the alleged breach of section 10.02 to [Employee 18], the Chief Compliance Officer, with a view to an investigation under the Procedures for Reporting and Investigating Suspected Misconduct (PRISM).

61. On 22 May [Year X+16] [Employee 18] appointed [Employee 19] as inquiry officer under the PRISM. [Employee 19] interviewed the Appellant, [Employee 15], [Employee 16], and [Employee 7]. [Employee 19]'s report was dated 22 June [Year X+16]. [Employee 19] found that the Appellant's salary increase and bonus award were relatively low and that the reason for this was as follows:

The evidence suggests that it is much more likely that the level of salary increase and the bonus award in [Year X+16] have been affected by [the Appellant's] reassignment to the new position, rather than victimisation for taking an appeal to the Administrative Tribunal...[The] position of [Position 1, Part A] in [Team 1] involved wider management responsibilities and is considered in the Bank as having a higher status than [Position 2].

62. [Employee 19] sent [Employee 19]'s report to [Employee 18], who endorsed it and on 23 June recommended to [Employee 17] that no charges of misconduct be made against [Employee 7].

63. The practice of OCCO was to inform complainants of the outcome of its inquiries. [Employee 20], Deputy Chief Compliance Officer, met with the Appellant on 8 September [Year X+15] and by email dated 11 September [Year X+16] summarised the conclusion of the OCCO inquiry in the following terms:

The evidence disclosed by [Employee 19]'s inquiry persuaded [Employee 19] that your pay rise and bonus award in [Year X+16] was set on the basis that you had recently moved to a position that was of less magnitude in comparison to your former position...

64. The Appellant did not ultimately pursue the head of claim that the Respondent had victimised him contrary to section 10.02 of the GAP. However, he relied upon the inquiry report and [Employee 20]'s summarising letter as support for his case that he had been demoted.

SECTION 3 – THE APPLICABLE LAW

The GAP

65. The Respondent’s decision to transfer the Appellant’s [Position 1, Part A] position to [Office 2] and to reassign him to [Position 2] was a decision of a discretionary nature within the meaning of section 1.03 of the GAP.
66. The test for whether to uphold an appeal in relation to a discretionary decision is set out in section 4.04(b) of the GAP:

When the administrative decision complained of is a decision of a discretionary nature, the Tribunal shall uphold the appeal if it finds that the decision was arbitrary, or discriminated in an improper manner against the staff member or the class of staff members to which he belongs, or was carried out in violation of the applicable procedure.

67. As regards the applicable law, section 4.03 of the GAP provides:

The Tribunal shall base its decision of the staff member’s contract of employment, the internal law of the Bank and the generally recognised principles of international administrative law.

Staff Regulations

68. The Staff Regulations are part of the internal law of the Bank and are expressly stated to embody the fundamental conditions of service (section 1(b)). They are incorporated into staff members’ employment contracts.
69. Section 3(a) of the Staff Regulations provides that the Bank “shall at all times act with fairness and impartiality in its relations with staff members”. Also relevant to the present case is section 6(a)(i), which provides as follows:

In the interests of efficient administration and to enable the Bank to adapt effectively to the evolving needs and circumstances, the President shall organise, assign, and transfer staff to meet the needs of the Bank and determine the terms and conditions under which staff members may be required to work outside the principal office of the Bank or be seconded or released to work for another entity.

Staff Handbook

70. The Staff Handbook is part of the internal law of the Bank and is incorporated into staff members' employment contracts. The Staff Handbook is a body of written rules and procedures issued by or under the authority of the President of the Bank, the Vice-President, Human Resources & Administration and the Director of Human Resources. Within the hierarchy of sources of the internal law of the Bank, it thereby ranks below the Staff Regulations in order of precedence in accordance with section 4.03 of the GAP.
71. Chapters 3 and 4 of the Staff Handbook deal with, among other things, job titles, work assignments, reassignments, transfers and salaries. Insofar as is material, the provisions are as follows:

3.1: The Job Family system

3.1.1 Job families

For purposes of internal administration and comparison with the external market, every employee is allocated to one of a number of different job families, according to the nature of his or her job...

3.1.2

Within each job family a structure of hierarchy of levels has been established, distinguished by title¹.

3.2: Work assignments

3.2.1: Initial assignments

Bank employees are initially assigned to work in a specific position, either at the Bank's Headquarters in London or at one of the Bank's Resident Offices elsewhere...

¹ The Department 1 Job Family title structure is as follows: [Group Director], [Team Director], [Level A], [Level B], [Level C], [Level D] (Resident Offices only) and [Level E]. There is no title level of [Position 1, Part A].

3.22: Subsequent reassignments

The employee's line managers may from time to time change his or her work assignments or the duties and responsibilities associated with the position, or may reassign the employee to another position in the team or department, as they judge necessary or appropriate in the light of the employee's experience, abilities and performance and the business needs or priorities of the team or department. These actions do not require the consent of the employee, and do not constitute a change in the terms and conditions of employment...

If the effect of a reassignment is to materially increase an employee's duties and responsibilities, his or her remuneration will normally be increased to reflect this. If the effect is to materially decrease the employee's duties and responsibilities, there may be a reduction in salary. The applicable principles and circumstances in which this may occur are outlined in section 4.3.3.

3.7: Mobility: transfers, reassignments and secondments

3.7.1: Definition of "mobility"

Mobility is the process by which staff members move from one position to another position with different duties and responsibilities. The new position may be in the same job family but in another unit or department, or it may be in another job family. It may involve a transfer from Headquarters to a Resident Office, from a Resident Office to Headquarters, or from one Resident Office to another...

3.7.3: Mobility at the initiative of the Bank

The initiative to move an employee from one position to another in the Bank...may also come from the Bank.

Before a decision is taken to move an employee to another position either within Headquarters or within a Resident Office, the employee will normally be consulted and his or her view and wishes taken into account. Ultimately, however, the decision is the Bank's as the employer and will not require the employee's consent. In such circumstances, unless otherwise stated in the letter from the Director of

Human Resources notifying the employee of the change, such a move will not constitute a change in terms and conditions of employment.

3.7.4: Effect of mobility on salary

(3) Transfers at the initiative of the Bank...The Bank may also demote an employee, with or without a change in salary, as a disciplinary measure under the Disciplinary Procedures...or as a consequence of the employee's failure to perform...

4.3: Salaries

4.3.3 Other salary adjustments

In certain circumstances an employee's salary may also be reduced, but this will generally occur only if the employee voluntarily transfers to a position at a lower title level, or is involuntarily transferred to such a position because of failure to meet the standards required at a higher level.

Principles of international administrative law

72. The test for challenging discretionary decisions contained in section 4.04(b) of the GAP is itself a distillation of the principles of international administrative law. The Appellant argued that the Respondent was liable under each limb of this test and the Respondent argued that it was not liable under any of them. In making their cases both parties referred to the learned treatise by Amerasinghe² and a leading decision of the World Bank Administrative Tribunal, namely, the *de Merode* case³.
73. In *de Merode* the applicants claimed (a) that the introduction of a new system of tax reimbursement was in breach of the their conditions of service and (b) that there was a contractual obligation on the Bank to increase salaries in accordance with cost-of-living increases in Washington DC. The Tribunal rejected both claims. In the process it articulated certain general principles:
- (1) Fundamental or essential elements in the conditions of service could not be changed without the consent of the employee. In the context of *de Merode*, one such

² C F Amerasinghe *Principles of the Institutional Law of International Organisations*, Cambridge University Press, in particular the chapter on "The internal law: employment relations".

³ *De Merode & others v The World Bank* WBAT Reports [1981] Decision No 1.

fundamental condition was the duty on the employer to conduct periodic reviews of salaries. Another was the principle, as opposed to the particular method of calculation, of reimbursement of taxes for employees with US citizenship.

- (2) Non-fundamental or non-essential terms could be changed, provided the decision to do so was not arbitrary, or retrospective in effect, or discriminatory, or based on an improper motive.

SECTION 4 – SUMMARY OF THE PARTIES’ ARGUMENTS

Summary of the Appellant’s main submissions

74. The following main submissions were made on behalf of the Appellant:
 - (1) The Respondent did not have a genuine business reason for transferring the position of [Position 1, Part A] to [Office 2] and reassigning the Appellant to [Position 2]. This was especially the case since the Appellant’s post was left vacant and no announcement about the reorganisation of [Team 1] was made until February [Year X+16]. It did not make business or policy sense to shift the [Position 1, Part A] post to [Office 2] in advance of the wider reorganisation. As regards the need to fill the [Position 2] post, the Bank did not produce any evidence as to why this was an urgent priority.
 - (2) In the absence of a credible explanation on the part of the Respondent, the Tribunal ought to infer that the Bank’s decision to transfer the Appellant’s position to [Office 2] and to reassign him to the [Position 2] position victimised him on the grounds that he had articulated staff concerns over the Bank’s pension provision.
 - (3) The said decision also amounted to a decision to demote the Appellant. It involved him in a loss of status and a reduction in profile within the Bank. As had been found by the OCCO inquiry, his relatively low salary and bonus increases for [Year X+16] reflected the diminution in his role.
 - (4) The principles of international administrative law, as enshrined in the *de Merode* case, meant that an employer such as the Respondent could not change fundamental terms of the contract, including the basic job content and work location, without the consent of the employee, notwithstanding the express provisions contained in the Staff Handbook.

- (5) Alternatively, if that proposition was not accepted by the Tribunal, then section 3.2.2 of the Staff Handbook did not in any event and on its true construction allow for reassignment without the employee's consent, if the reassignment involved the employee's demotion.
- (6) The Respondent's decision was arbitrary on numerous grounds: the Respondent did not have the lawful power to make it; it was a demotion and yet the demotion was denied by the Respondent; it moved the Appellant out of [Job Family 1] into [Job Family 2]; the Respondent insisted on transferring the Appellant prior to the wider reorganisation of [Team 1]; it had the effect of weakening [Team 1] in the short term; it was carried out in a way that involved discrimination and/or breach of the applicable procedure.
- (7) The Respondent was required but failed to consult with the Appellant over the reassignment. This was contrary to the specific duty in section 3.7.3 of the Staff Handbook and/or the principle of international administrative law that discretion should not be exercised without consideration of the relevant facts. Either way, it involved the violation of the applicable procedure.

Summary of the Respondent's main submissions

75. The following main submissions were made on behalf of the Respondent:
 - (1) The Respondent's decision to transfer [Position 1, Part A] from [Office 1] to [Office 2] was a legitimate operational decision based on well-documented policies that involved moving staff into Resident Offices and increasing the number of senior employees in [Office 2].
 - (2) Given that the Appellant did not wish to go to [Office 2], there were no suitable alternative vacancies within [Team 1] and he was unable to identify any. In these circumstances, the [Position 2] post was an appropriate available option.
 - (3) The decision to reassign and the timing of that decision were unrelated to the Appellant's role in the pension issue. It followed that there was no improper discrimination against the Appellant within the meaning of section 4.04(b) of the GAP.

- (4) The fact that the Appellant disagreed with the Respondent's decision to reassign him to [Position 2] or that the decision was arguably susceptible to criticism did not turn it into an arbitrary decision. The test of an arbitrary decision under section 4.04(b) of the GAP was whether the decision was made capriciously and without any reason being applied to it. The Respondent's decision to transfer the Appellant's [Position 1, Part A] to [Office 2] and to reassign him to [Position 2] was not capricious and was indeed the subject of considerable thought and deliberation by the Respondent. Even if it were the case that the Appellant's reassignment led to a reduction in his duties and responsibilities (which the Respondent disputed), this still did not mean that the reassignment was arbitrary.
- (5) There was no breach of the applicable procedure. In particular, there was no breach of the Staff Handbook's provisions on assignments and reassignments in the light of the following:
- (i) Under section 3.2.2 of the Staff Handbook the Respondent had the power to reassign employees without their consent, even if that resulted in a material decrease in duties and responsibilities.
 - (ii) There had been no such a decrease in this case. But even if there had been, section 3.2.2 still permitted the Respondent to reassign.
 - (iii) The Respondent had the express power to demote under section 3.7.4(3) on either disciplinary or performance grounds, but neither applied in this case and the Respondent did not purport to have demoted the Appellant.
 - (iv) In any event, the Appellant was not demoted. He was and remained a [Level A in Department 1]. There was no [Job Family 1] title of [Position 1, Part A].
 - (v) As regards consultation, the Staff Handbook did not specify a procedure for consultation, but, in any event, the Respondent had properly consulted the Appellant through a series of meetings and email correspondence from May to July [Year X+15].
 - (vi) *De Merode* was distinguishable because there the Tribunal was not required to consider the express and detailed regulatory content of staff contracts on issues such as reassignment and mobility, as contained in the

provisions of the EBRD's Staff Regulations and Handbook.

SECTION 5 – THE TRIBUNAL'S CONCLUSIONS

The question of whether the Appellant was demoted

76. From late May [Year X+15] the Appellant consistently maintained that [Position 2] would entail his demotion and that from 1 September [Year X+15] he had in fact been demoted. As far as he was concerned, he had been deprived of his managerial functions and had lost status. He genuinely believed that he had been demoted.
77. The Respondent was equally insistent that he had not been demoted, which was the Respondent's consistent position since at least June [Year X+15]. At the hearing it was clear that the Respondent's witnesses also had a genuine belief in their position, although they reached the same conclusion by somewhat different routes. [Employee 9] considered that the Appellant in his [Position 1, Part A] role had not been involved to a significant degree in front-line [Department 1 work], and that an employee within [Department 1] who was not so involved could not be a real manager. If the Appellant had not been a manager in the first place, he was by definition not demoted on being reassigned to [Position 2]. For [Employee 7] the Appellant was not demoted because the [Position 2] role was vitally important and involved exciting potential. For [Employee 8] (and also for [Employee 9]) the Appellant had not been demoted because in his [Position 1, Part A] role he had been a [Level A in Department 1] and in the [Position 2] position he was still a [Level A in Department 1].

Definition of demotion

78. In addressing this issue the Tribunal's initial task is to define what is meant by "demotion". The Tribunal's analysis will draw on the internal law of the Bank, in particular the provisions in Chapters 3 and 4 of the Staff Handbook.
79. The Staff Handbook does not contain a general definition of demotion. Rather it contains both (a) an expressly formulated concept of demotion, and (b) an expressly formulated and operational definition of demotion for the specific purpose of empowering the Bank to reduce pay.

80. The relevant concept of demotion is a material decrease in an employee's duties and responsibilities that is effected by a reassignment. This concept is contained in section 3.2.2 of the Staff Handbook. It is also clear from sections 3.7.4(3) and 4.3.3 that the same concept applies to a transfer at the initiative of the Bank. Therefore the concept may be restated as follows: a demotion occurs where the effect of a reassignment or transfer is to materially decrease the employee's duties and responsibilities. This concept corresponds with the plain and ordinary meaning of the word "demotion", which enhances its attractiveness and the scope of its potential application.
81. The Tribunal will now consider the Staff Handbook's operational definition of demotion for the specific purpose of empowering the Bank to reduce pay. Reading sections 3.2.2, 3.7.4(3) and 4.3.3 in conjunction, this operational definition of demotion applies where the following occurs: (a) the reassignment or transfer effects a decrease in the employee's duties and responsibilities; (b) the reassignment or transfer is by way of either a disciplinary measure under the Disciplinary Procedures or as a consequence of the employee's failure to perform; and (c) the employee is transferred to a lower title level⁴. In such circumstances the Bank is expressly empowered, if it so chooses, to reduce salary from the point in time at which the reassignment or transfer is implemented. Indeed, it is clear from the express wording of these provisions that their purpose is precisely to identify the circumstances under which salary may be reduced on a reassignment or transfer.
82. That leaves other circumstances where the operational definition of demotion for the purpose of reducing pay is not applicable but where the underlying concept of demotion still applies. For example, section 3.2.2 does not in terms or by implication preclude a reassignment that has the effect of materially decreasing an employee's duties and responsibilities, in circumstances which are not disciplinary and for reasons that have nothing to do with the employee's performance.
83. Although it is a slight digression at this stage, it is necessary to make clear that the proposition just advanced involves rejecting the Appellant's submission that under international administrative law the Respondent does not have the power to

⁴ This third element, which is contained in section 4.3.3, is prefaced by the word "generally".

reassign an employee without consent. It also involves the acceptance of the Respondent's submission that *de Merode* is distinguishable as it did not focus on the express and detailed content of staff contracts over issues such as reassignment and mobility, as contained in the provisions of the EBRD's Staff Regulations and Handbook. In addition, it involves rejecting the Appellant's alternative argument that section 3.2.2 does not in any event permit the reassignment of an employee without consent, if it involves a demotion, and the acceptance of the Respondent's submission to the contrary.

84. The Bank's power to reassign without consent where the employee's duties and responsibilities are decreased is not untrammelled. It is limited in at least three ways. First, under section 3.2.2 the reassignment has to be "necessary or appropriate in the light of the employee's experience, abilities and performance and the business needs and priorities of the team or department". Second, to the extent that the reassignment is also likely to be a decision to move an employee at the Bank's initiative within the meaning of section 3.7.3, the Bank is under an express duty to consult with the employee before making the decision. Third, the decision must not be arbitrary or discriminatory.

Was the Appellant, in fact, demoted?

85. In the present case it was common ground that the Appellant's reassignment was not disciplinary and was not related to his performance. Therefore, the circumstances to which the Staff Handbook applies the definition of demotion for the purpose of reducing pay did not apply. However, the question still arises of whether the Appellant's reassignment had the effect of materially decreasing his duties and responsibilities. If the answer is affirmative, then it is correct to say that he was demoted in accordance with a concept of demotion that is drawn from the Staff Handbook and corresponds with the plain and ordinary meaning of the word.
86. In considering this question the Tribunal has had regard to the views of the Assessors and to the following facts and matters:
- (1) The Respondent transferred the Appellant's [Position 1, Part A] position to [Office 2] as part of its wider strategy of increasing the presence of senior employees in [Office 2] (see paragraph 22 above), and its public announcement on 3 August [Year X+15] described the transfer as being

“consistent with the Bank’s decision to strengthen the management team in [Office 2]” (paragraph 45 above).

- (2) In his [Position 2] position, the Appellant did not have a management role as such. Specifically, he was no longer required to carry out the managerial duties or exercise the kind of authority (described at paragraphs 10-14 above) that went to the essence of his former [Position 1, Part A] role and had accounted for about 75% of his working time.
- (3) The fact that [Position 2] was a large group and that it became even larger in April [Year X+16] had a bearing on the quantity of the Appellant’s work, but it did not inject a managerial element into it.
- (4) The [Position 2] position’s managerial potential, which is described at paragraph 51 above, was limited and was not equal to the Appellant’s actual managerial functions in his role [in] [Position 1, Part A].
- (5) The fact that from 1 September [Year X+15] the Appellant’s title of [Position 1, Part A] was nominal was confirmed by [Employee 7].
- (6) On his reassignment to [Position 2] the Appellant was allocated a smaller office that he had previously occupied in his [Position 1, Part A] and [Position 1, Part B] position[s] (see paragraph 47 above).
- (7) The fact that the Appellant’s [Year X+16] salary and bonus awards were relatively low was consistent with and was indeed explained by the reduction in the magnitude of his duties and responsibilities on his reassignment to [Position 2].

87. In the light of the above, the Tribunal concludes that the Appellant was demoted.

Significance of the Appellant’s demotion

88. The final question concerns the significance, if any, of the Appellant’s demotion. The Tribunal accepts the Respondent’s submission that, in the circumstances of this case, a demotion on the part of the Appellant did not mean that the Respondent’s decision was arbitrary, or discriminatory, or was carried out in breach of the applicable procedure. However, if the Tribunal concludes for other reasons that the Respondent’s decision

should be characterised in one of these ways, then the demotion would have a bearing on the Appellant's loss. In other words, if there is liability on the part of the Respondent, the demotion goes to the Appellant's remedy.

Did the Respondent's decision discriminate against the Appellant in an improper manner?

89. The Appellant alleged that the Respondent's decision to relocate [Position 1, Part A] to [Office 2] and to reassign him to [Position 2] was made in order to punish him for having articulated staff concerns over the Bank's pension provision. The Appellant accepted that there was no direct evidence of this but argued that, since the Respondent was unable to give any satisfactory explanation for its decision, the Tribunal should draw the inference that victimisation because of the Appellant's role in the pension issue was the true explanation. Further, the Appellant argued that there was some indirect evidence supporting his allegation, notably, [Employee 14]'s strange behaviour on 7 April [Year X+15] and the Appellant's exclusion from the Bank's AGM shortly afterwards.
90. The flaw in the Appellant's case is that the Respondent was able to give a satisfactory explanation for moving [Position 1, Part A] to [Office 2] and for reassigning the Appellant to [Position 2]. The Tribunal's findings of fact in respect of the Respondent's decision to relocate [Position 1, Part A] to [Office 2] are set out at paragraphs 22-24 above. On the basis of those facts, the Respondent genuinely considered that there were good policy and business reasons for moving [Position 1, Part A] to [Office 2]. The Tribunal's findings of fact in respect of the need felt by the Respondent to fill [Position 2] are set out at paragraphs 25-26 above, and the findings in respect of [Employee 9]'s decision in fact to reassign the Appellant to [Position 2] are at paragraphs 28-29 above. On the basis of those facts, the Respondent genuinely believed not only that it needed to fill [Position 2] but also that that the Appellant was a highly suitable candidate to fill the vacancy.
91. As for the indirect evidence, it could not bear the weight that the Appellant placed on it. [Employee 14]'s behaviour on 7 April [Year X+15] was strange. However, on the evidence before it the Tribunal is not able to find on the balance of probabilities that this behaviour and its timing were linked to the pension issue. More importantly, even if there was a linkage, that in itself - when considered in the light of all the other evidence in this case

- would not be enough to show that the Respondent transferred [Position 1, Part A] to [Office 2] and reassigned the Appellant to [Position 2] in order to punish him for having raised the pension issue.

92. As far as the Appellant's exclusion from the AGM was concerned, the Tribunal agrees with the Appellant that [Employee 5]'s explanation in his email of 29 April [Year X+15], which he repeated in evidence to the Tribunal, was implausible. However, that does not mean that the Appellant's exclusion had any connection with the pension issue. By late April the discussion among senior managers concerning [Team 1] had reached the point where a decision was about to be made to transfer [Position 1, Part A] to [Office 2], and furthermore it was anticipated that the Appellant would decline to transfer with the position. Thus, although the Appellant did not know it, he was already considered to be on his way out of [Team 1]. In such circumstances, [Employee 5] probably felt that it would have been inappropriate to have the Appellant in attendance at the AGM in a [Team 1] capacity. The Tribunal considers that this was the most likely explanation of why the Appellant was not invited to the AGM.

93. [Employee 9], [Employee 6], [Employee 7], and [Employee 8] all strongly denied that the Appellant's role in the pension issue played any part at all in the transfer of [Position 1, Part A] to [Office 2] and the Appellant's reassignment to [Position 2]. In the light of the persuasive evidence on why the Respondent made its decision, the Tribunal accepts the denial by the Respondent's witnesses as the truth.

94. Accordingly, the Tribunal reaches a number of specific conclusions:

(1) The fact that the Appellant had played a role in articulating staff concerns over the pension issue did not feature at all in [Employee 9]'s decision to move [Position 1, Part A] to [Office 2].

(2) The considerations as to why [Employee 9] and [Employee 7] considered that the Appellant would be the most suitable candidate to fill [Position 2] did not include the fact that the Appellant had played a role in the pension issue.

(3) [Employee 9]'s decision to reassign the Appellant to [Position 2] was not related in any way to his role in the pension issue.

(4) The timing of [Employee 9]’s decision to reassign the Appellant was similarly unrelated to his role in the pension issue.

95. The Appellant’s allegation that he was victimised because of his role in the pension issue was the foundation of his claim that the Respondent had discriminated against him in an improper manner. In the light of the foregoing analysis and conclusions, the Tribunal will dismiss this claim.
96. The Appellant’s allegation of victimisation was also one of the numerous grounds advanced by the Appellant to support his claim that the Respondent’s decision was arbitrary. The Tribunal will dismiss that claim also and would indeed dismiss any other claim based on the victimisation allegation.
97. For the avoidance of doubt, to the extent that the Appellant has any basis other than discrimination in an improper manner for claiming that the Respondent’s decision victimised him because he raised staff concerns over the Respondent’s pension provision, the Respondent’s decision was not taken on the grounds that the Appellant so acted and was not in any way related to the pension issue.

Was the Respondent’s decision arbitrary?

98. The Tribunal does not consider that it is necessary in the present case to produce a definitive analysis of the meaning of “arbitrary” in section 4.04(b) of the GAP. Suffice to say that an arbitrary decision involves an abuse of discretionary power and includes a decision made without regard to rational business or policy considerations or a decision motivated by a desire to do an individual down.
99. In view of the Tribunal’s conclusion that the Respondent’s decision to transfer [Position 1, Part A] to [Office 2] and to reassign the Appellant to [Position 2] was for genuine business and policy reasons, it cannot be said that the Respondent’s decision was arbitrary.
100. The fact that the Appellant did not like the decision or indeed that the decision and the way it was made are susceptible to

criticism does not make it arbitrary. Thus, the transfer of [Position 1, Part A] to [Office 2] before an overall plan for the reorganisation of the senior management of [Team 1] had been worked out may be viewed as premature and unsatisfactory, but that does not make it an arbitrary decision. Further, by virtue of the express provisions of the Staff Regulations and the Staff Handbook, the Respondent had the power to make the decision. In making its decision, the Respondent was of course bound to follow its own procedure. However, even if the decision was made in breach of procedure, that still did not turn it into an arbitrary decision within the meaning of section 4.04 of the GAP.

101. The Tribunal will therefore dismiss the Appellant's claim that the Respondent's decision was arbitrary.

Violation of the applicable procedure?

102. The Respondent placed reliance on the Staff Handbook, especially section 3.2.2, to show that it had the power to reassign even without the Appellant's consent. The Tribunal accepts that the Respondent had this power, but for reasons that will now be explained that does not in itself decide the case in the Respondent's favour. In particular, the Tribunal must still determine whether the Respondent consulted the Appellant over his reassignment in accordance with its own procedure.

Duty to consult in section 3.7.3 of the Staff Handbook

103. The different sections of the Handbook should not be read in isolation from each other. Specifically, section 3.2.2 has to be read in conjunction with section 3.7.3. The latter section imposes a duty on the Bank normally to consult with an employee "before a decision is taken to move an employee to another position either within Headquarters or within a Resident Office" and furthermore "his or her wishes must be taken into account". The Appellant's reassignment from his [Team 1] position to [Position 2] involved the Respondent in moving him from one position to another within [Office 1] as envisaged by section 3.7.3. It follows that the Respondent was required prior to the decision being made to consult with the Appellant and to take his wishes into account.
104. Section 3.7.3 does not prevent the Bank from carrying out its necessary functions in an efficient way in accordance with its policy objectives. It merely requires the Bank to consult with

the employee before a decision is made and to take his or her wishes into account, a formulation that implicitly recognises that the Bank may not be able to accede to those wishes.

105. Save for the need to consult prior to making the decision and to take the wishes of the employee into account, the substantive content of the consultation duty is not expressly spelt out in the Handbook. But it is there by necessary implication. The minimum content of the consultation duty in section 3.7.3 is as follows. Consultation prior to a decision involves an explanation to the employee of what is being proposed, an opportunity for the employee to digest this information and to express his or her views on the subject, and the genuine consideration of those views by the Bank. If the employee expresses a reluctance to be moved, the subject of the consultation must also include a consideration with the employee of possible alternatives to the proposed reassignment. This is especially so where - as in the present case - the Bank does not purport to be demoting the employee for disciplinary or performance reasons.

Breach of the duty to consult in section 3.7.3?

106. Did the Respondent carry out its duty to consult with the Appellant prior to making its decision? There were two strands to the decision. The first strand was the decision to transfer the Appellant's position of [Position 1, Part A] from [Office 1] to [Office 2]. The second strand was the decision to reassign the Appellant to [Position 2]. Each strand needs to be considered in turn, in the light of the Tribunal's findings of fact set out above, especially the findings at paragraphs 24 and 27-30.
107. Although ExCom formally endorsed the first strand of the decision on 23 June [Year X+15], [Employee 9] effectively made the decision to transfer [Position 1, Part A] to [Office 2] in early May [Year X+15] and certainly by no later than 17 May. The first time the transfer was mentioned to the Appellant was at [Employee 9]'s meeting with him on 18 May, that is, after [Employee 9] had made the decision. In relation to the first strand of the decision, there was thus no consultation with the Appellant prior to the decision being taken
108. As regards the second strand of the decision, that is, the decision to reassign the Appellant, the following should be borne in mind. [Employee 9]'s meeting with the Appellant on 18 May [Year X+15] was preceded by the informal conversation between [Employee 7] and the Appellant on 3 May [Year X+15].

[Employee 7] did not inform him that [Position 1, Part A] was to be transferred to [Office 2], which was essential information for someone who was being sounded out as to whether he might be interested in moving to [Position 2] vacancy. Indeed, [Employee 7]’s whole effort on 3 May was to “sell” the idea of [Position 2] to the Appellant at a fairly general level. In advance of [Employee 9]’s meeting with the Appellant on 18 May, [Employee 9] was aware that for personal/family health reasons he was very likely to refuse to go with the transferred post to [Office 2]. In truth, going to [Office 2] was not an option for the Appellant. Predictably, when on 18 May [Employee 9] informed him that his position was to be transferred to [Office 2], he indicated that he would not be able to transfer with the position. [Employee 9] encouraged him to take [Position 2]. In response he expressed his lack of enthusiasm for it. At that point [Employee 9] made the effective decision that the Appellant would have to be reassigned to [Position 2] . Precisely when the reassignment would be implemented had not yet been determined, but the decision that the Appellant would be reassigned was made.

109. The meetings and the email correspondence that took place after 18 May, although they might have been useful in other ways, did not go to the consultation duty enshrined in section 3.7.3 of the Staff Handbook because they post-dated the effective decision.
110. On the basis of what occurred at the meetings of 3 and 18 May, the Tribunal’s conclusion is that the Respondent failed to consult in accordance with section 3.7.3 in advance of the decision being made. It cannot be said that these two meetings involved a careful explanation to the Appellant of what was being proposed, an opportunity for him to digest this explanation before expressing his views on the subject, and the genuine consideration of those views by the Respondent. Furthermore, given the Appellant’s known practical inability to transfer to [Office 2] and his reluctance to be reassigned to [Position 2], which he expressed on 18 May, there was a failure on the part of the Respondent to explore with the Appellant possible alternatives to the proposed reassignment. This is not to suggest that a viable alternative would necessarily have emerged from a process of consultation, but the fact was the Respondent failed to discuss alternatives prior to the decision made.
111. It is noteworthy that the Respondent continued to fail to discuss possible alternatives to the [Position 2] reassignment with the

Appellant in the meetings and email correspondence after 18 May [Year X+15]. In his email of 10 June the Appellant raised the question of whether possible alternative opportunities at [Office 1] involving managerial responsibilities might arise. On 15 June [Employee 8] specifically advised [Employee 9] not to respond to the Appellant's email and to press ahead with a 1 September implementation date. [Employee 9] acted on this advice. (See paragraphs 35-6 above).

112. In the light of the foregoing analysis, the Tribunal will uphold the Appellant's claim that the Respondent made its decision in violation of the applicable procedure.

Alternative bases for a duty to consult

113. Even in the absence of the provision on consultation in section 3.7.3 of the Staff Handbook, the Tribunal would hold that that the Respondent was under a duty to consult with the Appellant prior to making its decision to reassign him and that it failed to carry out that duty. The power to reassign in section 3.2.2 itself should be read as subject to an implied duty to consult prior to the decision being made. The scope of this implied duty is co-extensive with the scope of the consultation requirement in section 3.7.3.
114. The basis for implying the consultation duty into section 3.2.2 is two-fold. First, the implication is necessary in order to give expression to the Bank's duty under section 3(a) of the Staff Regulations to act with fairness at all times to staff members. In this connection, it is to be noted that under the internal law of the Bank, the Staff Regulations have precedence over the Staff Handbook (section 4.03 of the GAP). It follows that the Staff Handbook should, if possible, be interpreted in a way that is consistent with the Staff Regulations. For the avoidance of doubt, the implication of a consultation duty into section 3.2.2 of the Staff Handbook is perfectly compatible with section 6(a)(i) of the Staff Regulations.
115. Second, under the generally recognised principles of international administrative law, discretionary decisions that may adversely affect the individual ought not be taken without due process, that is, a fair procedure. This point is made by

Amerasinghe in a passage that envisages an implied consultation duty in the context of staff transfers⁵.

Breach not a mere technicality

116. Finally, the breach of the applicable procedure in this case cannot be dismissed as a mere technicality that could have had no practical consequences. Had the Respondent properly consulted with the Appellant, one cannot say for certain what the outcome might have been. This is underlined by the facts that the Appellant's former [Position 1, Part A] position was left vacant from 1 September [Year X+15] onwards and that no decisions about the broader reorganisation of [Team 1] were made until February [Year X+16].

Remedies hearing

117. A remedies hearing is listed for Monday 26 February 2007.

**Professor Roy Lewis
President
Administrative Tribunal
5 January 2007**

⁵ See the text to footnotes 148 and 149 in the chapter by Amerasinghe cited at note 2 above.