

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 105

13 February 2015

Claus

v.

Asian Development Bank

Lakshmi Swaminathan, President

Roy Lewis, Vice President

Shin-ichi Ago

Anne Trebilcock

1. The Applicant was a Senior Economist Level 5 of the Asian Development Bank (“ADB”, the “Bank”, or the “Respondent”). She has challenged five decisions taken by the Respondent, namely: Decision 1 (lateral transfer without consent); Decision 2 (denial of legal representation during internal administrative procedures); Decision 3 (non-renewal of her fixed-term contract); Decision 4 (her 2013 performance appraisal with an ‘unsatisfactory’ rating); and Decision 5 (failure to refer her complaint of suspected retaliation to the Office of Anticorruption and Integrity [“OAI”]). The Applicant has submitted that all these decisions are inextricably linked to each other and has sought for their rescission, stating that they were illegal and that the dedicated procedures were not followed. She has claimed damages, costs for reasonable legal fees incurred in bringing the proceedings before the Tribunal, and reasonable costs incurred in the preparation of proceedings within lower tiers of the Respondent’s internal justice system.

I. THE FACTS

2. The Applicant joined the ADB as a Senior Economist Level 5 in the Office of the Chief Economist (“EROD”) within the Economic and Research Department (“ERD”) on 5 August 2011. According to the Applicant, she only accepted the position because, and according to the job description, it would be reporting directly and exclusively to the Bank’s Chief Economist, and responsibilities included development of the global monitoring system relating to finance, food and fuel (in effect the “3F” Technical Assistance [“TA”] project). The Applicant

received the job offer in a letter dated 31 March 2011, which she accepted on 3 May 2011. The terms and conditions of her employment were governed, *inter alia*, by “the [Bank’s] Administrative Orders and public international law”. The appointment letter also stipulated that she would be recruited for three years to a position within EROD with a possibility of an indefinite or fixed term extension, and that there was a probationary period of one year from the date of her reporting for duty.

3. The Bank did not inform the Applicant at the time of recruitment that the funding for the 3F project was due to terminate on 31 December 2011. The 3F project was not included in her work plan, approved on 24 October 2011, and she was never given the opportunity to work on that project.

4. Around four months after her joining the Bank, on 23 November 2011, the Chief Economist (“CE”) raised the issue of moving the Applicant out of EROD to a different team in ERD. The CE also asked her about shifting to the Economic Analysis and Operations Support Division (“EREA”) as there was a shortage of staff there. The Applicant informed the CE that she wished to stay in EROD but that she would be happy to help EREA.

5. After deciding to reconfigure EROD given that some of its work, in particular the monitoring of global markets, was duplicating the work of the Macroeconomics and Finance Research Division (“ERMF”), the CE decided to shift global monitoring from EROD to ERMF. It was within this context that on 16 February 2012 the CE raised the issue of a permanent move and told the Applicant that he would like her to move out of EROD to ERMF starting 1 January 2013. On 17 February 2012, the Applicant sent an email to the CE to “decline” his offer to move to a different team, stating *inter alia* that she had accepted the Bank’s offer of employment because the position was in EROD and that she would not have considered the offer of employment in the Bank in a different team.

6. On 20 February 2012, the Applicant forwarded the aforesaid email to the Principal Human Resources Specialist, Budget, Personnel and Management Systems Department (“BPMSD”) asking for advice, who told her to continue talking to the CE and to seek clarification. In April 2012, the CE again raised the issue of her moving to ERMF and told her that, as she was the only Level 5 staff in EROD, evaluating her performance as “special recognition” or “excellent” would be difficult and might make the prospects for her promotion slower. The Applicant again contacted the Principal Human Resources Specialist, BPMSD, who explained to her that she would be evaluated against the performance competencies, in accordance with the expected standards for her level and not

against managers and advisors in EROD and ERD. On 11 July 2012, taking into account the Applicant's reluctance to move out of EROD, the CE sent an email stating that '[The Applicant] still wants to be in EROD. Therefore, technically she will be in EROD but mostly work for EREA for the next six months.'

7. On 31 July and 18 September 2012, the CE met with the Applicant to again explain the reasons why it was necessary for her to move to ERMF; EROD needed to be restructured and her position would be abolished. The CE did not agree with the Applicant's synopsis of the meeting that if she did not move voluntarily he would have to "force" her to move. On 1 August the CE corrected the Applicant that *"I think the word 'force' seems to suggest I am asking something that I should not. My point is that as a chief economist, it is not beyond my management right to reassign our staff's (sic) a new duty as a part of restructuring of our department."* The Applicant then initiated Informal Conciliation through the Ombudsperson of the Bank on 27 September 2012. The Applicant received advice from the Deputy Director General, BPMSD, in an email dated 27 September 2012, that normally the Bank had the right to move staff, but it needed to be to a similar position that used her skills and experience or "where you can best [be] developed into new roles beneficial for the Bank". Further discussions and correspondence about her transfer took place on 4 October 2012, 18 October 2012, and 26 November 2012. During those exchanges, the Applicant complained that her transfer was in effect a demotion. The Bank, through the Assistant Chief Economist ("ACE"), responded by acknowledging that *"I suppose there is a certain cachet to being a part of the front office, but the important thing is to make sure that a move to ERMF doesn't undermine your career path."*

8. The Applicant emphasized in several of her emails that the position she was offered and accepted was specifically described as reporting directly and exclusively to the CE, whereas the position in ERMF where she was asked to transfer was reporting to the ACE. On 5 December 2012, the CE requested the approval of the Director General ("DG"), BPMSD, for the Applicant's transfer from EROD to ERMF, effective 1 January 2013. In that request, the CE explained the reasons for the move, that the Applicant's duties would be similar to those of her current position, and that the planned reassignment had been discussed with the Applicant at least six months earlier. On 8 January 2013 the Applicant emailed the Senior Advisor, BPMSD, stating that she did not consent to the transfer, and requesting its suspension pending the outcome of her grievance. She was informed the next day by the Senior Advisor, BPMSD that under Administrative Order ("AO") 2.06 ("Administrative Review and Appeals procedures"), paragraph 4, a request for compulsory

conciliation would not suspend the implementation of the decision subject to administrative review.

9. On 10 January 2013, the Applicant emailed the Vice President, Knowledge Management and Sustainable Development, that as far as she was concerned, working in EROD was a “*fundamental and essential term*” of her employment. She added that her consent was required for any variation and noted that her transfer out of EROD amounted to a breach of contract by the Bank. Meanwhile on 28 January 2013, the conciliation regarding the Applicant’s transfer ended unsuccessfully.

10. On 30 January 2013, the Applicant met the Senior Advisor of BPMSD, who told her to move immediately to ERMF and that, if she did not comply, the Bank would have no choice but to proceed with disciplinary action against her. On 31 January 2013, the Applicant wrote to the DG, BPMSD, that she would move “*pending resolution of my redress of grievance*” and noted that she had been “*threatened with disciplinary action for seeking to contest an administrative decision...*”. On 1 February 2013, the Applicant emailed to the ACE a draft of her 2013 work plan. In the email she stated that “it would be prudent to assume that: my time in ERMF is transitory ... there is a positive probability that I may not be at ADB longer term ... [this] has implications for prioritizing projects, the type of work I will be doing and whether or not to get other people involved.” On 6 February 2013, in response to her earlier communication Senior Advisor, BPMSD, responded that the “*prospect of disciplinary action ... was raised not because of your request for administrative review, but because you had refused to comply with the instruction to transfer to ERMF ...*”. The Applicant replied on 8 February 2013 by stating that the Bank had committed a breach of its contractual obligations and that by continuing to raise the prospect of disciplinary action, she was being bullied. On the same date, she requested administrative review of her transfer and, on 9-10 February 2013, she moved her belongings to the office of ERMF.

11. In response to an email dated 11 February 2013 from the Applicant’s counsel, on 15 February the Bank replied that (i) she was fully entitled to seek the advice of counsel; (ii) in the context of the Bank’s internal review process, it would communicate directly with the Applicant and not with her counsel; and (iii) in the event that there was an Application to the Administrative Tribunal, the Applicant would be entitled to engage counsel as her representative. Not being satisfied with this, the Applicant claimed, in an email on 27 February 2013, that she had been “*denied effective legal representation.*” On 14 March 2013, the Bank reiterated its position and noted that it was in accordance with AO 2.06. The Applicant’s counsel responded on 16 March 2013 that AO 2.06 “*denies the*

right of ADB staff members to be legally represented” and is “*unjust and unfair*” and requested repeal of the rule. The reply given by the Deputy General Counsel of the Bank to the Applicant stated, *inter alia*, that she was not permitted to be legally represented in relation to the pending proceedings in the Appeals Committee and that ADB would communicate directly with her regarding her case.

12. The Applicant’s request for administrative review was dismissed by the Officer-in-Charge, BPMSD, in a memorandum dated 25 February 2013.

13. On 3 April 2013 the Applicant submitted another request for compulsory conciliation regarding the refusal of legal representation during the internal grievance process. This terminated on 17 May 2013 without settlement.

14. On 31 May 2013 the Applicant submitted a request for Administrative Review of the decision of the DG, BPMSD, regarding her legal representation. This request was denied on 17 June 2013. On 1 July 2013, the Applicant appealed the Bank’s refusal to permit her legal representation. Her appeals to the Appeals Committee relating to the first decision to transfer her to ERMF and the second decision to deny her legal representation were consolidated on 8 August 2013 by the agreement of both parties. On 22 October 2013, the Appeals Committee recommended that the President reject all claims and relief sought in relation to both claims. On 29 October 2013, the President made the decision to affirm the recommendation of the Appeals Committee, which was communicated to the Applicant on 6 November 2013.

15. The Applicant had her performance assessed on three occasions. First: in February 2012, after six months of employment, the CE rated the Applicant as “*proficient*” in four of the six competencies, those four being ‘Client Orientation’, ‘Achieving Results’, ‘Working Together’, and ‘Communication and Knowledge Sharing’. He rated her as “*developing*” in the competencies of “*application of technical knowledge and skills*” and “*innovation and change.*” Second: on 31 July 2012, at the end of her one year probationary period, the CE rated the Applicant as “*proficient*” in all six competencies, confirmed her appointment, and recommended the highest salary increase allowed for her Level. Third: on 11 February 2013, at the end of the Applicant’s 2012 Annual Performance Review, the CE rated the Applicant as “*proficient*” in only three of the six competencies. She was rated as “*developing*” in “*client orientation*”; “*working together*”; and “*communication and knowledge sharing.*”

16. The Applicant complained in her comments submitted 6 March 2013 that the “*sharp deterioration*” in her assessment was a reprisal for her seeking to overturn the decision to transfer her to ERMF. The CE responded in a 16 May 2013 email to Director, BPMSD, that “*The feedback I received is that ... she ... often said “no” when she was asked to work on issues that she is not very familiar with. However, ERD is not a university and ADB staff should be ready to tackle unfamiliar new topics if there are institutional needs. ... I disagree with her allegation that my assessment of her work performance from August to December 2012 is a reprisal ... I think it is the supervisor’s responsibility to evaluate work attitude of the staff together with technical ability.*”

17. On 6 December 2013, the CE wrote a draft recommendation not to renew the Applicant’s fixed-term appointment. The CE referred to the Applicant’s lack of flexibility to ADB’s changing needs by not having agreed to the proposed move from EROD to ERMF as demonstrating “*a severe deficiency in terms of the ‘Client Orientation’ competency.*” He also cited the Applicant’s narrow work plan that had “severely limited” her outputs as a second ground justifying non-renewal. Further, he stated that the Applicant was selective about the tasks she had agreed to undertake, she had been uncooperative and had not worked well with others. A copy of this draft recommendation was provided to the Applicant and discussed with her in a meeting between herself, the CE and the Deputy Chief Economist (“DCE”) on 9 December 2013, and the Applicant was given five working days to submit written comments.

18. On 11 December 2013, the Applicant submitted her comments on the draft recommendation directly to DG, BPMSD, with a copy to the CE. She alleged that the recommendation had omitted to mention all previous positive remarks made by the CE in relation to her work, including mention of knowledge sharing and teamwork competency and general skill for collaboration. She referred to the fact that she had successfully completed the performance review at the end of her one year probationary period in August 2012. She also alleged that a decision not to renew her appointment would be a reprisal and amount to retaliation against her for having challenged the legality of the CE’s recommendation to transfer her to ERMF.

19. On 23 December 2013, the CE sent a final memorandum to the DG, BPMSD, together with the Applicant’s comments, recommending non-renewal of her fixed-term appointment when it expired on 4 August 2014. On 13 February 2014 this recommendation was approved by the President and communicated to the Applicant on 28 February 2014.

20. At the end of 2013, the Applicant prepared Part 1 (relating to key accomplishments and results) of her 2013 Performance Review to which the ACE added his assessment confirming those key accomplishments and results and emailed this to the CE on 6 December 2013. The CE and DCE then contributed as input supervisors to the ACE's assessment of the Applicant's competency in Part 2. The Applicant was assessed as "*proficient*" in three of the six competencies but "*not proficient*" in "*client orientation*"; "*working together*"; and "*innovation and change.*" The 11 February 2014 overall comments noted the Applicant's technical ability but commented that "[s]he has not demonstrated the capacity for adaptation, leadership and teamwork." The DCE rated the Applicant's overall performance as "*unsatisfactory*".

21. The Applicant and the ACE met on 11 February to discuss her review, and on 22 February 2014 the Applicant provided her comments noting that her assessment should have been from her supervisor (who was the ACE) and not the considered view of the Department. She noted that she did not report to the CE or the DCE in 2013. She also stated that her overall "*unsatisfactory*" assessment was a reprisal for her attempt to reverse the transfer decision. The rating was further discussed on 7 March 2014 where the Applicant alleged that no prior meetings had taken place during 2013 to discuss her performance concerns, that the CE and DCE should not have been included as input supervisors, that there was no factual basis for the assessment and that proper procedures had not been followed.

Application to the Administrative Tribunal

22. On 10 April 2014 the Applicant and Respondent made a joint application to the Tribunal that pleaded that there were "*exceptional circumstances*" under paragraph 3 of Article II of the Tribunal's Statute. This was to facilitate the referral to the Tribunal of the five decisions challenged by the Applicant, despite internal remedies not having been exhausted for all five decisions. They requested the Tribunal to join all the decisions on the basis that they were inextricably linked with each other, namely: Decision 1 (lateral transfer without consent); Decision 2 (denial of legal representation); Decision 3 (non-renewal decision), Decision 4 (the 2013 performance appraisal with an "*unsatisfactory*" rating); and Decision 5 (procedural impropriety through a failure to refer a complaint of retaliation to the OAI). Further, the parties applied for consolidation and temporary suspension of proceedings until 21 May 2014 to allow them to seek the opportunity to resolve the case through extended negotiations. If no final "*global settlement*" was reached by that date, the consolidated proceedings would be resumed before the Tribunal.

23. By order dated 14 April 2014, the joint request of the parties was allowed by the Tribunal, including the waiver of the need to exhaust internal remedies for all decisions. Thereafter, all the five impugned decisions were joined in one proceeding before the Tribunal.

24. The Applicant submitted a request for compulsory conciliation to the Director, BPMSD, in respect of Decisions 3, 4 and 5. The compulsory conciliation terminated on 21 May 2014.

25. In the event, the parties failed to reach a settlement. On 18 June 2014 the Applicant submitted an Addendum Application to her earlier 7 February 2014 Application, in which she sought to justify her complaints 3, 4 and 5 and seek further remedies with respect to them. The Respondent submitted its consolidated Answer to the Application and Addendum Application on 16 July 2014, the Applicant her Reply on 1 September 2014, and the Respondent its Rejoinder on 6 October 2014.

Relief sought

26. In the original Application to the Tribunal dated 7 February 2014, the Applicant had contested Decisions 3, 4 and 5 which she stated were inextricably linked and unlawful. She asked for the Tribunal to consider the totality of the Bank's actions against her and the time frames in which each of the three administrative Decisions were reached and communicated, which she claimed merited rescission and specific performance. In the original Application she also sought relief for removal of all references on the ADB website and documents that she was in ERMF, an independent and external review of the Respondent's internal laws, and a declaration by the Respondent that in dealing with its employees it is obliged to adhere to the fundamental principles of international human rights law. She has, however, not referred to this relief in the documents filed by her later, including the Addendum to the Application.

27. By her Addendum to her Application dated 18 June 2014, she sought rescission of Decisions 3, 4 and 5, in addition to the relief sought in her original Application. She also sought damages for breach of contract in the sum of three years' final salary with appropriate annual salary increases. Further or in the alternative, she sought damages equivalent to three years' final salary in lieu of the specific performance, and the award of additional legal fees. She has also applied to withdraw two specific remedies earlier sought, namely those associated with her return to the Bank such as reversion to her

position within the EROD reporting to the CE and renewal of her fixed-term appointment beyond its expiration date.

II. CLARIFICATION OF ISSUES

28. The facts as summarised raise a number of legal issues for determination by the Tribunal, namely:

1. Were proper procedures followed in laterally transferring the Applicant to ERMF or was the decision an abuse of discretion, arbitrary, discriminatory, or improperly motivated?
2. Was the denial of legal representation during the internal administrative review process unlawful?
3. Was the non-renewal decision arbitrary, not based on essential facts and a retaliation or made without recourse to due process?
4. Was the 2013 performance appraisal and “unsatisfactory” rating made according to proper procedures and not an abuse of discretion, arbitrary, discriminatory or improperly motivated?
5. Was the decision not to refer the Applicant’s complaint to the Office of Anticorruption and Integrity in accordance with proper procedures?

III. SUMMARY OF THE PARTIES’ CONTENTIONS

The Applicant’s Contentions

29. The Applicant asserts that:

1. Her transfer to ERMF breached the fundamental and essential terms of her contract and required her consent. It also did not follow proper procedures, was discriminatory and involved her being recruited on a false basis.
2. The decision not to allow her legal representation during internal grievance procedures was an abuse of discretion and unlawful.

3. The non-renewal decision was a termination carried out without recourse to proper procedure; and it was unlawful as it omitted essential facts, comprised mistaken conclusions, constituted a reprisal and was made with an improper purpose.
4. The 2013 performance appraisal was unlawful due to numerous breaches of the Bank's appraisal procedures, constituting an abuse of process, and was retaliatory and motivated by an improper purpose.
5. By failing to refer the Applicant's complaint of retaliation to OAI, the Bank breached its own procedures and denied her due process.

The Transfer Decision

30. The Applicant alleges that the Bank contracted with her in bad faith, it misrepresented her job for which she was recruited and is estopped from transferring her from EROD to ERMF. She asserts that the Bank had represented that she would be reporting directly to the CE and undertaking a specific type of work leading global monitoring of financial, food and fuel markets (the 3F project). However, when the Bank made this representation, it was aware that the project that featured in the job description was due to conclude in 5 months after her joining the Bank, and in the event she was never provided with the opportunity to develop and lead the 3F project. Accordingly, she states that the Bank 'induced' her to leave her career in New Zealand, her home and her family and move a considerable distance to a location that is at times extremely challenging, with the pre-settled intention not to honour the agreement. This constituted a misrepresentation made in bad faith.

31. The job to which she was ultimately forced to transfer, according to her, bore no resemblance to the job description she had been offered, in that:

1. It was located outside of the office of the Bank's CE.
2. It did not report to the CE and therefore, carried lower status, scope for promotion and career enhancement potential.

3. It involved “preparing macroeconomic analytical work” of a character [the Applicant] had undertaken at a much more junior point in her career and which did not feature in the job description she had accepted.

She concludes from the above that this amounted to a fundamental breach of the essential terms of her contract.

32. She states that she would never have considered taking the job except that it was located in the most strategically important economic office within the Bank. She submits that the discretion to be exercised by the Bank under AO 2.03 (‘Performance Management, Assignments, Lateral Transfers, Promotion, Position Classification and Staff Level Complement System’) may not be exercised arbitrarily and does not legitimize a misrepresentation made in bad faith or otherwise.

33. The Applicant argues that the decision to unilaterally move her represents an abuse of discretion. She has submitted that the Bank has failed to comply with the word and spirit of AO 2.02 (“Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members”) paragraph 2.1 to be “guided by fair, impartial and transparent personnel policies and practices” in the management of its staff. She argues that the transfer decision infringed on the Bank’s career management policies and procedures under AO 2.12 (“Career Management”) paragraph 2.1. She adds that as her position was an essential and fundamental condition of her contract, the transfer required her consent. She further contends that transfers made during the probationary period must satisfy two conditions: (1) the new duties must be comparable for which the staff member was hired; and (2) the transfer must be temporary.

34. As part of her complaint against the transfer, the Applicant alleges there was discrimination on the grounds of gender contrary to AO 2.02. She alleges that one other male staff member, who like her was employed in 2011 to work on the 3F project, remained in EROD. She adds that ERD requested a position for another male officer in EROD. She states that during the tenure of the CE, all the male international staff members in EROD with fixed term appointments were offered permanent positions and four out of five were promoted. However, out of the three female international staff members, only the most junior had been regularized, with the Applicant’s employment being terminated on 4 August 2014.

Legal Representation

35. With respect to her claim of denial of legal representation, the Applicant argues that as the Respondent is a product of international law and bound by its fundamental principles, including international human rights law, it could not have denied her legal representation in the Bank's internal justice system below the level of the Administrative Tribunal. She claims that this is in breach of "*equality of arms*" and denies her the right to a fair hearing.

36. The Applicant contends that this denial offends fundamentally the rule of law and contravenes her human rights. She alleges that the Bank has an entire office of lawyers to defend it against claims brought by staff members, whereas the Bank's staff members, many of whom reside outside of their country of origin, are isolated and have nowhere to turn for independent legal advice and guidance. Unlike some other international organizations, the Bank has not established an office of staff legal assistance nor does it fund a staff association lawyer.

Non-Renewal Decision

37. The Applicant notes that the DG, BPMSD, used the word "termination" when referring to administrative arrangements in his 28 February 2014 memorandum to the Applicant. She alleges therefore that the non-renewal decision was actually a "termination for unsatisfactory service" requiring strict procedures under section 10 of AO 2.05 ("Termination Policy") that were not followed. She also argues that the sharp deterioration in the assessment of her performance over the period August-December 2012 by the CE is a reprisal contrary to AO 2.04 ("Disciplinary Measures and Procedures"). It was, she alleges, based on an improper motive as it coincided with her attempt to seek to overturn his underlying decision within the Bank's internal justice system to move her from EROD to ERMF. She submits that the non-renewal decision omitted essential facts as her previous two and a half years at ADB demonstrated that she possessed expert knowledge and practical experience that ADB required for the foreseeable future and, based on AO 2.01 ("Recruitment and Appointment of external candidates"), she falls squarely within the suitable category for further employment and to suggest otherwise "is a fiction born out of an improper motive."

Performance Appraisal and “Unsatisfactory” Rating for 2013

38. The Applicant argues that her 2013 performance appraisal did not follow AO 2.03 paragraphs 2.3 and 2.6. She argues that her appraisal included contributions from the CE and DCE and yet they had had no direct input to her work in 2013 and she had not been given notice that they would be her input supervisors. She also alleges that her “not proficient” ratings were not grounded on a fair assessment, no specific examples were given to substantiate them, and her assessment did not include any proper appraisal of her output. She also claims that contrary to AO 2.03, paragraph 2.1, she was not given constant feedback and/or her alleged performance issues were not discussed with her. Finally, she maintains that her appraisal was retaliatory and motivated by improper purpose as the CE had assessed her performance as having deteriorated sharply after she had sought to overturn the CE’s decision to transfer her.

Non-referral to OAI

39. The Applicant alleges that the Bank has breached AO 2.10 (“Whistleblower and Witness Protection”), paragraph 6.3 by failing to refer her complaint of retaliation to OAI.

Respondent’s Contentions

Lateral Transfer

40. The Respondent submits that it has not misrepresented the job for which the Applicant was recruited and argues it is incorrect that the job for which she applied was different to the job she was given. The Respondent notes that the advertised position did not make any reference to the 3F TA or to any other Technical Assistance. It submits that the fact that the Applicant was not directly associated with 3F TA does not mean she was not involved with the monitoring of global regional economic events in financial commodity and energy markets. According to the Bank, the function of global monitoring financial, key commodity and energy markets is broader than the 3F TA. The purpose of moving her to ERMF was to make her part of the macroeconomic monitoring team, which prepares the global baseline assumptions for the Asian Development Outlook as one of its key activities. The Bank denied the allegations of the Applicant that they contracted with her in bad faith or misrepresented the job for which she was recruited. In fact, the Applicant refused to move for almost a year to ERMF. In this context, the Respondent notes that the Applicant’s unwillingness to move was unreasonable and demonstrated a

lack of flexibility, adaptability and disregard for the legitimate and reasonable needs of the Respondent to organise its resources.

41. The Bank has contended that the Applicant's lateral transfer from EROD to ERMF was a valid exercise of its discretion. Without this flexibility and as a policy matter, the scope of Respondent's authority to reassign staff to effectively respond to the needs of the members and fulfil its mandate would lead to negative consequences. It has relied on the terms of the appointment which state that "*[i]f necessary, a staff member may be reassigned to a position in any other department/office as appropriate, including assignments in any locations outside headquarters.*" It has also relied on Section 1 of the Staff Regulations and paragraphs 1.1 and 3.1 of AO 2.03 stating that the Respondent is entitled to assign staff to 'any of the activities or offices of ADB.' The Bank has also stated that consistent with AO 2.03, paragraph 3.1, it has reassigned the Applicant from EROD, the front office of ERD, to ERMF, which is a division of the same department (ERD) at the same grade level. The Bank argues that this is a lateral transfer that does not require staff consent. The Respondent notes that the Appeals Committee had found that the lateral transfer did not amount to an abuse of discretion and was not arbitrary, discriminatory, improperly motivated or in breach of procedure.

42. The Respondent submits that the Tribunal's assessment of management decisions can only be very limited and in any case, the Tribunal cannot substitute its own judgment for that of the Respondent.

43. The Respondent argues that the EROD and ERMF positions were essentially similar and thus the Applicant's transfer from one to the other did not involve a demotion. While there was some difference in the scope of the research work required, the research focus of both positions was on macroeconomics and protection against shocks. Moreover, the two positions overlapped very substantially in respect of both outcomes and core competencies. The Respondent acknowledges that the one main difference was that the EROD position involved reporting to the CE while the ERMF position involved reporting to the ACE. However, the Respondent argues that a Senior Economist Level 5 in either position would have precisely the same status and seniority.

44. The Respondent argues that the educational requirement for the two positions are the same and in fact, the ERMF position requires a higher education degree (Doctoral level) than the initial EROD position that only required a university degree, although a PhD would be preferred.

45. The Respondent also submits that the Applicant has failed to substantiate her allegations of gender based discrimination and argues in any event that, by virtue of Article II of the Statute, these allegations are outside the scope of the Tribunal's powers.

46. The Respondent further notes that the move of the Applicant was not made during the probationary period which ended on 4 August 2012.

Legal Representation

47. With regard to the Applicant's plea for legal representation, the Respondent submits that it has not violated any fundamental rule of law, and that the Applicant has been dealt with in a fair and even handed manner consistent with its internal grievance procedures. The Respondent argues further that the Applicant's allegations to the contrary should be rejected for two reasons: (i) the Respondent's rules do not provide for representation of counsel during internal administrative review and appeals; and (ii) the Respondent's policies and procedures do not 'fundamentally violate the rule of law'. The Applicant's appointment letter states that the Respondent's actions are guided by the relevant provisions of AO 2.06. Under paragraph 7.2, the staff member filing an appeal may nominate another staff member to represent and act on his/her behalf before the Appeals Committee. However, before the Tribunal, the Applicant may designate any person to represent him or her, including counsel. It submits that its policies and procedures did not 'fundamentally violate the rule of law'. Both the Applicant and the Respondent have received advice from their respective counsel and the matter of legal representation is governed by the rules established in each international organization.

Non-Renewal of Contract

48. The Respondent submits that it was not obligated to extend or convert the Applicant's fixed-term appointment. It relies on AO 2.1 paragraph 13.1, which provides that "ADB is under no obligation to extend or convert a fixed-term appointment of a staff member". In taking a decision whether a fixed-term appointment should be extended and converted or allowed to lapse by non-renewal, they have to consider the criteria set out in paragraph 13.1(a) and (b). The Respondent's 6 December 2013 memorandum from the CE clearly explained the reasons underlying the recommendations that the Applicant's fixed-term appointment should not be renewed. This non-renewal of the contract was not a retaliation to her decision to seek to overturn their decision to laterally transfer her from EROD to ERMF. Her ratings were in three competencies reduced from 'proficient' to

‘developing’ based on her assessment of performance for a longer period. The Respondent denies that it failed to take into account the Applicant’s strengths as well as her weaknesses. The Respondent also denies that the non-renewal was a “termination” for unsatisfactory performance under AO 2.05 paragraph 10, as contended by the Applicant, but rather it was a decision not to renew a fixed-term appointment and the correct procedures under AO 2.01 paragraph 13 were followed.

“Unsatisfactory” Performance Rating for 2013

49. The Respondent argues that the review of the Applicant’s performance for 2013 was conducted in accordance with the procedures provided in AO 2.03 and the performance review guidelines. As ‘input supervisors’, the CE and the DCE are responsible for managing the work program and operations of ERD. It was entirely appropriate for the CE or the DCE as Head of the Department to provide input on ADB wide competencies, which are assessed in part 2 of the performance review. The Respondent submits that the 2013 performance review of the Applicant was consistent with the Bank’s procedures, which include the inputs of supervisors, other than the main supervisor of the staff member. The Applicant was given notice that her performance was deteriorating and her 2013 performance review was based on the work and competencies and was not a retaliation. The Respondent submits that the Applicant did not give evidence that she had challenged the recommendation of the CE.

Failure to Refer Complaint to OAI

50. The Respondent denies that it unlawfully failed to refer a complaint of reprisal to OAI. The Applicant reported to the DG, BPMSD, by an email dated 11 December 2013 this allegation of retaliation against the CE’s non-renewal decision. However, the Respondent maintains that its non-referral of the matter to OAI was not a breach of AO 2.10 paragraph 6.3. It submits that it has respected the Applicant’s recourse to the internal dispute resolution process and has fully participated in the same. Since there was no misconduct by the Respondent that warranted a referral by BPHR to OAI for investigation under AO 2.10, the allegation of the Applicant with respect to Decision 5 had no merit. It also submits that under AO 2.10, paragraph 3, the BPHR is required to refer a report of retaliation to OAI for investigation. This must be read in conjunction with paragraph 6.1 of AO 2.10, which provides that “[s]taff who believe that they have been subject to retaliation as a consequence of reporting a suspected integrity violation or of cooperating with an OAI investigation must notify OAI of their concern and seek relief from retaliation and in

the case of reporting suspected misconduct or cooperating with a BPHR investigation, must notify BPHR of their concern and seek relief from retaliation.”

IV. FINDINGS AND CONCLUSIONS

Preliminary issues

51. On 30 October 2014 the Applicant filed an application for oral hearing pursuant to Rule 14 of the Rules of the Tribunal. The Applicant submits that as she had not had the benefit of an oral hearing in the Bank’s administrative process and internal justice system, the Tribunal should afford her an oral hearing. In any case, she argues that the apparently unprecedented case on Decision 2 (Legal Representation) justified an oral hearing on this aspect, taking into account the importance of the issue and its potential repercussions on future challenges within the Bank’s internal justice system. The Bank has not agreed that an oral hearing is either necessary or would yield the disclosure of any new information with probative value. It has submitted that the Applicant did not avail herself of the opportunity to request witness testimony before the Appeals Committee under the provisions of AO 2.06, Appendix 2, paragraphs 4.8 - 4.9 at the Appeals Committee stage, when she had challenged the decision of her transfer (Decision No. 1) and the appeal against her claim to be represented by counsel (Decision No. 2).

52. Under Article VIII of the Statute of the ADB Administrative Tribunal (“ADBAT”), it is for the Tribunal to take a decision in each case whether oral proceedings are warranted or not. This provision has to be read with the provisions of Rule 14 of the Tribunal’s Rules of Procedure, which provide that “Oral proceedings, including the presentation and examination of witnesses or experts, may be held only if the Tribunal so decides.”

53. Taking into account the nature of the allegations made by the Applicant and the very extensive and detailed comments with supporting documents given by her and the Bank to substantiate their arguments, the Tribunal after due deliberation has decided that oral proceedings were not warranted in this case, as conveyed to the parties by the Order dated 23 December 2014.

Decision 1 – Lateral Transfer Without Consent

54. The Applicant has submitted that she was recruited to a position within EROD to work on the 3F project and that she would not have accepted the Bank’s offer if she was to work in any other team. She has alleged that the Bank had wholly failed to inform her that

the funding for the 3F project was due to terminate on 31 December 2011, a determination that the Bank had made on 11 December 2009. In fact, the technical assistance was extended to 31 December 2012. She claims that the 3F project was not included in her work plan approved on 24 October 2011. Less than four months after joining the Bank, on 23 November 2011, the CE first raised the issue of moving her outside EROD to a different team in ERD. She had indicated then that she wished to stay in EROD but was willing to help EREA. Again, the CE raised the issue of a permanent move on 16 February 2012. The Applicant has argued that she did not consent to the re-allocation, as it would not transfer her to an equivalent position and constituted an effective demotion. As it was proposed that the Applicant's position within EROD would be abolished, the Applicant has argued that the procedure in AO 2.05, namely six months to find a new job, had to be followed, but she was never provided with this opportunity. She has also relied on the email dated 26 November 2012 from the ACE, ERMF, who wrote to her acknowledging that "[he] supposed there is a certain cachet to being a part of the front office [i.e. the Office of the CE], but the important thing is to make sure that the move to ERMF doesn't undermine [her] career path." She has further argued that working in EROD was a "fundamental and essential term" of her contract of employment which required her to report exclusively to the Bank's CE and the change in the reporting structure entirely destabilize the contract of her employment, to which she did not consent.

55. On the other hand, the Bank has submitted that it has not misrepresented the position for which the Applicant was recruited. According to the Respondent, the allegation that it had made a contract with the Applicant in bad faith or that it had misrepresented the job for which she was recruited was counter-productive to the interests of the Bank itself and was without merit. The Bank has further submitted that the job description did not make any reference to 3F or any other technical assistance. The ERD was to carry out its function of global monitoring of finance, key commodity and energy markets that would strengthen the Bank's monitoring capacity. It has stated that the purpose of moving the Applicant to ERMF was to make up a part of the Macroeconomic Monitoring Team, which monitored global, regional and economic events in financial markets and key commodity and energy markets. It has further submitted that her lateral transfer was a valid exercise of its discretion and her offer of appointment dated 31 March 2011 included a condition that "[i]f necessary, a staff member may be assigned to a position in any other department/office, as appropriate, including assignments in any location outside headquarters." It has also relied on paragraph 1.1 of AO 2.03 ('Performance Management, Assignments, Lateral Transfers, Promotion, Position Classification and Staff Level Complement System'). The Respondent could also reassign

such staff member(s) “at their grade level on a lateral basis to a new activity office if the interests of ADB [...] so warrant” (AO 2.03, paragraph 3.1), which could be done without the consent of the staff member. The Bank has, therefore, submitted that the lateral transfer of the Applicant from EROD to ERMF did not constitute a demotion of the Applicant as the Bank had a valid interest to reassign staff where necessary. It has acknowledged the fact that while her ERMF position reported to the ACE, her earlier position in EROD reported to the CE, which did not suggest a difference in status.

56. This Tribunal has held in *Lindsey* Decision No. 1 [1992], I ADBAT Reports, para. 11 that the “[d]ecisions on the number and levels of staff to be employed in a given division are not reviewable by the Administrative Tribunal.” It has also held that the Tribunal “cannot say that the substance of a policy decision is sound or unsound.” (*ibid*, para. 12). The decision for the Tribunal revolves around whether the Bank has failed to take into account relevant considerations or taken into account irrelevant considerations or whether it has abused its discretionary power in carrying out a transfer, or whether it has followed its own internal procedures.

57. The reasons for the transfer of the Applicant from EROD to ERMF were explained by the CE in his memorandum of 5 December 2012. These reasons included the fact that he had decided to remove the global monitoring team from EROD to ERMF in order to avoid duplication of work. Such changes are within management’s authority. Further, such decisions may involve the lateral transfer of staff. However, in the Applicant’s case, her appointment letter of 31 March 2011 offered her the post of “Senior Economist, Level 5, in the Office of the Chief Economist, Economics and Research Department”. In addition, the advertised post for which the Applicant applied, which in effect contained the job description, indicated under the heading of “Immediate Reporting Relationships” that the position would report to the Chief Economist. Yet after her transfer to ERMF the Applicant was to report to the ACE rather than the CE. This may not have been a demotion as such, but nevertheless was a significant change in her position.

58. Moreover, the job description/advertisement for the EROD position specified four expected outcomes. Of these four outcomes, three were concerned with economic research work, and of these three, one was headed “Commodities, Energy, and Global Economic Monitoring.” This indicated that the position would “establish systems for monitoring high-frequency data on the global macro-economy, global financial markets, and key commodity and energy markets” and “prepare reports on the implications of global economic events in these markets for the regional economic outlook.” From this terminology the Tribunal concludes that the 3F project, although not explicitly mentioned

in those terms, was nevertheless part of the advertisement/job description. The Respondent has a flexibility to assign staff to “any of the activities or offices of ADB” as provided in paragraph 1.1 of AO 2.03. This Tribunal has also held in *Agliam*, Decision No. 83 [2008] VIII ADBAT Reports, para. 31 that “staff members will have their preferences considered but cannot always expect to have them honoured.” However, it is a fact that the Bank did not deny that its decision prior to the Applicant taking up the post to discontinue funding for this project was not communicated to her before she joined the Bank.

59. Taking into account the entirety of the circumstances as described above, including in particular, the significant change in the Applicant’s reporting line, we find substance in the Applicant’s claim that the Bank’s action contravened AO 2.02, paragraph 2.1 whereby ADB “is guided by fair, impartial and transparent personnel policies and practices in the management of all its staff.” This is enough to justify an order of equitable compensation to be paid to the Applicant.

60. Another ground on which the Applicant relied was that the Bank contracted with her in bad faith in that it misrepresented the job for which she was recruited. According to her case, the Bank should have been “estopped” from transferring her from EROD to ERMF. However, the Tribunal does not accept that the Bank has intentionally misrepresented the facts in bad faith or that the principle of estoppel applies in this case.

61. Finally, the Applicant’s allegation of gender discrimination has been denied by the Bank. This claim related primarily to her transfer and involved allegations about the treatment of other staff members in EROD. According to paragraph 2.4 of AO 2.02, the “employment, promotion and assignment of staff will be made without discrimination on the basis of sex, race or creed”. The Application itself set out specific allegations that might in other circumstances have called for a shift in the burden of proof to the Bank to show that objective considerations other than sex had justified its actions. However, in this case, it appears that the Applicant did not mention any allegations of discrimination on the basis of sex or gender in earlier statements to the Bank about her treatment.

62. At the same time, the Tribunal has reservations about the position taken by the Bank on this issue. The Respondent argued that Article II of the Statute of the Tribunal confines the Tribunal to an examination of the application of an individual staff member, without hearing or passing judgment upon what the Bank has termed “general matters of the Respondent.” The Tribunal notes that an allegation of discrimination in contravention of paragraph 2.4 of AO 2.02 may require it to examine allegations of treatment of other

staff members. This may be necessary in order to establish whether or not, by appropriate comparison, an applicant has suffered discrimination on a prohibited ground.

63. In light of the above, the Tribunal considers that discrimination was raised as an afterthought and in any event, the Tribunal is not persuaded by the substance of the Applicant's claim on this point.

Decision 2 – Alleged Denial of Legal Representation

64. Another contention of the Applicant is that she was unlawfully denied legal representation, which she maintained is a fundamental principle and part of international human rights law, the right to a fair hearing. She states that the Respondent was advised and represented by lawyers throughout the entire course of the litigation within its internal justice system, which she has been denied and the Respondent is, therefore, in breach of customary international law. The Bank for its part denies any obligation to allow legal representation below the Administrative Tribunal. The Applicant also argues that in so far as the Bank relies on AO 2.06 to justify exclusion of counsel from proceedings before the Appeals Committee, it is a provision that is unlawful by virtue of public international law.

65. A recent Advisory Opinion issued by the International Court of Justice sheds light on what *equality of arms*, referred to earlier, means in the context of an international organization (see the ICJ Advisory Opinion of 1 February 2012, concerning Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development, paragraph 44):

“That principle [equality of the parties, referred to here as *equality of arms*] must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds.”

In this Advisory Opinion, the ICJ referred to relevant paragraphs of the Human Rights Committee's General Comment No. 32: Right to Equality before Courts and Tribunals and to a Fair Trial, as provided by Article 14 of the International Covenant on Civil and Political Rights. Paragraph 18 of that General Comment states: “[W]henver rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal ...”.

66. Both the Applicant and the Respondent can be represented by counsel in oral proceedings before this Tribunal under Rules 13-15 of the Rules of Procedure, “if the Tribunal so decides” (Rule 14). In the light of the ICJ Advisory Opinion, this Tribunal is of the view that no customary international law requires legal representation within an international organization at all the levels of administrative review. Neither public international law nor international human rights law ensures a right to legal representation at a stage below the review by a competent, independent and impartial tribunal that issues a reasoned, public decision. Since the ADBAT is such a tribunal, the Bank’s decision to keep legal representation out of the internal review process, including in particular the Appeals Committee, in accordance with AO 2.06, is not unlawful. In addition, in this case, there is no doubt that the Applicant has obtained legal advice and guidance from her counsel during her troubled association with the Bank.

67. The contention of the Applicant is that her right to a fair hearing is not merely confined to proceedings before the Tribunal but applies to all aspects of the internal justice system under which the merits of her case were judged. The Tribunal considers that her right to a fair hearing has not been denied simply because she was not given the right to legal representation in the internal stages of administrative review. Accordingly, the Tribunal rejects the Applicant’s contentions in relation to Decision No. 2.

Decision 3 – Non-Renewal of Her Fixed-Term Appointment

68. The next action which has been impugned by the Applicant is Decision 3 (non-renewal of fixed-term appointment). She has submitted that the reasons given expressly related to her initiation of proceedings within the Bank’s internal justice system, which amounts to an act of retaliation and is inextricably linked to Decisions 1 and 2. The Applicant states that the Bank should have desisted from retaliation and acted in a fair and transparent manner in making its non-renewal decision. She has specifically invoked paragraph 10.1 of AO 2.06 which provides that “staff members are free to avail [themselves] of the remedies of administrative review and appeal, and no reprisal will be taken against them for doing so”, and paragraph 2.1 of AO 2.02 that provides that the Bank must be “guided by fair, impartial and transparent personnel policies and practices in the management of all its staff.” She has also alleged that paragraphs 2.3 and 2.6 of AO 2.03 for conducting a performance review have not been adhered to by the Bank.

69. On the question of the non-renewal of her fixed-term contract, the Applicant has referred to the memorandum dated 23 December 2013, written by the CE to the DG, BPMSSD. In this memorandum the CE alleged that the Applicant had demonstrated her

unsuitability for further employment at ADB because of lack of flexibility to meet the organization's changing needs, and her inability or unwillingness to respond to the emerging needs of the institution positively and flexibly. The Applicant has argued that, despite having assigned her a satisfactory performance rating in her Performance Review at the end of one year probationary period in August 2012 as well as the highest possible pay increase, he had sought to undermine his own conclusion by criticizing a work plan which he had failed to approve. Further, her argument was that the CE's criticism coincided with her recourse to the Bank's internal justice system in respect of her "forced" transfer from EROD to ERMF and hence was retaliation. She has also alleged that the CE did not cite any one of her key achievements within the Division and had not given a balanced appraisal. Additionally, she has alleged that she had not been assigned important tasks because of the initiation of formal proceedings.

70. The comments of the CE for recommendation of non-renewal of the Applicant's contract had been sent to the Officer in Charge, BPMSD, who had drafted an endorsement of the CE's recommendation. This was submitted to the President of the Bank and was finally accepted and sent to her by a memorandum dated 28 February 2014. She noted that in this memorandum the DG, BPMSD, used the word "termination" and accordingly the Respondent should have resorted to the procedures concerning "termination for unsatisfactory service" under paragraph 10 of AO 2.05. She contended that the Officer-in-Charge, BPMSD, had also omitted the positive contributions made by her.

71. It is noted that the Applicant had completed Part 1 of the 2013 performance review and had also discussed the work plan in a meeting with the ACE, ERMF. After meeting with the Applicant, the ACE submitted his Competency Assessment (Part 2 of the performance review). She was assessed "proficient" on the following three competencies: (i) Application of Technical Knowledge and Skills, (ii) Achieving Results and Problem Solving; and (iii) Communication and Knowledge Sharing. The Applicant was assessed "not proficient" on three other competencies, namely: Client Orientation, Working Together and Innovation and Change. He also gave his overall comments, which included the fact that the Applicant had not demonstrated the capacity for "adaptation, leadership and team work". The DCE, who had completed Part 3 of the performance review, rated her performance as "unsatisfactory" based on the assessment of the work plan and competencies of the Applicant in 2013.

72. There is no dispute that the Applicant was appointed on a fixed-term contract for three years and, at the end of that period, the Applicant's appointment could "at the option

of ADB, be extended or allowed to lapse.” Paragraph 13.1 (a) of AO 2.01 provides as follows:

“ADB is under no obligation to extend or convert a fixed-term appointment of a staff member. Such appointment will generally be extended or converted to a regular appointment, when the following criteria are met:

- (a) ADB decides that it will continue to require the staff member’s particular blend of skills and experience for the foreseeable future; and
- (b) ADB is satisfied with his/her performance and suitability for further employment.”

73. The Respondent has given the reasons for non-renewal of the Applicant’s fixed-term contract and they have relied upon the CE’s memorandum dated 23 December 2013. One of the reasons given was that the Applicant lacked flexibility to meet the Respondent’s changing needs and this was illustrated by the fact that she did not consent to transfer from the office of the CE for several months. In the Tribunal’s view the Applicant did demonstrate competency on certain technical skills. However, it is clear she has also demonstrated her unsuitability for further employment in the multi-cultural environment of the Bank. The Tribunal considers that it was within the managerial discretion of the Bank to indicate to the Applicant that, unless she carried out their instruction to transfer, it could legitimately take disciplinary action against her. In relation to the Bank’s assessment of the Applicant’s performance, the Tribunal considers that the Bank did not abuse its discretion. In the circumstances of this case, we are unable to agree with the contentions of the Applicant that she had been improperly threatened with disciplinary action; instead her position was explained to her and it did not constitute retaliatory action.

74. It is true that the DG, BPMSD, used the word “termination”. However, that did not change the character of the Applicant’s contract. This was a fixed-term contract and it was brought to an end on the expiration of the fixed-term. Therefore the termination procedure within paragraph 10, AO 2.05 was not applicable to the Applicant’s case and she was not entitled to rely on it. This Tribunal in *Alexander* Decision No. 40 [1998] IV ADBAT Reports 41, para.38 has held that “[t]he Bank’s discretion in deciding whether to regularize a fixed-term appointment is somewhat greater than in a decision to terminate a staff member’s continuing employment. In the instant case, the Applicant bears the burden of

proving abuse of discretion.” This Tribunal concludes that the expiration of the fixed-term contract did not involve the Bank in abusing its discretionary power or acting arbitrarily or improperly.

Decision 4 – 2013 Performance Appraisal and “Unsatisfactory” Rating

75. The Applicant’s complaint concerning the 2013 performance appraisal is summarised at paragraph 38. It is settled law that the assessment of staff members’ Annual Performance is essentially made by the Bank and it is not for the Tribunal to substitute its assessment. The general position concerning the Tribunal’s ability to review the Bank’s assessment of staff members, is described in *Mr. E*, ADBAT Decision No. 103 (12 February 2014), para. 54:

“...The Respondent’s exercise of discretionary power is subject to review by the Tribunal, but only in circumstances of where the challenged management decision is arbitrary, discriminatory, improperly motivated, adopted without due process or involves an abuse of power or discretion (see *Lindsey*, Decision No. 1[1992] I ADBAT Reports 5, para. 12).

As part of this reviewing process, the Tribunal has examined with care AO 2.03 (“Performance management, assignments, lateral transfers, promotion, position classification and staff level complement system”) together with the applicable Performance Management – Implementing Guidelines. It is the Tribunal’s task to consider the facts of the present case in the light of these principles and specific provisions in the administrative order and the guidelines.

76. The Tribunal’s conclusions are as follows.

1. We do not accept that the Applicant’s poor performance assessment was a result of retaliation because she had initiated formal proceedings within the Bank’s administrative process.
2. The Bank was fully entitled as part of the 2013 performance appraisal to have the CE and the DCE as input supervisors, which is permitted by virtue of paragraph 6 of part B of the Implementing Guidelines.

3. However, the Bank itself recognised that it could have better informed the Applicant in 2013 of the unsatisfactory aspects of her performance, but did not do so as these deficiencies were known to the Applicant as they were raised with her in 2012. The Bank also recognised that it had not reported the Applicant's major performance issues to BPHR in accordance with Section IV. A of the Implementing Guidelines, but did not do it because BPHR were in any event aware of these deficiencies.
4. In any event, the Tribunal finds that the Applicant's 2013 Performance appraisal was substantially in accordance with the rules and procedures and it has not been motivated by extraneous, irrelevant or retaliatory considerations.
5. Finally, such minor criticisms as could be made had no effect whatsoever on the outcome of the Applicant's performance review.

Decision 5 – Failure to Refer the Applicant's Complaint of Retaliation to OAI

77. The underlying contention of the Applicant in her final complaint is that the non-renewal decision was unlawful as it constituted a reprisal and was made with an improper purpose. She has argued that she had legitimate expectations of renewal, given the positive feedback she had received earlier in respect of the quality of her work, which was followed by the CE not recommending her contract to be renewed. Against this essential background, the Applicant alleges that the Officer in Charge, BPMSD, had failed to refer her complaint of retaliation to the OAI.

78. Relying on AO 2.10 ("Whistleblower and Witness Protection"), the Respondent has denied the above allegation. It also has submitted that there must have been a prior act of suspected misconduct to which there was alleged retaliation, which chain of events do not exist in the present case.

79. The Tribunal rejects the Applicant's contention that BPHR failed to refer her complaint of retaliation to the OAI for the following reasons.

1. According to the Applicant (paragraph 18 of her Addendum Application), BPMSD "undertook its own assessment of the claim [of misconduct through retaliation] which ultimately ended in an exoneration of [the CE]". It is to be

noted that BPHR is the HR section of BPMSD called up to investigate whether or not there has been misconduct with view to a possible referral to OAI under paragraph 4.6 of AO 2.10. The Tribunal accepts the Applicant's analysis insofar as it described BPMSD, which means for this purpose BPHR, undertaking an assessment that exonerated the CE.

2. It follows from this implicitly that, following its assessment, BPHR concluded that there was no misconduct to refer to OAI.
3. Accordingly, the Tribunal concludes that the Applicant's claim that the Bank was at fault in not referring the matter to OAI is without merit.

Other Pleas

80. In the Application dated 7 February 2014, the Applicant has also sought relief for removal of all references on the ADB website and documents that she was in ERMF. She has, however, not referred to this relief in the documents filed by her later, including in the Addendum to the Application.

81. The Tribunal can see no good ground to grant the above request as all information including details of the case and decision of the Tribunal are published on the ADB website, in accordance with Rule 2 of the Rules of Procedure of the Tribunal. It is noted that the Tribunal did not receive a request for anonymity from the Applicant pursuant to Practice Direction No. 3.

Conclusions

82. Accordingly, the Tribunal concludes that in relation to Decisions 2, 3, 4 and 5 the Applicant's case has no legal merit. In relation to Decision 1 (lateral transfer of the Applicant from EROD to ERMF), the Tribunal has concluded that the Bank did not abuse its discretionary power, but it did contravene AO 2.02, paragraph 2.1 to the extent described above at paragraphs 57-59 of this decision.

Remedy

83. In relation to Decision 1, the Tribunal finds that neither rescission nor specific performance as provided in Article X of the Tribunal's Statute would be appropriate in the

present case. In all the circumstances, it would be in order to award the Applicant some reasonable equitable compensation for intangible injury\caused to the Applicant by the Respondent's action (see *Alexander*, Decision No. 40 [1998] IV ADBAT Reports and *Rive*, Decision No. 44 [1999] Volume V, ADBAT Reports).

84. The Tribunal had determined, in terms of Rule 5A of the Rules of Procedure, that this case warranted consideration by a panel consisting of all its members. However, on account of unforeseen circumstances, one member was unable to attend this plenary session of the Tribunal. In the exercise of its powers under Rule 23 and considering that Rule 5, paragraph 4 provides that three members of the Tribunal shall constitute a quorum for a plenary session, the Tribunal decided that this case should be determined by the four members present in the plenary session.

DECISION

For the above reasons, the Tribunal unanimously decides that:

- i) The intangible injury suffered by the Applicant as a consequence of the Bank's breach of its own procedures will result in the Tribunal awarding equitable compensation of US \$ 35,000 and \$5,000 for the reasonable costs incurred by the Applicant.
- ii) There is no justification for any damages.
- iii) All other claims are dismissed.

Lakshmi Swaminathan

/s/

President

Roy Lewis

/s/

Vice-President

Shin-ichi Ago

/s/

Member

Anne Trebilcock

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary