ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 116
(2 October 2018)

Ms. J
v.
Asian Development Bank

Lakshmi Swaminathan, President
Gillian Triggs, Vice-President
Shin-ichi Ago
Anne Trebilcock
Chris de Cooker

1. The Applicant seeks relief against the decision of 20 October 2017 taken by the President of the Asian Development Bank ("ADB" or "the Bank") to impose sanctions upon her, including dismissal, for misconduct. The Applicant seeks rescission of that decision, reinstatement, or alternatively payment of separation pay, as well as moral damages, actual damages, other relief deemed just and equitable under the circumstances, and legal fees. Three cases which have features in common with the present Application were considered at the same session as the present one and examined separately on their own merits (see Mr. K v. ADB, Decision No. 117; Ms. L v. ADB, Decision No. 118; and Ms. M v. ADB, Decision No. 119).

I. THE FACTS

Background

2. The Applicant joined the Bank in May 2005 as a Level 8 Officer. In February 2010, Applicant was promoted to Level 9 (corresponding to National Staff 3 (NS3)), a position which qualified her for the privilege of purchasing a tax-exempt vehicle ("TEV"). Imposition of sanctions on the Applicant followed a Bank investigation into a scheme involving importation of tax-free vehicles. The finding of misconduct was based on a conclusion of the Office of Anti-Corruption

and Integrity ("OAI") that the Applicant had availed herself twice of the privilege of purchasing a TEV through fraudulent practices by misrepresenting that her purchases were within the tax-exempt limit.

Framework and operation of the TEV arrangement for ADB staff

3. The TEV privilege falls within those foreseen by the Headquarters Agreement ("HQA") concluded between the Bank and the Government of the Republic of the Philippines on 22 December 1966, which provides for *"immunities, exemptions, privileges and facilities as are enjoyed by members of diplomatic missions of comparable rank, subject to corresponding conditions and obligations."* (HQA, Section 44(c)). Section 49 of the HQA states that the TEV privilege is part of the overall package granted in the interest of the Bank.

4. The HQA further provides that the Bank *"shall take every measure to ensure that the privileges, immunities, exemptions and facilities conferred by this Agreement are not abused and for this purpose shall establish such rules and regulations as it may deem necessary and expedient."* (Section 51). At the time of the Applicant's vehicle purchase, initiated in the first part of 2013, such measures included:

a) Section 8 of the Staff Regulations, which recalls that the privileges granted to the Bank are in its interest, and not for the personal benefit of staff, and provides that they *"furnish no excuse to the staff members who enjoy them for non-performance of their private obligations";*

b) Administrative Order 2.02 on the Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members, dated 20 September 2011,[1] which sets out, under General Principles of Conduct, the expectations of staff members in relation to the privileges they enjoy under agreements entered into between the Bank and governments of

[1] This was replaced by later versions, in particular the current Code of Conduct contained in AO 2.02 of 31 March 2017.

ADB member States. Para. 4.3(i) provides that staff members *"shall avoid any action … which may reflect unfavorably upon their position as employees of an international organization."* Para. 4.3(ii) recalls that privileges enjoyed by staff under agreements between the Bank and its member States are granted to the ADB, not the individual, and that staff members are "*expected to satisfy in good faith their obligations as resident of the host countries of ADB, including all personal obligations outside the ADB"* whose non-fulfilment *"could reflect unfavorably upon their position as staff members."* Finally, para. 4.8 (vi) provides that accepting benefits from sources external to ADB with respect to any ADB transaction is prohibited;

c) Administrative Order 2.04 on Disciplinary Measures and Procedures, dated 9 September 2010, which specifies that misconduct *"does not need to be intentional."* (para. 2.01). *"Misconduct includes, but is not limited to, the failure to observe the Staff Regulations, AOs, Administrative Circulars and all other duties of employment."* (idem). This AO includes, as an example, *"abuse or misuse of the privileges and immunities accorded to staff members…"* (para. 2.1(d)); and

d) Integrity Principles and Guidelines (IPG) of October 2010, which include fraud as an integrity violation, defining fraudulent practices as *"any act or omission, including a misrepresentation that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation"* (Section 2A).

5. The TEV privilege was originally provided only to international staff to assist them with relocation to the Philippines; as from 1973, the host country acceded to a request by the Bank to permit certain national staff at *"higher or equivalent level to Administrative Assistant"* (referred to later as Senior National Staff (NS)) to import "one duty free automobile," subject to certain conditions. (Memorandum from the Office of the President of the Philippines dated 15 August 1973). In 1997, the host country's Department of Foreign Affairs ("DFA") agreed to increase the

applicable "car value entitlement limit" ("TEV limit") to USD 24,000 for vehicles imported by Senior NS (DFA Memorandum dated 18 September 1997). The two memoranda did not define or elaborate on the terms "car value entitlement" or the "duty free automobile". Vehicles with a value in excess of the TEV limit for Senior NS became ineligible for the TEV privilege. Letters exchanged between the ADB and the DFA (dated 15 April, 17 December and 24 December 1999) reiterated that the privileges afforded in accordance with section 49 of the HQA are *"granted in the interest of the Bank,"* but shed no light on the price of a vehicle in relation to the TEV.

6. At the relevant time, the Logistics Management Unit of the Office of Administrative Services ("OAIS-LM") of ADB administered the TEV privilege on behalf of the ADB. The website of the Office of Administrative Services states that, *"Tax-Exempt Vehicle Services is responsible for ensuring that the acquisition, registration and disposal of ADB official vehicles and staff tax-exempt vehicles conforms with government requirements".* OAIS-LM provided the relevant documentation to eligible Senior NS when they enquired about the TEV importation process and handled communications with the host country. This documentation included the one-page fact sheet entitled "ADB TEV Entitlement," setting out in tabular form the privilege accorded to each category of staff. The fact sheet noted, next to the notation *"NS3-NS6, Eligible National Staff," "One imported vehicle within first year of appointment and/or promotion to NS3".* Directly beneath this statement, the following text appeared in italics: *"Note: The vehicle purchase is limited to US$24,000."* Footnotes in this fact sheet referred to the two memoranda of 1973 and 1997 mentioned above, without attaching them.

7. Another fact sheet, entitled *"Tax-Exempt Vehicle (TEV) Importation and Registration,"* outlined the steps and actions, with an indicative timeframe and remarks, for purchase, customs clearance, and registration. It noted that after submitting proof of eligible status to the Bank's OAIS-LM, a Senior NS member *"submits the following documents to OAIS-LM for the filing of*

"Pre-Clearance Request"(PCR) with the DFA…." These documents included a *"Completed Request to Import a Tax-Exempt Vehicle (TEV) ["RFEMV"] form"* and personal identification. The OAIS-LM would then send a copy of the PCR approved by DFA to the staff member and the vehicle supplier. In the next step, *"[s]taff instructs the vehicle supplier or mover/shipper to ship the vehicle and sends scanned copy of shipping documents (i.e. Bill of Lading, packing list and sales invoice or Certificate of Title) to OAIS-LM for the filing"* of the Request for Free Entry of the Motor Vehicle with the DFA. The OAIS-LM is then to submit the second endorsement request to the Department of Finance (DOF). This fact sheet does not specify any particular vehicle supplier, and staff was not required to use a particular provider (in contrast to the designated service providers for vehicle registration processing). The provider of the staff member's choice would furnish information relating to a vehicle ordered by a staff member as a basis for the Bank to seek the necessary clearances from the host country in order to facilitate the transaction.

8. The OAIS-LM would normally send the staff the "Request for Free Entry of Motor Vehicle", a one-page form which included the "Shipment Value" of the vehicle, instructing him/her to return it to OAIS-LM for preparation of the Pre-Clearance Request to DFA. The covering email from OAIS-LM stated, *"Please make sure that the actual/official invoice of the car would not exceed US$24,000.00 limit, otherwise filing of free entry request with DFA will be delayed."* In this particular case, no evidence was presented that the Applicant received such an email.

Abuse of TEV privilege scheme uncovered by OAI

9. In April 2015, and unrelated to the Applicant, OAIS-LM, the Bank's unit that administered the TEV privilege, noticed irregularities with the paperwork submitted in connection with a number of TEV transactions. These irregularities were reported to ADB's Office of Anti-Corruption and Integrity ("OAI"). The OAI commenced an investigation involving a vehicle sales

firm, referred to here as "AAA". This firm was one of the personal service providers ("PSPs") maintaining a presence on Bank premises at headquarters as a convenience to staff.

10. The investigation also uncovered a scheme whereby ineligible vehicles were imported by some NS through AAA under the TEV privilege using fraudulent invoices that stated the price so that it fell under the prescribed limit. Several staff interviewed by the OAI explained that the AAA representative, referred to as "Ms. S", had told them they were entitled to import particular models, and that certain arrangements would be made to ensure that the vehicle's total value fell within the USD 24,000 TEV limit. The AAA representative prepared two invoices: one with the actual amount paid ("genuine invoice") and the other with a lower amount under the TEV limit ("fraudulent invoice"). Genuine invoices were never submitted to OAIS-LM.

11. The investigation found that both AAA and the AAA representative had engaged in fraudulent practices. The OAI investigation concluded that the scheme was far-reaching, involving 33 Senior NS. The scheme had operated for more than six years before being investigated. As a result of the investigation, both AAA and "Ms. S" were subjected to sanctions publicized by the Bank.

12. The OAI proceeded to initiate individual investigations for each Senior NS implicated but, due to the volume of cases, decided to prioritize (i) current staff in entrusted positions, such as those in the treasury, audit and controller's departments, and (ii) staff who were "multiple offenders," i.e. who had imported more than one vehicle using the TEV privilege. According to the Bank, staff who consistently took responsibility for their wrongful actions and fully cooperated with the investigation were also prioritized. As of 17 February 2017, the ADB had issued disciplinary measures to 12 individuals in relation to the scheme; of these, four staff (including the Applicant) were dismissed (each of whom have filed Applications before the Tribunal), another four staff were demoted one level, two former staff were permanently barred from working for the

ADB, and two former staff were barred from working for the ADB for three years. Dismissed serving staff (as compared to staff who had already retired from the Bank and were also subject to sanctions for the same type of misconduct) did not lose their post-retirement benefits but they could only receive their pension benefits in a lump sum. An additional 21 staff were subsequently investigated and disciplined for having engaged in misconduct under very similar circumstances.

Investigation of Applicant

13. The Applicant availed of the Bank's TEV privileges twice by purchasing two vehicles. The first vehicle, a BMW X1, was purchased in 2010 at a value of USD 26,797.33. Following total loss of her car following flood damage during Typhoon Ondoy, the Applicant purchased a second vehicle, also a BMW X1, in 2013 at a value of EUR 24,078.97 (equivalent to USD 31,543.45). The Applicant purchased both vehicles from AAA and was assisted by the AAA representative who was found to have engaged in fraudulent practices. "Genuine" and "fraudulent" invoices were created for each purchase with the "fraudulent invoices" submitted on the Applicant's behalf by the AAA representative to the OAIS-LM, the Department of Foreign Affairs, and the Department of Finance. The value of the TEV indicated in the "fraudulent invoice" for the 2010 purchase was USD 23,989.33. The value of the TEV indicated in the "fraudulent invoice" for the 2013 purchase was USD 23,919.29.

14. On 7 December 2015, OAI commenced investigations in relation to the allegation of Applicant's possible integrity violation under the ADB's Anticorruption Policy and IPG (Integrity Principles and Guidelines), and misconduct under AO 2.04. When interviewed by OAI on 8 December 2015, the Applicant provided the following information:

a) She was aware of the USD 24,000 TEV limit;

b) She assumed the limit referred to the base price only, excluding options accessories, freight and insurance ["base price" theory]. This understanding was confirmed by the AAA

representative. The Applicant did not confirm this understanding with OAIS-LM on either occasion;

c) At the time, she did not think that the transaction was "illegal" since the AAA representative was stationed at the Bank and the Applicant had been shown a list of staff members who had purchased the same vehicle;

d) She confirmed the receipt of certification from the agent stating that the cost, insurance and freight (C.I.F.) price of the car was within the limit;

e) She confirmed she did pay more than USD 24,000 for each TEV but explained she understood the limit covered the base price only;

f) She was aware of the genuine invoices for both cars and was aware only of the fraudulent invoice for the 2013 vehicle;

g) She did not question the fraudulent invoice because it could be explained with the exclusion of freight and charges.

15. On conclusion of the investigation, the Applicant was provided the opportunity to comment on the draft OAI Report and her comments were taken into account in its finalization.

OAI report

16. On the basis of its investigation, OAI found by a preponderance of evidence, that Applicant had misrepresented the values of the vehicles she had bought so as to knowingly or recklessly mislead ADB to obtain the tax exemption for her vehicle importations. The 13 May 2016 OAI Report stated *"it is not credible that the [Applicant] understood the TEV limit to cover the 'base price' excluding options, accessories, freight and insurance."*

17. The OAI concluded that the Applicant was aware of the TEV Limit, she paid more than the TEV limit for her vehicles, she had knowledge of the Fraudulent Invoices, her explanation of

the "base price" theory was not credible, and the Applicant was responsible for the AAA representative's actions as she acted on the Applicant's behalf and for the Applicant's financial benefit. These actions amounted to fraudulent practice as defined under section 2A of the IPG and misconduct under para. 2.1(d) of AO 2.04.

Disciplinary proceedings

Formal disciplinary proceedings

18. On 22 June 2016 the Respondent initiated disciplinary proceedings against the Applicant. The Applicant was charged with violating section 8 of the Staff Regulations; paras. 4.3(i), 4.3(ii) and 4.8 (vi) of AO 2.02; and section 2A of IPG, each cited in paragraph 4 of this judgment.

19. Staff of the Budget, Personnel and Management Systems Department ("BPMSD") held meetings with the Applicant and took submissions. In AO 2.02, under "General Principles of Conduct," para. 4.3(i) provides that staff members *"shall avoid any action ... which may reflect unfavorably upon their position as employees of an international organization."* Para. 4.3(ii) recalls that privileges enjoyed by staff under agreements between the Bank and its member States are granted to the ADB, not the individual, and that staff members are *"expected to satisfy in good faith their obligations as resident of the host countries of ADB, including all personal obligations outside the ADB"* whose non-fulfillment *"could reflect unfavorably upon their position as staff members."*

Disciplinary measure imposed

20. After reviewing all relevant submissions and responses, BPMSD sent a 15 September 2016 memorandum to the President recommending that the President impose the following disciplinary

measures on the Applicant:

a) dismissal for misconduct with immediate effect;

b) in the event that a tax liability for the two TEVs is later discovered or determined that requires ADB to address such liabilities, ADB reserves the right to recover the amount from the Applicant;

c) permanent ineligibility to work as a consultant or contractual employee employed by ADB or any ADB-financed activity; and

d) access to ADB premises only allowed with prior approval of Director, BPHP.

21. The 15 September memorandum correctly identified the Applicant's position – a position that was not entrusted with important responsibilities in the Audit, Treasury and Controller's departments and therefore was not considered a "position of trust".

22. The President thereupon approved the recommendation.

The Applicant is dismissed for misconduct

Notice of disciplinary measure

23. On 21 September 2016 Director, Human Resources Business Partners Division ("BPHP") served to Applicant the Notice of Disciplinary Measure which included the Applicant's dismissal with immediate effect.

Appeals Committee

Appeals Committee report

24. On 20 October 2016 the Applicant lodged an appeal directly with the Appeals Committee under AO 2.06 of 19 February 2013 on Administrative Review and Appeal Procedures (prior administrative review not being required for disciplinary measure cases), appealing the President's decision to dismiss her. The Appeals Committee, pursuant to AO 2.06 para. 13.2, considered the appeal jointly with three other appeals on the same subject and submitted its recommendation almost one year later on 11 October 2017. On 17 October 2017 the Appeals Committee informed the Applicant by letter that it regretted the delay beyond the 90-day timeframe indicated in AO 2.06 and that the urgency *"was never underestimated during the time it took to deliberate on the case",* however *"the intricacies of the case and the substantial amount of documentation submitted by both sides had a considerable impact on the amount of time necessary to consider this case and to deliberate."*

25. The Appeals Committee, comprising a three-member panel of staff appointed to the AC in accordance with para. 9 of AO 2.06, unanimously found that:

a) the proper procedures had been applied; and that
b) the conduct was within the scope of "misconduct".

However, it was not unanimous as to the question whether there was an abuse of discretion or discrimination, or whether the measures were proportionate to the seriousness of the misconduct. A minority of the Committee felt that the application of discretion extended so far as to be arbitrary, that the inability of the Applicant to choose between receiving the pension as an annuity or a lump-sum *"may prove significant and ultimately unjustified"* since former staff found to have engaged in similar misconduct were allowed to maintain their pension on an annuity basis, as they were

investigated after they retired, and that the abuse of the TEV privilege *"did not rise to the level of such seriousness as to warrant dismissal."* The minority further argued for less severe measures in light of inadequate ADB supervision of the automobile salesperson, who was given license to do business within Headquarters, leading to an environment in which TEV abuse became common.

26. The Committee also unanimously noted that:

c) OAIS-LM had stated in an email to the [Applicant] *"please make sure that the actual/official invoice of the car does not exceed the USD 24,000 limit, otherwise filing of free entry request with DFA will be delayed";* and

d) the Applicant had been copied on an email to OAIS-LM from the AAA representative who had issued the two (fraudulent) invoices.

27. Nevertheless, the Committee, on a non-unanimous basis, recommended that the President reject the Applicant's appeal. The 11 October 2017 Report was certified by one member who also signed "for" another member. The Secretary of the Committee signed "for" the Chairman of the Appeals Committee.

28. On 20 October 2017, the President adopted the Appeals Committee's recommendations and the Applicant was informed of the decision on 25 October 2017.

Application to the Administrative Tribunal

29. On 26 January 2018 the Applicant brought this Application to the Tribunal.

Relief sought:

30. The Applicant seeks:

a) rescission of the contested decision;

b) dismissal of the integrity violation complaint and reversal of BPMSD Memorandum of 21 September 2016 dismissing her for misconduct and its complete expunction from her employment record;

c) reinstatement to the last position she held with full payment of back salaries, benefits and privileges without loss of seniority; or, in the alternative, if reinstatement is no longer feasible, payment of a separation pay in an amount equal to five times the annual salary of the Applicant;

d) payment of moral damages for sleepless nights, anxiety, mental anguish, besmirched reputation and social humiliation and the ill effect on her health because of this case equivalent to five times her annual salary;

e) payment of actual damages by way of reimbursement of legal consultation fees and other costs including insurance and health policy premiums;

f) other relief deemed just and equitable under the premises; and

g) attorney's fees.

31. The Respondent filed its Answer on 2 April 2018. The Applicant's Reply was submitted on 18 May 2018, and the Respondent's Rejoinder on 20 June 2018. The Respondent maintained that the Application was without merit and should be dismissed and that the Applicant was not entitled to any relief.

Tribunal's request for additional information

32. On 11 July 2018, following its consideration of the views of the parties and under Rules 10(1) and 11 of the Rules of Procedure of the ADB Administrative Tribunal, the Tribunal sent the Respondent a "Request for Additional Information" in relation to other ADB staff mentioned in the Appeals Committee Report who had been sanctioned. The information requested included a)

position held; b) number of years of employment in the Bank; c) the number of vehicles purchased; and d) the penalties imposed upon the individual. On 16 July 2018, in response to the Tribunal's request, the Bank submitted the information and requested that the Tribunal review the information *in camera*. The Applicant was provided a redacted version of the information. On 18 July 2018, Applicant's counsel commented on the additional information submitted by the Respondent.

33. At the conclusion of its session on 21 July 2018, the Tribunal decided it was necessary to seek additional information and views of the parties and, pursuant to Rules 10(1) and 11 of the Rules of Procedure of the ADB Administrative Tribunal, requested additional information from the Bank in relation to the other 21 individuals referred to in paragraph 47 of the Respondent's Answer covering the OAI investigation on the fraudulent TEV purchase and import scheme. The Tribunal directed the Bank to provide similar details for these individuals as for its 11 July request regarding the original 12, in a consolidated manner for all 33. Additionally, the Tribunal asked the Bank to furnish *in camera* any information on action taken by it regarding management and individual accountability of those officers responsible for processing the TEV privilege during the time of the fraudulent scheme. The Tribunal also asked the Bank to provide the final OAI Report covering AAA. On 2 August 2018, the Bank provided these requested documents to the Tribunal along with a request that the Tribunal conduct its review *in camera*. Redacted versions of the documents were provided to the Applicant. The information showed that in relation to the 33 individuals, Respondent decided to:

a) dismiss 5 staff;

b) demote 12 staff by one level;

c) demote 7 staff by one level with additional salary reduction;

d) declare 6 retirees/former staff as permanently ineligible to be recruited as a consultant or contractual staff in an ADB financed activity; and

e) declare 3 retirees/former staff ineligible to be recruited as a consultant or contractual staff in an ADB financed activity for 3 years.

34. Within the entire group, three staff members were found to have "engaged in obstructive practice"; of these, one was dismissed and two were demoted with a five percent salary reduction. Of those staff who had not retired, seven were designated as being in a position of trust, of whom four were dismissed and three received a "mitigated sanction as a result of staff's cooperation" of demotion by one level with ten percent salary reduction.

Explanatory information/additional pleadings submitted during sharing of additional information

35. In the 18 July 2018 correspondence from the Applicant's counsel, Applicant submitted comments on the additional information provided by the Respondent on 16 July 2018. The Applicant's counsel argued that the mitigating factors were not uniformly applied and, having taken "responsibility for his/her wrongful actions", indirectly penalized the exercise of the right to defend one's self. The counsel noted that the Applicant "cooperated" by fully participating in the OAI investigation, answering all questions, and supplying documents that were requested. The counsel also questioned the meaning of "consistently cooperated" and whether this "option" was presented to the Applicant as a means of mitigating her sanction.

36. In its 2 August 2018 response to the Tribunal's request for additional information, the Respondent supplemented its information with explanatory comments. The Respondent emphasized that "while the general misconduct of abusing the TEV privilege was common to all cases, consistent with para. 4.1 of AO 2.04, the disciplinary sanctions were determined on a case-by-case basis, taking into account (i) the nature and weight of the evidence gathered in each case; (ii) the individual circumstances; and (iii) the criteria set forth in para.6 of AO 2.04 [effective as of 9 September 2010]."

37. The Respondent also explained the mitigating circumstances and aggravating circumstances it considered. With respect to mitigating circumstances, it noted that it considered whether the individuals (i) "*assisted OAI in the investigation and were instrumental in helping it determine how the fraudulent scheme occurred*"; and/or (ii) "*admitted their misconduct and expressed their willingness to mitigate the consequences of their actions*". With respect to aggravating circumstances, it noted that it considered (i) "*the official position held by the staff/former staff member*"; (ii) whether the TEV privilege had been abused on more than one occasion; and (iii) whether additional misconduct occurred during the investigation phase by engaging in obstructive practices.

38. The Respondent also, while maintaining that its processes and procedures were not deficient such that it bears "any responsibility for the actions of the Applicants", explained to the Tribunal that it had approved *"several actions which were aimed at tightening the controls on the administration of the TEV privilege in order to minimize the risk of similar fraudulent acts occurring."* Those actions included transferring the responsibility for all processing and administration for the TEV privilege from OAIS-LM to the Bank's "Government Relations" section and revising processing procedures so that staff are now to submit all documents themselves.

39. On 10 August 2018, the Applicant, through her counsel, submitted her comments on the Respondent's consolidated information dated 2 August 2018. Apart from comments on her availing of the TEV privilege twice as being "unfairly" considered an aggravating factor, the Applicant reiterated her same points from her 18 July 2018 correspondence with elaborations. In her Application and Reply, the Applicant expressed her concerns about the timing and batching of sanctions and asserted that her case was wrongly used as a deterrent.

40. With regard to her availing of the TEV privilege twice, the Applicant, through her counsel,

argued that it was unfair to portray her as a repeat offender because there was no proper investigation on her first use of the TEV privilege. She also noted that there were at least four other existing or former staff other than the Applicant who availed of more than one TEV but were not dismissed.

II. <u>FINDINGS</u>

Preliminary matters

a. Confidentiality request

41. Applicant requests confidentiality of the entire proceedings and expressly requests that her name and position not be disclosed. Practice Direction No. 3 provides for confidentiality only in relation to the Applicant's own name, or the name of any of his or her witnesses or any person cited in the pleadings. This Direction does not mention position or Department. However, since there is no reason for not anonymizing the position or Department's name, the Tribunal accords anonymity also to the position and Department, along with the Applicant and any other persons cited in the pleadings, taking all the circumstances into consideration.

b. En banc

42. In light of the complexity of the issues posed in the case, the Tribunal decides, in accordance with Article V (5) of the Statute of the ADB Administrative Tribunal read with Rule 5A, that this Application warrants consideration by a panel consisting of all its members.

c. Applicant's request for production of documents

43. Applicant requested pursuant to rule 6.3 of the Rules of Procedure that the Respondent furnish the Tribunal (not the Applicant) with the decisions and/or resolutions on all the investigations and administrative proceedings conducted against employees of the Bank involving charges of misconduct or integrity violation for abusing the TEV privilege. The Applicant requested these documents so that the Tribunal might determine whether discrimination, abuse of process or failure to follow procedures occurred in the case of the Applicant. The Applicant wanted the Tribunal to ascertain if there was a valid distinction between her case and the other resolved cases which did not conclude with dismissal. The Applicant repeated this request in her Reply and noted that she also wished to secure the records of the investigation into the TEV that pertained not only to the Applicant in the hope that evidence would exculpate her and others "who were meted disciplinary sanctions".

44. The Respondent requested the Tribunal to reject the Applicant's request as it asserted such documents were not relevant to the inquiry presently before the Tribunal. The issue was not whether other staff members were properly sanctioned by Respondent, but rather whether, taking into consideration the individual circumstances in Applicant's case, the President erred in the assessment of the severity of misconduct, and the proportionality of the disciplinary sanction.

45. The Tribunal is empowered, under ADBAT Rules 10 and 11[2], when it considers it necessary for the proper examination of an application, to require a party to submit documents or evidence that might be pertinent to the issues posed. The Tribunal has employed this power in this case to obtain information from the Bank concerning individuals, other than the Applicant, who were also disciplined in relation to the fraudulent scheme up to February 2017. This was the time

[2] Rule 10 empowers the President of the Tribunal to "call upon the parties to submit additional written statements or additional documents" and Rule 11 empowers such additional documents to be "filed after the case has been included in the list."

when the Appeals Committee obtained the information, as stated in its report concerning the Applicant's conduct. The Tribunal has also obtained for its *in camera* review, information regarding the other individuals sanctioned, a copy of OAI's Report into AAA and its representative, and the Bank's institutional learnings and measures taken after the uncovering of the TEV privilege scheme. The Tribunal sought this information in order to examine the Applicant's claims of discrimination and proportionality of the sanctions imposed upon her.

The Merits

The Tribunal's scope of review in this matter

46. While reiterating the Tribunal's basic position regarding the scope of review with regard to managerial decisions in general (*Lindsey,* Decision No. 1, [1992], I ADBAT Reports 5, para. 12), the Tribunal has set out its scope of review with respect to disciplinary measures in the following terms:

> *"In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed."* (*Hua Du*, Decision No. 101 [2013] IX ADBAT Reports 94, para. 31).

47. In the instant case, there are three principal issues before the Tribunal: whether the procedures utilized by the Bank were proper and in accordance with due process; whether the Applicant's misconduct legally amounted to misconduct; and whether the sanction imposed was within the Bank's discretion, proportionate and that there was no discrimination.

Summary of positions

Applicant's position

48. The Applicant argues her dismissal is unlawful on the grounds that:

1. there were procedural flaws in the OAI investigation as it failed to interview the key witness (the AAA representative) and the Appeals Committee process was flawed as not all Appeals Committee members certified the report, it relied on inaccuracies in the OAI report, and it breached the 90-day limit for production of its Report;
2. there was no misconduct and thus the dismissal was without basis:
    - the TEV limit had a "questionable legal basis" and was a "creation of law";
    - what constitutes the TEV limit was never clearly defined and so should be considered in favor of the Applicant;
    - there is no evidence that she was a party to the fraudulent scheme; and
    - she acted in good faith - there was no reason for the Applicant to be diligent about the actions of AAA and its representative and the presumption was that everything was in order;
3. the dismissal was an abuse of discretion because it discriminated against the Applicant;
4. the sanction was disproportionate to the alleged offense.

The Respondent's position

49. The Respondent argues that there is no merit in the Applicant's claim and that it should be dismissed with the Applicant not entitled to any relief. The Respondent asserts that the Applicant's acts of taking advantage of a fraudulent scheme not once, but twice, were a "fundamental violation of the standards of integrity expected of her" and the only conceivable disciplinary measure was dismissal.

50. The Respondent asserts that the Applicant was aware of the TEV limit, it would be unreasonable to interpret this to mean anything other than the total price including cost, insurance and freight charges, and she was aware that the total cost of both purchases was above the TEV limit.

51. The Respondent asserts that the dismissal decision was both warranted and proportionate to the serious misconduct of Applicant. The dismissal constituted a lawful exercise of Respondent's discretion and it adhered to due process and followed all relevant procedures for dismissal.

Issue (1): Did the Respondent follow due process in taking the decision to dismiss the Applicant?

Applicant's position

OAI investigation

52. The Applicant asserts an abuse of process as the finding of an integrity violation was based on an incomplete investigation and insufficient evidence as neither the AAA representative nor anyone from AAA was interviewed as part of the investigation of the Applicant. She further asserts that she felt her rights violated because what was initially thought to be an investigation about AAA and its representative turned out to be an investigation against her and she was never given the option to remain silent or confer with counsel.

Appeals Committee

53. The Applicant asserts that the rendition of the contested decision did not follow established procedure for appeals and also constituted an injury to the Applicant which is compensable. The

Applicant notes three matters with respect to the Appeals Committee:

54. Firstly, only one voting member certified the Report in contravention of para. 4.11 of Appendix 2 of AO 2.06 where it states that decisions will be made by majority vote. The Applicant asserts this takes on "special significance" because three of the Appeals Committee findings were not unanimous.

55. Secondly, the disposition of the appeal breached the 90-calendar time period pursuant to para. 14 of AO 2.06 (the report was issued approximately one year after the appeal first lodged).

56. Finally, inaccuracies in the OAI report were cited in the Appeals Committee Report and improperly influenced the outcome (with regard to the disciplinary sanction decision). For example, a) she was erroneously identified as a CPA ("Certified Public Accountant") and a Senior Audit Officer; b) evidence was relied on which she did not have the opportunity to rebut; and c) she does not recall receiving emails from OAIS-LM that advised *"...please make sure that the actual/official invoice of the car does not exceed the US$24,000 limit…"* which erroneously were supposed to have shown Applicant's awareness of the TEV limit.

Respondent's position

57. The Respondent asserts that it followed the proper procedures as set forth in AO 2.04.

OAI investigation

58. The Respondent asserts that the OAI Investigation (referred to in AO 2.04, para. 8 and Appendix 2) is essentially fact-finding and separate to BPMSD's disciplinary proceedings referred to in AO 2.04, para. 9. The Respondent, therefore, asserts that due process was ensured and the

Applicant in both instances was given a meaningful opportunity to explain herself and provide evidence in support of her defense.

59. With regard to the absence of testimony from the AAA representative the Respondent notes that the Applicant has failed to explain how the evidence in the record is insufficient to sustain the Respondent's findings that she committed misconduct. The Respondent nevertheless explains that AAA did cooperate with OAI and OAI made attempts to contact the AAA representative but those efforts were unsuccessful. Moreover, the Respondent asserts that OAI has no power to subpoena or compel parties outside of the Bank to cooperate or submit to its investigations.

Appeals Committee

60. In support of the Respondent's assertion that the Applicant's rights have not been violated it argues:

a) the fact that the Appeals Committee members granted their colleagues the authority to sign on their behalf is not an indicator of impropriety, and this does not amount to a violation of Applicant's rights;

b) it does not dispute the delay in issuing the report, and the Appeals Committee noted in its letter to the Applicant that it regretted the delay, but the Appeals Committee is empowered under Rule 1.4(c) of the Rules of Procedure for the Appeals Committee to *"extend any time limit which may apply under the Rules, taking into account the nature and complexity of the appeal."* The Respondent argues that the extension was appropriate in this case given the reasonable decision of the Appeals Committee to consider the case together with related cases, the complexity of the information in the evidentiary record, and the significant importance of the matter to the institution. The Respondent distinguishes *BC v. IFC,* WBAT Decision No. 427 [2010] as in the present case the Applicant has not demonstrated that the Appeals Committee delayed the issuance of the

report without reason, in a manner that unduly affected her rights; and

c) the Respondent acknowledges that the Appeals Committee's decision includes inaccurate statements suggesting the Applicant held a CFA *(sic)* and was a Senior Audit Officer and notes "such transposition errors are regrettable." However, it asserts that the Appeals Committee was aware that the Applicant was at the relevant time in a position that was not a position of trust and the President, the critical decision-maker, was apprised of the correct facts and decided to terminate Applicant's employment not because of a misapprehension of her job functions, but because she abused the TEV privilege and engaged in fraudulent practices on multiple occasions. Likewise, the Respondent concedes that the Appeals Committee erroneously referred to e-mail correspondence which did not pertain to Applicant, however it asserts that this does not entail a flawed process so as to warrant compensation. The email was with regard to the Applicant's awareness of the TEV limit, but this has not been disputed by the Applicant - she instead disputes the meaning of the limit (whether it refers to base price or total price). In other words, the Respondent asserts that the e-mail message does not address the point of contention. The Respondent concludes that the Applicant has not demonstrated that the Appeals Committee would have reached a different decision but for these errors and in any event, its errors do not amount to a procedural violation which merits compensation.

Finding (1): Did the Respondent follow due process in taking the decision to dismiss the Applicant?

61. With respect to the OAI investigation, the Tribunal finds, firstly, the omission of interviewing the AAA's representative is regrettable, although it is not outright illegal. The minority view in the AC made a reservation to the majority view by maintaining that the failure to interview the witness may have resulted in missing some crucial information that could have had

an impact on the decision. The Tribunal, however, considers that as internal bodies without police powers, neither the OAI nor the AC could compel her to participate in the investigation or other proceedings. The Tribunal finds that the Bank made reasonable efforts to locate her, and even in her absence took the measure of posting her name in connection with the fraudulent scheme. The Bank was more successful in relation to obtaining information from her former employer, the car sales firm, which the Bank also sanctioned. The Tribunal finds no violation of due process in this respect.

62. Secondly, the fact that Applicant was not aware of herself being investigated does not amount to non-observance of due process by the Respondent. She was apparently not informed about her own investigation because AO 2.04, para. 8.1(d) permits the investigator not to disclose the purpose of the investigation, if he/she determines that such disclosure could lead to the concealment or destruction of evidence or attempts to improperly influence witnesses, unlike in the formal disciplinary procedures, under para. 9 of AO 2.04, where it is obligatory to inform the person that he/she is under investigation.

63. In the unique circumstances, the Tribunal finds that the OAI investigation met the due process requirements.

64. With respect to the Appeals Committee, the Tribunal finds, firstly, that AO 2.06 of 19 February 2013 provides that the Appeals Committee is to submit its report to the President within 90 days of its receipt of the appeal (AO 2.06, para. 14). The Appeals Committee Rules of Procedure annexed to the AO define “Time Limit” as “the time period within which an action has to be taken”, subject to a rule on how a day on which the ADB is not open for business is to be treated (AO 2.06, Appendix 2, The Appeals Committee, Rules of Procedure [AC RoP], para. 1.2(h)). The AC may “at any stage of the proceedings” “extend any time limit which may apply under the Rules, taking into account the nature and complexity of the appeal” (AC RoP, para. 1.4(c)). Nothing on the

record indicates that the AC explicitly took that step or informed the Applicant that it was doing so, nor that it was considering her appeal together with three others pursuant to para. 13.2 of its RoP.

65. The AC's competence in reviewing decisions and disciplinary matters is to determine whether ADB's Staff Regulations, Administrative Orders and policies and procedures have been correctly applied (AO 2.04, para. 9.2(d)). The AC thus does not conduct an independent investigation. It can request additional documentation, which it did in February 2017 and at the end of May 2017. According to the AC report, the last information it received was a memorandum from BPMSD on 26 May 2017, following the AC's request of 23 May 2017.

66. There was no explanation whatsoever of why the AC took from the end of May until almost mid-October to submit its report. The appeal was somewhat complex, which could have justified the AC extending its own time-limit to a certain extent in order to grasp the relevant elements, but the delay involved here – exceeding four times the normal time-limit of 90 days - was excessive. The AC should also have informed the Applicant of the new time-limit it was providing for itself under para.1.4(c) of its RoP.

67. Secondly, the Tribunal notes that two signatures in the final report were signed for the members by a fellow member and the Secretary. Whether a Secretary can formally substitute a member of AC in signing the final report is questionable and even if it can be accepted, it is difficult to understand why these formal requirements were not properly satisfied after an excessively long duration of the procedure. So much so, that the justification of a long duration was explained by the Respondent to ensure careful examination of the case addressing a complex issue.

68. Thirdly, the AC report included inaccurate references, such as suggesting that the Applicant held a CPA and was a Senior Audit Officer or erroneously referring to e-mail

correspondence which did not pertain to Applicant. The Tribunal notes that the Applicant had been prioritized for investigation due to her multiple offences and not for her "position of trust". It also notes that the error was eventually corrected at the end of the Report when it recommended a disciplinary measure with a reference to the Applicant's correct position.

69. The Tribunal finds that irregularities at the appeals process level did not amount to improper process or denial of due process as a whole. However, the Tribunal also observes that the Appeals Committee did not follow the Bank's own rules, for which the Applicant should be entitled to compensation.

Issue (2): The Applicant's alleged misconduct. Whether the facts gathered legally amount to misconduct as contemplated by AO 2.04?

(i) Was there a legal basis for the TEV limit or was it ambiguous?

Applicant's position

70. The Applicant alleges her dismissal was an abuse of discretion because the TEV privilege had a "questionable legal basis." She argues that the TEV is a "creation of law" and that the TEV *"is not a privilege granted by the management of the ADB …. While ADB may be administering the TEV privilege, it cannot go beyond the scope of the law or add to its requirements."* Further, the *"law allowing the TEV ... does not impose a ceiling for the value of the automobile that officers and staff of the Bank may import."* In her Reply, the Applicant again emphasizes that there is no concrete legal basis ever presented for the car value entitlement limit of USD 24,000 C.I.F. (cost, insurance and freight) and *"[i]f there is no law or rule on the price limit of $24,000, Applicant has not violated anything."*

71. In any event, she asserts that what constitutes the value of said TEV limit has never been clearly defined in any of the TEV guidelines, there is no Administrative Order from the Bank implementing the program, and "car value entitlement" is open to different interpretations that should be considered in favor of the Applicant. *"[N]owhere is it stated that "car value entitlement" includes C.I.F."*.

72. In her Reply the Applicant notes that since she availed herself of the TEV privilege, the Respondent has issued a new set of guidelines for TEV and updated the Request Form to spell out that the definition of car value entitlement includes cost, insurance and freight, as it was prone to different interpretations. It now reads *"I am allowed to import a TEV subject to the price limit of USD 24,000 C.I.F. (Philippines)."* (emphasis supplied). The price limit of "USD 24,000 C.I.F." was not present at the time Applicant availed herself of the privilege – instead the USD 24,000 price limit was a "mere footnote in the form" and did "not mention C.I.F.".

Respondent's position

73. The Respondent asserts that the Applicant's pleas of ambiguity into the meaning of the cost limit and "car value entitlement" are not credible. With regard to the Applicant's claims that 'nowhere is it stated that the 'car value entitlement' includes C.I.F.", the Respondent asserts that *"it would be unreasonable to interpret these statements to suggest that the cost limit did not refer to the total price of the vehicle. ... If it was intended that the TEV limit only referred to the "base price", this would need to be explicitly stated. In the absence of such specification, a reasonable reader would have concluded that the cost limit referred to the total price."* In any event, the Respondent asserts that the Applicant's apparent misapprehension is belied by the record. The Applicant informed OAI that she saw the fraudulent invoice for the 2013 purchase in which the total C.I.F. price was stated to be approximately USD 23,919.29, i.e. below the USD 24,000 value and yet, the Respondent asserts, if she understood the TEV limit pertained only to the "base price"

then it is surprising that the Fraudulent Invoices and certifications ensured that the total C.I.F. value was below the TEV limit.

74. In its Rejoinder, the Respondent notes that it does not bear the burden of disproving staff's unreasonable interpretation of the meaning and applicability of the relevant rules. The Respondent asserts that it is entitled to expect that staff will follow the rules and, if in doubt, seek clarification from the appropriate offices.

Finding (2)(i): Was there a legal basis for the TEV limit or was it ambiguous?

75. Firstly, the DFA Memorandum dated 18 September 1997, read with the Memorandum from the Office of the President of the Philippines dated 15 August 1973, granted tax exemption for the importation of vehicles by NS3 and above, subject to car value of USD 24,000. There was a concrete legal basis for the car value entitlement to be limited to USD 24,000.

76. Secondly, as to the vagueness of the definition of car value entitlement, it is admitted that the normal reading of the term would mean the total value of the car including accessories, modifications and other costs. The base price of a car can be as little as half of the final price of the same car model with a different motor and other options, which would make the ceiling rate meaningless. Furthermore, the Applicant admits seeing the "fraudulent invoice", which indicated a car price with C.I.F. below the TEV ceiling, contradicting her assertion that she had thought the car value to be the "base value".

77. Thirdly, Appendix 1 of the revised AO 2.04 describes a preponderance of evidence as *"[e]vidence which is more credible and convincing than that presented by the other party …."* In *Gnanathurai*, ADBAT Decision No. 79 [2007], VIII ADBAT Reports 29, para. 31, this Tribunal noted

> *"... In disciplinary proceedings, the respondent organization must of course bear the burden of showing that the official or employee charged did commit the acts constituting the misconduct or unsatisfactory conduct imputed to him. It is a widely recognized rule that where the respondent established a prima facie case that the staff member did commit the misconduct or unsatisfactory conduct, the staff member must thereupon provide a reasonable and countervailing demonstration that the misconduct is not fairly or properly attributed to him."*

78. The Tribunal notes that the Respondent established a *prima facie* case on the basis of a preponderance of evidence, such as the fact that the Applicant was aware of the invoice received by the OAIS-LM which gave the full car value including C.I.F., that she was equally aware of the "base value" of the car to be USD 24,000, and that she received an invoice with much higher price than she paid. However, the Applicant has not rebutted the *prima facie* case established by the Bank.

79. Accordingly, the Applicant was at least reckless in choosing to rely on her own interpretation of the proper meaning of the term "car value entitlement".

(ii) Was there evidence of knowledge or recklessness?

Applicant's position

80. In her Application, the Applicant noted that TEV importation through AAA had been ongoing for years without any reported issues even before the Applicant qualified to avail herself of the privilege and there was no reason for the Applicant to be diligent about the actions of AAA or its representative. She acted in good faith. The Applicant asserted that she *"had no hand in the figures presented by [the AAA representative] to OAIS-LM"* and that there was no "indication that

she will resort to a fraudulent practice." She further asserted that nowhere in the guidelines and procedures for TEV purchase did it require any form of verification concerning documents submitted by the broker and she had not "certified" the form. She maintained that the Respondent cannot establish that the Applicant was aware of any fraudulent act prior to her application for TEV being processed by OAIS-LM. She further maintained that it was OAIS-LM which had the duty of verifying the legality of the document.

Respondent's position

81. The Respondent asserts that the Applicant cannot absolve her responsibility because the AAA representative supposedly provided her with misinformation about the TEV limit and produced the Fraudulent Invoice. The Respondent also notes that as a Senior NS, it was unreasonable for her to have concluded that the AAA representative could provide authoritative information on the scope of the ADB's tax-exempt vehicle privilege with the host country.

82. The Respondent rejects the Applicant's assertion that ensuring the truthful submissions for the importation of her vehicle fell solely on OAIS-LM, noting that she was responsible to ensure the truthfulness of the submissions and that she was best placed to alert OAIS-LM to the misrepresentations.

83. Finally, the Respondent notes that the OAI investigation concluded that the Applicant (i) was aware of the USD 24,000 TEV limit (conceded in her interview with OAI and clearly stated in the "Request to Import a Tax-Exempt Vehicle" form that she signed); (ii) was aware that her payment for both vehicles exceeded the limit (she does not deny that she paid USD 26,836.33 and approximately USD 31,543.45 for the two respective vehicles); and (iii) knew of the fraudulent invoices being used in the process of her TEV privilege. The Respondent, therefore, argues the facts gathered by OAI demonstrate that the Applicant, on a preponderance of evidence, engaged

in fraudulent practice and misconduct by misrepresenting that the two vehicles that she was importing were within the TEV limit for Senior NS through the submission of falsified invoices and certification of the Fraudulent invoice value. These actions breached the Respondent's Staff Regulations, AO 2.02 and the IPG, which give rise to a finding of misconduct for which disciplinary measures can be imposed under AO 2.04 para. 2.1.

Finding (2)(i): Was there evidence of knowledge or recklessness?

84. The Tribunal finds that the Applicant cannot claim innocence, for all of the following reasons. The Applicant reiterates her contention in many instances that she had thought the USD 24,000 limit applied to the "base value" of the car and the invoice supplied by AAA to OAIS-LM indicated the "base value", excluding options and C.I.F. However, as she stated during the OAI investigation, she was aware of the "fraudulent" invoice for the 2013 vehicle, the break-down of which contained all kinds of options including C.I.F. She was to realize that the amount given in the fraudulent invoice submitted by the AAA representative to OAIS-LM did not match the actual payment she was going to make. Therefore, the Applicant's assertion that she believed the formal invoice submitted to the OAIS-LM not to be fraudulent cannot be accepted. If there were a doubt about the meaning of the "car value", she should have clarified it with the Bank and she should not have simply believed the AAA representative's explanation, who was not authorized to substitute for the Bank. Even though the Applicant had not signed or endorsed the fraudulent invoice, she cannot claim innocence. A misrepresentation *"that knowingly or recklessly misleads"* is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2012, specifies that *"misconduct does not need to be intentional,"* and that it extends to reckless acts or omissions (para. 2.1).

85. In conclusion, the Tribunal finds that, on a preponderance of evidence, the Applicant fell within the standard of acting *"knowingly or recklessly"* that constitutes misconduct and the

Respondent was thereby authorized to impose penalties under AO 2.02 and AO 2.04 para. 2.1.

<u>Issue (3): Was the dismissal abuse of discretion, discriminatory or disproportionate to the alleged misconduct?</u>

Applicant's position

86. The Applicant asserts she has been discriminated against because others similarly charged were meted with less harsh penalties than dismissal, and the Bank found fault on her part yet did not find negligence on the part of the administering unit (OAIS-LM) of the TEV program. The Applicant notes from the information referred to in the Appeals Committee Report provided by BPMSD that of 12 individuals issued disciplinary measures she was one of four dismissed. She construes that BPMSD considered certain factors in imposing less harsh penalties on the other eight, such as demotion if those staff had *"(i) admitted to the misconduct; (ii) fully cooperated with the investigation (including voluntary submission of inculpatory evidence); or (iii) were instrumental in helping OAI understand the nature of the fraudulent scheme."* She argues that she should have been given the same opportunities to mitigate the consequences of her supposed transgressions. Why was she not given the opportunity to be an instrumental informant? She concludes discrimination in the way BPMSD has handled her case and the three others who were dismissed from service.

87. With regard to the assertion by the Respondent that she is a repeat offender, the Applicant explains that she was "constrained to make a subsequent purchase" as a replacement because her first car was flooded and considered a total loss. She asserts that the 2013 purchase under the TEV regime was not intended by the Applicant to have another tax-free vehicle.

Respondent's position

88. The Respondent asserts that the issue before the Tribunal is not whether other staff members were properly sanctioned but whether the President's decision to dismiss the Applicant in this case was an abuse of discretion, arbitrary, discriminatory, improperly motivated or a violation of fair and reasonable procedure, in light of the individual circumstances of each case (para. 4.1 of AO 2.04), taking into account the criteria set forth in AO 2.04 para. 6.2, namely para. 6.2(a) on the degree of the breach, para. 6.2(b) on the gravity of the adverse consequences and para.6.2(c) on the recurrent misconduct. The Respondent adds that the damage to ADB and its relationship with the Philippine Government "cannot be overemphasized."

89. As regards the allegations of discrimination made in comparison to those who had voluntarily collaborated with the investigation and received less harsh punishment, the Respondent asserts that the Applicant had ample opportunity to inform the Respondent of the AAA representative's fraud at the time of her transactions and *"could well have mitigated the extent of her misconduct"*.

Finding (3): Was the dismissal an abuse of discretion, discriminatory or disproportionate to the alleged misconduct?

90. Having considered the arguments put forward by the parties about the sanction imposed, the Tribunal reiterates its basic mandate that it cannot substitute its assessment for that of the head of the organization *"unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty"* (*Abat, supra*, citing *Khelifati*, ILOAT Judgment No. 207 [14 May 1973]; see also *Bristol*, Decision No. 75 (2006) Volume VII, para. 45, citing *Zaidi*, ADBAT Decision No. 17, (13 August 1996)). In *Zaidi*, para. 22, the Tribunal adopted the test for the question of proportionality as developed in *Planthara,* WBAT Decision No. 143

(1995), para. 37:

> *"… to determine whether a sanction imposed by the Bank upon a staff member is significantly disproportionate to the staff member's offense, for if the Bank were so to act, its action would properly be deemed arbitrary or discriminatory."*

91. AO No. 2.04 on Disciplinary Measures and Procedures sets out criteria for imposing disciplinary measures, including relevant factors to be considered (para. 6). In assessing the seriousness of the misconduct, AO No. 2.04, para. 6.2 sets out the following criteria, among others, to be taken into consideration:

a) the degree to which the standard of conduct has been breached by the staff member;

b) the gravity of the adverse consequences and damage or potential damage to ADB, its staff or any third party;

c) the recurrence of misconduct by the staff member, particularly when there is a repetition of misconduct of a similar nature;

d) the official position held by the staff member and the extent to which the staff member was entrusted with responsibilities in matters to which the misconduct relates;

e) collusion with other staff members in the act of misconduct;

f) whether the misconduct was a deliberate act;

g) the personal circumstances of the staff member and the staff member's length of satisfactory service; and

h) the staff member's admission of the misconduct prior to the date it was discovered and any action taken by the staff member to mitigate any adverse consequences resulting from his/her misconduct.

92. AO No. 2.04 further stipulates in para. 6.3 that, *"The disciplinary measure of dismissal for misconduct is particularly appropriate when the misconduct is serious or recurrent, or has*

jeopardized, or would in the future be likely to jeopardize, the reputation of ADB and its staff, … when misconduct involves Fraudulent Practices, Corrupt Practices or abuse of authority or abuse or misuse of ADB benefits …. Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's service is not in the interest of ADB."

93. The Applicant's conduct included documented misrepresentations about the purchase of two vehicles with a value exceeding the TEV limit, enabling her to benefit from a privilege to which she was not entitled; this amounted to fraud in violation of ADB rules in a way that jeopardized the reputation of the Bank. Instead of reporting the abuse of the TEV privilege to relevant authorities, Applicant took advantage of the fraudulent scheme. These elements were, in the Tribunal's judgment, legitimate factors for the Bank to weigh in deciding upon sanctions for the misconduct.

94. The Tribunal finds that the Bank legitimately took into account the relevant factors of the nature of the misconduct and the multiplicity of the offence in deciding upon the disciplinary measures to be applied. AO No. 2.04, para. 4.1 states that *"disciplinary measures imposed by the bank on a staff member shall be determined on a case-by-case basis…."* This was done in the present case, and the Tribunal finds that the severity of the penalties imposed on the Applicant were "not significantly disproportionate" to the gravity of the offence (see *Abat, supra*).

95. However, the Tribunal notes that one of the elements of due process is fair and equal treatment, and that the imposition of a sanction may not be discriminatory (see *Bristol, supra,* para. 45). In *Gnanathurai*, ADBAT Decision No. 79 [2007], VIII ADBAT Reports 17, para. 43, the Tribunal adopted the applicable rule as stated in *Khelifati* (*supra*):

> *"[O]fficials enjoy the protection … of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action*

has been or may be taken for different reasons and in different circumstances."

Upon receipt of the additional information supplied by the Bank on 2 August 2018 on all 33 staff who were disciplined, the Tribunal has noted a case of a staff member who was in the same situation as the Applicant (namely, not in a position of trust, availed himself/herself of the TEV entitlement more than once, and had no mitigating factors) but was not dismissed. Given that the disciplinary action was taken for the same underlying reasons, i.e. abuse of the TEV privilege, the Tribunal considers that this amounts to a failure of the Respondent to exercise its disciplinary sanction without discrimination. The Tribunal is, therefore, bound to rescind the Respondent's decision to dismiss the Applicant.

Relief

96. The Tribunal has found that the Applicant's claim of discrimination is founded and therefore her claim for rescission of the dismissal decision is granted. However, should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case, the Tribunal has, in accordance with Article X (1) of the Tribunal's Statute, fixed the amount of compensation to be paid to the applicant for the injury sustained. This amount of compensation to be paid by the Bank has been reduced on account of the fact that misconduct did occur. The Tribunal also considers it reasonable to conclude that the Applicant suffered intangible injury as a result of the Respondent's breach of AO 2.06 in three particular matters. For this she should be compensated. (See *Alexander*, Decision No. 40 [1998] IV ADBAT Reports 67, para. 88, and *Rive*, Decision No. 44 [1999] V ADBAT Reports 22, para. 23). Having prevailed in part on her claim, a portion of the Applicant's attorney's fees are also granted.

DECISION

For these reasons, the Tribunal unanimously decides:

1. The dismissal decision is rescinded;
2. The Applicant shall be reinstated to her former Level 3 position and be made whole for all earnings and benefits lost, less any earnings received since 20 October 2017 until payment, with restitution of her benefits and entitlements to the level they would have been but for the Bank's actions subject to the condition that the Bank may impose any disciplinary measure, short of termination;
3. Alternatively, should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case, pursuant to Article X, para. 1 of the Statute of the Tribunal, the Tribunal fixes the amount of compensation to be paid to the Applicant at USD 40,000;
4. In either case, award the Applicant USD 10,000 in damages for intangible injury relating to the Bank's failure in three instances to follow rules governing the Appeals Committee;
5. The Bank shall pay a portion of the Applicant's attorney fees in the amount of USD 6,000; and
6. All other claims are dismissed.

Lakshmi Swaminathan

/s/
President

Gillian Triggs

/s/
Vice President

Shin-ichi Ago

/s/
Member

Anne Trebilcock

/s/
Member

Chris de Cooker

/s/
Member

Attest:

Cesar L. Villanueva

/s/
Executive Secretary

At Asian Development Bank Headquarters, 2 October 2018