ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 119
(2 October 2018)

Ms. M
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 having engaged in serious misconduct. The Applicant seeks reversal of that decision, reinstatement or, in the alternative, payment of separation pay, as well as moral damages, actual damages, and "other relief deemed just and equitable under the premises." 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 *Ms. J v ADB*, Decision No. 116, *Mr. K v ADB*, Decision No. 117, and *Ms. L v ADB*, Decision No. 118).

I. THE FACTS

Background

2. The Applicant joined the Office of the Auditor General ("OAG") of the Bank in August 2005. In October 2009 she was transferred to the Office of Anti-corruption and Integrity ("OAI") and, following a promotion in 2010, was promoted in 2012 to Senior Audit Officer, a National Staff 3 ("NS3") position that 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 OAI that the Applicant had availed herself of the privilege of purchasing a TEV through fraudulent practices by misrepresenting that her purchase was 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 Agreement states that such privileges are 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 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

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

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 although the Appeals Committee Report inaccurately stated this had occurred (a finding the Applicant disputes, see below at paras. 62-64).

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 concerning importation by persons who were not known to the Bank. 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 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 currently 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.

The Applicant's vehicle purchase and the OAI investigation into it

13. The Applicant availed of the Bank's TEV privileges by purchasing a BMW X1 vehicle in March 2013 at a value of EUR 23,346.31 (approximately USD 30,350.20) including a "base cost" of USD 24,440. The Applicant claims that the "gross base cost" in the genuine invoice of EUR 18,800 (approximately USD 24,440) did not reflect a standard deduction of EUR 1,000. The Applicant chose to purchase her vehicle through AAA. She was assisted by the AAA representative, Ms. S, who was later found to have engaged in fraudulent practices. The Applicant claimed that Ms. S had confirmed her understanding that the car value entitlement limit covered only the base costs. It was alleged that the Applicant misrepresented that the BMW X1 she

purchased was within the TEV Limit and that a Fraudulent Invoice was used to obtain the TEV privilege. "Genuine" and "Fraudulent" invoices were created for the purchase with the "fraudulent invoice" submitted on the Applicant's behalf by the AAA representative to the OAIS-LM, the Department of Foreign Affairs ("DFA"), and the Department of Finance. The value of the TEV indicated in the "fraudulent invoice" was EUR 18,312 (approximately USD 23,893.53). The OAIS-LM stamped the receipt of the fraudulent invoice and used the USD total shown to prepare the RFEMV. The RFEMV, dated 17 April 2013, and showing a "shipment value" of USD 23,893.53, was submitted to the DFA by OAIS-LM. The DFA stamped the RFEMV on 19 April 2013. After government clearance was secured, the RFEMV was emailed to the Applicant on 24 April 2013.

14. In December 2015, OAI commenced investigations in relation to the allegation of the Applicant's possible integrity violation under the ADB's Anticorruption Policy and IPGs, and misconduct under AO 2.04. Based on an interview with OAI on 18 December 2015 and a 21 December 2015 email from the Applicant to OAI, OAI reported that the Applicant had stated the following sequence of events leading up to the importation of her vehicle in 2013:

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

b) She "interpreted" the TEV limit in the DFA memorandum dated 18 September 1997 to cover only the "base cost" (excluding options, accessories, freight and insurance) of the TEV due to the following reasons:

   a. the DFA memo was not clear as to the meaning of the limit;

   b. she has seen the majority, if not all, NS3s buying BMWs; and

   c. the limit was unreasonably low if it were interpreted to refer to the total price of the car, considering inflation.

She said that this understanding was confirmed by the BMW agent (AAA representative). The Applicant did not verify her understanding with OAIS-LM;

c) At the same time, she admitted that, as a CPA, she was trained to interpret "cost" as "total cost";

d) In a 20 December 2015 email to OAI, she stated she believed "flexibilities/special accommodation" were being exercised by the Philippine Government and ADB as they were aware that the TEV limit was determined in 1997 and may not be currently adequate;

e) She was aware that the total payments she had made for her TEV exceeded the TEV limit;

f) She believed she was in compliance with the TEV limit because she interpreted the limit to apply only to the "base cost" of the car;

g) She was familiar with the genuine invoice but did not recall the fraudulent invoice for the foreign-made vehicle;

h) During the interview she initially said that she did not recall receiving the RFEMV but in a subsequent email to OAI she stated that she had received the RFEMV but had not noticed that the reported TEV value was lower than the value stated in the invoice in her possession, as she considered the transaction was completed and the TEV was "due to arrive". She explained that she was preoccupied with other tasks including preparing for her mission;

i) She stated she relied on ADB's approval process and that she expected that she would be informed by ADB if the TEV importation was not approved.

15. On conclusion of the investigation, the Applicant was provided the opportunity to comment on the 1 April 2016 draft OAI Report. She provided comments on 11 April 2016 and they were taken into account in its finalization.

OAI report

16. On the basis of its investigation, the 20 April 2016 OAI report found, by a preponderance of evidence, that it was more probable than not that the Applicant had misrepresented the value of the vehicle she had bought so as knowingly or recklessly to mislead ADB to obtain the tax exemption for her vehicle importation. The 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 vehicle, she had knowledge of the fraudulent invoice value because she had received a copy of the RFEMV which stated that the "shipment value" was USD 23,893.53 which was derived from the Fraudulent Invoice, 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. The OAI found, on a more probable than not basis, that by misrepresenting the total TEV acquisition cost, the Applicant had engaged in a fraudulent practice and, as a result, benefitted from exemptions on the payment of taxes on both vehicles. These actions amounted to a fraudulent practice as defined under section 2A of the Integrity Principles and Guidelines (IPG) and misconduct under para. 2.1(d) of AO 2.04. The OAI Report was submitted to the Director General, Budget, Personnel and Management Systems Department ("DG, BPMSD") on 20 April 2016.

Disciplinary proceedings

Formal disciplinary proceedings

18. On 14 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 the Integrity Principles and Guidelines, each cited in paragraph 4 of this judgment. The Applicant was told that the charges against her were "especially serious" considering her position as a Senior Audit Officer which entrusted her with sensitive fiduciary responsibilities and necessitated high levels of trust. She was told that the charges may warrant the imposition of disciplinary measures, including dismissal from ADB. The Applicant sent a response to the BPMSD on 28 June 2016, denying the charges, including denying that she had knowledge of the agent's submission of a fraudulent invoice. On 9 August 2016, a meeting was held between the Applicant and staff of the BPMSD where the Applicant again denied the allegations.

Disciplinary measure imposed

19. After reviewing the various submissions and responses, the Director General, BPMSD sent a 15 September 2016 memorandum to the President recommending imposition of the following disciplinary measures on the Applicant:

a) dismissal for misconduct with immediate effect;

b) in the event that a tax liability for the TEV 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, Human Resources Business Partners Division (known as BPHP).

20. The President adopted these recommendations.

The Applicant is dismissed for misconduct

Notice of disciplinary measure

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

Appeals Committee

Appeals Committee report

22. On 20 October 2016, the Applicant lodged an appeal of the decision directly with the Appeals Committee ("AC") under AO 2.06 of 19 February 2013 on Administrative Review and

Appeal Procedures (prior administrative review not being required for disciplinary measure cases). The AC, pursuant to AO 2.06 para. 13.2, which permits it to consider appeals jointly "if they will concern the same subject matter", examined her appeal together with three other appeals on the same subject.

23. On 8 November 2017, the Applicant received a copy of the decision of the President rejecting the appeal (No. 3c of 2016), together with the Report and Recommendation of the Appeals Committee (which was dated 11 October 2017 and had been sent to the Applicant on 25 October 2017). The report revealed that the AC had requested additional documentation from the Bank, first in February 2017 and again in 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. When submitting the report to the President, the Chairperson of the Appeals Committee wrote, "*Due to the intricacies of the case, which required request for additional information, the very substantial amount of submitted documentation, and the amount of time necessary to consider this case, the Appeals Committee regrettably submits the attached reports longer than the foreseen 90-day timeframe indicated in AO 2.06"*. Between the filing of the appeal and the submission of the AC report almost one year had elapsed.

24. Additional information requested and received by the AC included i) information regarding the agreements between the ADB and AAA; ii) information regarding the disciplinary measures imposed on 12 staff members (including 4 former staff) for the same type of misconduct; and iii) information on disciplinary measures applied to retired staff for the same type of misconduct. The latter two items were the subject of a request by the ADB Administrative Tribunal for the production of documents in this Application.

25. The AC, comprising a three-member panel of staff appointed to the AC in accordance with para. 9 of A.O. 2.06, found unanimously that there was no abuse of process. The AC was also unanimous in deciding that proper procedures had been followed, but recognized that, despite OAI's efforts, its failure to interview the car company agent, Ms. S, "*may have resulted in missing some crucial information, which could have had an impact on the Decision.*" The AC concluded

unanimously that the Appellant's conduct was within the scope of "misconduct". The AC panel was not however unanimous on several points, including whether the "more probably than not basis" was sufficient to warrant dismissal. The AC concluded, by a majority, that the President's decision was not an abuse of discretion or discriminatory, and that the measures were proportionate to the seriousness of the misconduct.

26. In its findings, the AC erroneously quoted inaccuracies in the OAI report, namely that:

a) she had not submitted a fraudulent document to OAIS-LM; and

b) she was "*copied in an email between the [AAA representative] and OAIS-LM stating that the total cost was within the limit*" and had supposedly received an email from OAIS-LM to her stating "*please make sure that the actual official invoice of the car does not exceed the US$24,000 limit; otherwise filing of free entry request with DFA will be delayed."*

27. One member of the AC, forming a minority, considered that the exercise of discretion amounted to arbitrariness, 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 on Headquarters premises, "*leading to an environment in which TEV abuse became common*".

28. A majority of members of the AC recommended that the President reject the Applicant's appeal. The 11 October 2017 Report was signed by one member who also signed "for" another member. In addition, the Secretary of the Committee signed "for" the Chairman of the AC as a member of the panel.

29. On 20 October 2017, the President signed off on the AC's recommendations, thereby adopting them, without comment. The Applicant was informed on 25 October 2016 of the decision to reject her appeal.

Application to the Administrative Tribunal and relief sought

30. On 2 February 2018 the Applicant brought this Application to the Tribunal. The Applicant seeks:

a) rescission of the contested decision;

b) dismissal of the integrity violation complaint and reversal of the 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) a declaration that the Applicant is free of any liability for taxes and duties with respect of the TEV importation considering that the Bureau of Customs-assessed amount of PhP 465,907 has already been paid;

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

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

g) other relief deemed just and equitable under the premises.

31. On 9 April 2018, Respondent filed its Answer to the Application. On 25 May 2018, Applicant submitted her Reply. The Bank's Rejoinder was filed on 22 June 2018. The Respondent maintains that the Application is without merit and should be dismissed and that the Applicant is 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[2] 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 Rule 11(1) of the Rules of Procedure of the ADB Administrative Tribunal requested additional information from the Bank in relation to the thirty-three 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. 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 had decided to:

a) dismiss 5 staff;
b) demote 12 staff by one level;

[2] Rule 10(1) provides that "[i]n exceptional cases, the President [of the Tribunal] may, on his or her own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he or she shall fix …" Under Rule 11, this may be required after the case has been listed.

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 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 objected to the Respondent's use and categorization of individuals holding a "position of trust". The Applicant's counsel asserted that the phrase "*position of trust*" is "*merely a subjective description by the Respondent*" and furthermore, "*it is not the position per se but the actual responsibilities of the staff member in relation to the supposed misconduct that is factors in the disciplinary measure.*" Counsel also contested the mitigating factors used and asks what is meant by "*consistently cooperated*" if this "option" was never presented to the Applicant as a means of mitigating her sanction. Counsel also contested taking "*responsibility for his/her wrongful actions*" as a mitigating factor as it discourages staff to avail all legal remedies available.

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 Section 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 Section 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. The Respondent also noted that “*for certain staff who were entrusted with important responsibilities in the Audit, Treasury and Controller’s departments*” or those staff in a “*position of trust*”, the Respondent decided that the breach of trust was so serious that continuation of the individual’s services was not in the interest of ADB.

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. The Applicant reiterated her points from her 18 July 2018 correspondence with elaborations. Applicant continued to note discrepancies related to application of the “*position of trust*” criterion and mitigating factors and the lack of clear guidelines on how mitigating factors were applied. In her Application and Reply,

the Applicant reiterated her concerns about the timing and batching of sanctions and asserted that her case was wrongly used as a deterrent.

II. FINDINGS

Preliminary Matters

a. Confidentiality request

40. The Applicant requests, pursuant to Practice Direction No. 3 (19 August 2005) of the Practice Directions of the ADBAT, confidentiality of her name, position, and department. The Bank opposes this.

41. The Tribunal's 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. As the Bank correctly notes, certain information about the Applicant's position in the Bank is central to aspects of the impugned decision. Taking all of the circumstances into account, the Tribunal takes the view that the Applicant's request for confidentiality with respect to her name, as well as the name of any persons cited in the pleadings, should be granted. However, since the department in which the Applicant served and the position she held were elements considered by the Bank when imposing sanctions upon her, and as the Applicant has challenged the proportionality of those sanctions, this element of her request is denied.

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. The Applicant requests, pursuant to Rule 6.3 of the ADBAT Rules of Procedure, production of documents for the Tribunal's *in camera* review to ascertain if there was a valid distinction between her case and the other resolved cases. Specifically, she has requested:

a) the decisions and/or resolutions on all the investigations and administrative proceedings conducted against employees of the Bank involving charges of misconduct or integrity violations for abusing the TEV privilege; and
b) the full investigation results that led to the sanction of AAA.

44. In its Answer, the Bank asserted that such documents are not relevant to the inquiry presently before the Tribunal. It argued that proportionality of the sanction should be assessed vis-à-vis the individual circumstances of the Applicant's case and not vis-à-vis other staff members. It also asserted that it had explained the publicly available records of the sanctions imposed against AAA and its representative and failed to see the relevance of sharing strictly confidential information relating to those sanctions.

45. The Tribunal notes that para. 9 of AO 2.04 on Disciplinary Measures and Procedures of 9 September 2010, applicable at the time, provides for restricted access to non-public information obtained during an investigation. This would preclude divulgence of the explanations and statements made by staff and of AAA's representative to the OAI investigators, and the report of irregularities to the OAI. Similarly, para. 8.1 of AO 2.04 states that only the President, General Counsel, Director General BPMSD and the Director of BPHR, or persons designated by one of them, may examine the investigative reports. Such reports would include documents and statements underlying the report, as well as conclusions regarding other individuals. As part of the rules governing the Applicant's contract of employment with the Bank, the cited provisions of AO 2.04 provided the justification for the Respondent not to furnish her with copies of the information requested.

46. The Tribunal is empowered, under ADBAT Rules 10, 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 obtained 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 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 a copy of the OAI's Report into AAA, its representative, and the Bank's institutional learnings and measures taken after the uncovering of the TEV privilege scheme. The Tribunal wanted 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

47. The Tribunal's scope of review of an Application is settled:

> *…The Tribunal … can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. [Lindsey,* Decision No. 1, [1992], I ADBAT Reports 5, para 12].

48. 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*." (*Mr. H*, Decision No. 108 [6 January 2017], para. 47, citing *Hua Du,* Decision No. 101 [2013] IX ADBAT Reports 94, para. 31). See also, inter alia, *Zaidi*, Decision No. 17 [1996] II ADBAT Reports 92, para. 10).

49. In the present case, there are therefore five principal issues before the Tribunal: whether the procedures used by the Bank were proper and in accordance with due process; whether the Applicant's actions legally amounted to misconduct; whether the sanctions imposed were within the Bank's discretion; whether the sanction of dismissal was significantly disproportionate to the misconduct; and whether it was discriminatory against the Applicant.

Issue (1): Were the procedures used by the Bank proper and in accordance with due process?

Allegations regarding due process

50. As a general matter, the Tribunal notes that paras. 8 to 10 of AO 2.04 set out the procedures to be followed in a disciplinary case and the rights afforded to a staff member suspected of having engaged in unsatisfactory conduct or misconduct. These include the rights to be informed that he or she is under investigation, to be informed in writing of the charges, to provide explanations in response to those charges, and to have certain procedures followed. In relation to disciplinary procedures, the burden of proof is on the Applicant to demonstrate that his/her due process rights were violated. As stated in *Gnanathurai,* Decision No. 79, [2007] VIII ADBAT Reports 32, para. 38:

> *….. [a] staff member is indeed guilty of the misconduct attributed to him, and that such staff member must have a reasonable opportunity to show that he did not commit such misconduct."*

(i) Conduct of the investigation by OAI

(a) Failure to interview witnesses

51. The Applicant claims that due process was denied by the OAI's failure to interview witnesses from AAA and in particular the AAA representative. The Bank in response explains that AAA did cooperate with the OAI and the OAI made attempts to contact the AAA representative but those efforts were unsuccessful. Nevertheless, the OAI appropriately considered the totality of

evidence available to it to conclude, on a more probable than not basis, that the Applicant had committed misconduct.

Finding (1)(i)(a): Failure to interview witnesses

52. The Tribunal finds that neither the OAI nor the AC could compel the AAA representative to participate in the investigation or other proceedings. AAA had dismissed Ms. S in June 2015 and had filed criminal charges against her well before the investigation of staff members began. The Tribunal, having seen *in camera* evidence, considers 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 and enabling other development banks to cross-bar her. While the Tribunal shares the AC's unanimous conclusion that it would have been preferable if Ms. S had been located and interviewed in order to complete the picture, such testimony was not indispensable to reaching a determination about whether or not the Applicant had herself engaged in misconduct. Even if the AAA agent had testified that she did not tell the Applicant that she was preparing a fraudulent invoice, this would not have relieved the Applicant of her own responsibilities as an ADB staff member. For the same reason, the investigation into the alleged abuse by other staff members of TEV privileges as possible misconduct is irrelevant to what the Applicant herself did. Therefore, no violation of due process occurred in relation to these aspects of the OAI investigation. The Tribunal concludes that the Applicant had a reasonable opportunity to show that she did not commit misconduct and that no due process violation occurred in the course of the investigation.

(b) Prioritization

53. The Applicant has also argued that she was denied due process because of improper prioritization of the investigation into her conduct, and of the ensuing decision to hold her liable for serious misconduct. She claims that the grouping and prioritization of some staff in positions of trust, for purposes of investigation and sanctioning, prejudged the outcome in her case, since investigations of others accused of similar misconduct had not been completed by the time she was sanctioned.

Finding (1)(i)(b): Prioritization

54. The Tribunal finds that the Bank has shown that each staff member's conduct was assessed on a case-by-case basis. Moreover, as the Bank needed to investigate the conduct of a total of 33 persons, the Tribunal finds that it was reasonable for the Bank to proceed against some staff members, before it had completed investigations and disciplinary procedures involving all of them. The Applicant was in a group of staff identified because of the positions they held and/or who had requested importation of more than one tax-free vehicle. By grouping and prioritizing certain cases, the Bank avoided causing undue delay in its investigation and discipline of the initial group of staff members. The initial group included the Applicant, who was not singled out. She has not convinced the Tribunal that she was prejudiced by prioritization, and the Tribunal sees no due process violation in this regard.

(ii) Were the procedures used by the AC proper?

55. The Applicant raises a further three instances where the Appeals Committee ("AC") allegedly failed to follow its own procedures as to 1) the length of time the AC took to submit its report, 2) the propriety of the signatures on the AC Report, and 3) inaccuracies in the OAI Report that were cited in the AC Report. The Applicant asserts these failures constituted an injury to her which is compensable. The Bank, to the contrary, asserts that the Applicant is not entitled to any damages and that the appropriate cure is the present Tribunal proceeding.

(a) Time lapse between the appeal to the Appeals Committee and its report

56. The Applicant refers to the lapse of more than a year between when she filed her appeal (20 October 2016) and when she received the AC report (dated 11 October and received on 8 November 2017). She has complained that this breached the 90-calendar time period rule pursuant to AO No. 2.06 par. 14. The Bank does not dispute the delay in issuing the report. However, the Bank asserts that the AC is empowered under Rule 1.4(c) of the Rules of Procedure for the AC to "*extend any time limit which may apply under the Rules, taking into account the nature and*

complexity of the appeal." The Bank contends that, in this case, the extension was appropriate given the reasonable decision to consider the present case together with three related cases, the complexity of the information in the evidentiary record, and the significant importance of the matter to the institution.

Finding (1)(ii)(a): Delay in issuing AC report

57. The Tribunal notes 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 No. 2.06, para. 14). The Appeals Committee Rules of Procedure ("AC RoP") annexed to the AO define "*time limit*" as "*the time period within which an action has to be taken*" (AO 2.06, para. 1.2(h)). The statement in the cover memorandum to the AC report, that the 90-day time frame is "*indicated*" in AO 2.06, downplayed the definition of the time-limit in para.1.2(h) of the AC RoP as a period in which an action "*has to be taken*." 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)). However, nothing on the record indicates that the AC explicitly took that step or informed the parties that it was doing so.

58. The AC's competence when reviewing decisions and disciplinary matters is essentially to determine whether ADB's Staff Regulations, Administrative Orders and policies and procedures have been correctly applied (AO 2.06, para. 9.2(d)). The AC thus does not conduct an independent investigation. It can hold hearings, which it did not do in this case, as well as request additional documentation, which it did in February and 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. It is not clear why it had taken this long for the AC to request this information, or whether or not a copy of this memorandum was provided to the Applicant for possible comment.

59. In explaining the reasons for failing to submit the report within the stipulated period, the AC referred to "*the intricacies of the case*" and the amount of documentation, including

additionally requested information, and time necessary to consider the appeal. The appeal was complex, justifying in the Tribunal's view an extension by the AC of the time limit, in order to grasp the relevant elements of the cases concerned, as permitted by its rules. But in the eyes of the Tribunal, the delay – exceeding by almost four times the normal time limit of 90 days –was excessive (cf. *BC v IFC*, WBAT Decision No. 427 [2010]). In the interest of transparency, the AC, while it might not be required to do so, should also have informed the parties of the new time limit it was providing for itself under para. 1.4(c) of its RoP.

(b) Signatures on the AC report

60. Secondly, the Applicant notes that 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. The Respondent asserts that the fact that the AC members granted their colleagues the authority to sign on their behalf is not an indicator of impropriety.

Finding (1)(ii)(b): Signatures on the AC report

61. The Tribunal calls attention to two noteworthy features of the signatures on the final page of the AC report. In one case, one member signed "for" another member, and in the other case the Secretary of the AC signed "for" a third AC member. The Tribunal finds it questionable that these signatures were made without an indication of authorization to the person signing, particularly given the lack of unanimity in respect of some conclusions of the AC and the serious sanctions imposed on the Applicant. While the Tribunal does not conclude that the shortcoming was of sufficient import to invalidate the AC's report, it expresses concern that the Bank has not taken greater care in this respect.

(c) Inaccuracies cited in the Report

62. Finally, inaccuracies in the OAI report were cited in the AC Report and evidence was relied on by the AC which the Applicant says she did not have the opportunity to rebut. Namely, in contrast to what was cited in the AC Report:

a) The Applicant did not submit a fraudulent document to OAIS-LM; and

b) The alleged emails, such as the Applicant being "*copied in an email between [AAA] and OAIS-LM stating that the total cost was within the limit*" and an email from OAIS-LM to her asking that she "*please make sure that the actual official invoice of the car does not exceed the US$24, 000 limit; otherwise filing of free entry request with DFA will be delayed*") were not received by the Applicant.

63. The Bank acknowledges these inaccuracies and that "such errors are regrettable." However, it asserts that the Applicant has not demonstrated that the AC would have reached a different decision but for that error, and in any event, that the errors do not entail a flawed process so as to warrant compensation.

Finding (1)(ii)(c): Inaccuracies cited in the report

64. The repetition by the AC of these several admitted inaccuracies raises the concern that they influenced the decision of the AC that the Applicant was at least reckless as to compliance with the USD 24,000 limit and that she was properly sanctioned for misconduct. While it is true that the Applicant did not personally submit a fraudulent document, the process was designed so that it was the service provider, (in this case AAA), that submits the documentation, rather than the staff member. The Tribunal considers that the inaccuracies, and the fact that the Applicant did not herself submit a fraudulent document, do not outweigh the findings that she failed to meet her primary responsibility to comply with the limit and that she was reckless as to whether she had exceeded this limit.

Compensation

65. With regard to the excessive delay in the AC Report, the irregularities in signature, and certain inaccuracies in the Report, the Tribunal finds that, while they did not affect the outcome and thus did not amount to due process violations by the Bank, the deviation by the Appeals Committee from its own rules warrants an award of some compensation to the Applicant for intangible injury.

Issue (2): Did the Applicant's actions legally amount to misconduct?

66. The Applicant essentially argues that her actions did not legally amount to misconduct because:

(i) the TEV limit had a questionable legal basis and was ambiguous;

(ii) there was no evidence that she was a party to the fraudulent scheme; and

(iii) she acted in good faith - there was no reason for the Applicant to be diligent about the actions of AAA and its representative, since the presumption was that everything was in order.

67. The Bank asserts that the Applicant was aware of the TEV limit and that it would be unreasonable to interpret this to mean anything other than that it referred to the total price including cost, insurance and freight charges of the vehicle. The Bank also asserts that the Applicant was aware that the total cost of the vehicle exceeded the TEV limit and that a fraudulent invoice was used to facilitate the vehicle importation. Accordingly, the Bank asserts that the Applicant misused the tax privilege to her advantage through her reckless act or omission and, in so doing, placed the ADB's relationship with the host country in jeopardy. This constituted misconduct and warranted disciplinary measures under AO 2.04 para. 2.1.

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

68. The Applicant alleges that her dismissal was an abuse of discretion because it arose from her having availed herself of the TEV privilege, which she argues has a "questionable legal basis". In her view, the validity of imposing a USD 24,000 TEV limit on ADB NS's importation of an automobile is "questionable if not altogether illegal", as nowhere in the legal basis for ADB's TEV program is there a mention of a car value limit. She emphasizes that while the TEV purchase and/or importation is a creation of law, any condition placing a price cap agreed between departments of the Bank and DFA "does not rise to the level of law or enforceable rule". If there is no law or rule on the price limit of USD 24,000, the Applicant reasons, she has not violated anything. The Applicant also asserts that *"even assuming that a limit is legally valid for the TEV privilege, there were no increments since 1997, or more than a decade after Applicant availed the privilege [which is not] preserving the privilege granted to National Officers".* The Bank contests this assertion.

69. In addition, the Applicant asserts that what constitutes the value of said TEV limit is ambiguous and has never been clearly defined in any of the TEV guidelines or Administrative Orders from the Bank implementing the program. She asserts that tests which are ambiguous should be construed in favor of the staff (see *S v. EPO,* ILOAT Decision No. 3701 [6 July 2016]) and notes in her Reply that since she availed herself of the TEV privilege, the Bank has issued a new set of guidelines for the TEV and updated the request form to define the USD 24,000 price limit as "USD 24,000 C.I.F.". (emphasis supplied).

70. The Bank asserts that it was fully within the discretion of the Government to determine the appropriate conditions for the use of this privilege and the Applicant's pleas of ambiguity into the meaning of the cost limit and "car value entitlement" are not credible. The Bank maintains that the materials provided by the Respondent to eligible NS staff members were plain on their face: the cost limit was USD 24,000 and this amount was provided on the document entitled "ADB Tax-Exempt Vehicle Entitlement" and on the form entitled "Request to Import a Tax-Exempt Vehicle" (RFEMV). The Bank submits that whatever doubts the Applicant may have had about the meaning of "cost", she was responsible to seek clarification of the term and was not free to interpret it

however she saw fit. At a minimum, she should have made efforts to resolve any doubts by contacting OAIS-LM.

71. In its Rejoinder, the Bank notes that it does not bear the burden of disproving any unreasonable interpretation by staff of the meaning and applicability of its 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. The Bank relies on *K*, WBAT Decision No. 352 [2006], para. 40 where the WBAT noted "*the Bank would be ungovernable if staff members were allowed to construct post facto rationalizations for their disregard of the rules, and thereby be excused if the bank – totally unaware of these mental rewritings of the rules, and therefore not organized to monitor each individual's way of complying with his or her "conscience" – cannot disprove the rationalization.*"

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

72. The Tribunal finds, firstly, that there was a formal legal basis for the car value entitlement to be limited to USD 24,000. 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 staff at NS3 and above the privilege of importing vehicles tax exempt, subject to car value of USD 24,000. The Bank accepted this limit as binding on it. Under Bank rules, employees must respect the limit fixed, regardless of whether or not they think, as did the Applicant, that the amount should have been raised since 1997. In addition, the Applicant's plea is contradictory, since she wants to avail herself of the privilege, while maintaining that the dollar cap has no legal basis.

73. Secondly, as to the vagueness of the term of "car value entitlement limit," the "base price" of a car – the notion favoured by the Applicant – can be as little as half the final price of the same car model with a different motor and other options, which would render the ceiling rate of USD 24,000 meaningless. There were other available makes and models of car with a value that fell under this figure, and there was no entitlement to import any particular vehicle tax-free. The Tribunal finds that a normal reading of the words would mean the total value of the car, including

accessories, modifications and other costs. Accordingly, the Applicant was at least reckless as to her interpretation of the proper meaning of the "car value entitlement".

74. While the Tribunal does not consider the rules on the TEV ceiling to have been overly vague, it notes that the information the Bank made available to persons seeking to avail themselves of the TEV privilege should have been more explicit with better guidance. For instance, the heading, "ADB TEV Entitlement Form," suggests that an entitlement, rather than a privilege, is involved. On the other hand, the limit of USD 24,000 appeared clearly in the documentation available to the Applicant. Rather than seeking clarification from the responsible unit in the Bank as to what the cap included, the Applicant took it upon herself to interpret the meaning of the TEV limit as the "base price," i.e. something less than the full value of the car that included its options and accessories.

(ii) Was there a lack of evidence that she was party to the fraudulent scheme?

75. The Applicant asserts that her conduct was not within the scope of "misconduct" as contemplated by AO 2.04 as there is *"simply no evidence that [she] was party to a fraudulent scheme".* She alleges she had no knowledge that a fraudulent invoice had been submitted as she was neither privy to nor in possession of a false invoice. She was not in the loop or copy-furnished when AAA's representative submitted the invoice to OAIS-LM. The Applicant claims that she became aware of the fraudulent invoice only during the OAI investigation in December 2015. She notes that "[*h]er lack of possession of the false invoice distinctively differentiates her situation from other National Staff who have been investigated in relation to the TEV program.*"

76. The Applicant contends that OAI concluded erroneously that she had knowledge of existence of the false invoice because she had been provided a copy of the RFEMV. She asserts that the RFEMV was prepared, signed and released to the Government by OAIS-LM, and a copy was furnished to the Applicant only through an email on 24 April 2013 after Government clearance was secured. Therefore, the Applicant maintains, she had no participation whatsoever in the preparation and release of the RFEMV and false invoice to the Government.

77. In her Reply the Applicant also asserts that it was the AAA representative who facilitated the purchases and who made and submitted false invoices. She distinguishes her situation to those cases cited by the Respondent *(*e.g. *Bristol*, ADBAT Decision No. 75 [2006], VII ADBAT Reports 113), as she never "certified" anything, nor did she directly create or submit any false or fraudulent form. The Applicant alleges that the Respondent cannot show, on a preponderance of evidence, that she was aware of any fraudulent act in relation to the TEV.

78. The Respondent asserts that the evidence supports OAI's conclusion that it was more probable than not that the Applicant was aware of the use of the Fraudulent Invoice to obtain the tax exemption. The Bank does so on the grounds that the Applicant (i) was aware of the USD 24,000 TEV limit (as 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 her vehicle exceeded the limit (she does not deny that she paid EUR 23,346.31 (approximately USD 30,350.20) for her vehicle); and (iii) was in possession of the RFEMV which stated the fraudulent invoice as the value of the purchase (she confirmed she received a copy of the RFEMV, which was prepared by OAIS-LM on the basis of the fraudulent invoice provided by the AAA representative on the Applicant's behalf). "*Even if Applicant claims she did not know of [the AAA Representative's] deceit, Applicant received the RFEMV and was therefore aware that the RFEMV was based on the depressed car value*."

79. The Respondent asserts that these facts demonstrate that the Applicant engaged in fraudulent practice and misconduct by misrepresenting that the vehicle she was importing was within the TEV limit. The Bank concludes that the Applicant misused the tax privilege granted by the government of the Philippines for her own financial benefit and placed ADB's relationship with the host country in jeopardy and brought the organization and its staff into disrepute. These actions, the Bank argues, breached its Staff Regulation, AO 2.02 and the IPG and, accordingly amount to misconduct attracting disciplinary measures under AO 2.04 para. 2.1. The Respondent asserts that the Applicant has not presented evidence sufficient to disprove the findings of OAI's investigation.

Finding (2)(ii): Was there a lack of evidence that she was party to fraud?

80. Having considered the arguments submitted by the Applicant and the Respondent, the Tribunal recalls that the Applicant has the burden of showing that the Bank's decision "*could not reasonably have been taken on the basis of facts accurately gathered and properly weighed"* (*Lindsey, supra*). Before imposing disciplinary measures, the Bank has a duty to show that a "preponderance of the evidence" indicates that the Applicant engaged in misconduct. This term means "*evidence which is more credible and convincing than that presented by the other party. In cases of misconduct, it is a standard of proof requiring that the Evidence as a whole shows that it is more probable than not that the staff member committed misconduct.*" (AO 2.04, para. 11).

81. As noted in *Gnanathurai,* Decision No. 79 [2007], VIII ADBAT Reports 29, para. 31:

> *... where the respondent establishes 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. ... "*

82. A misrepresentation "*that knowingly or recklessly misleads*" is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2013, specifies that "*misconduct does not need to be intentional,*" and that it extends to reckless acts or omissions (para. 2.1). This includes abuse or misuse of privileges and immunities and "*making of knowingly false statements or willful misrepresentation or fraud pertaining to official matters*…" (AO No. 2.04, paras. 2.1(b) and (f)). The facts indicate that there was sufficient evidence to conclude that the Applicant engaged, if not knowingly, recklessly in relation to the purchase of her vehicle and that she was a party to the fraudulent scheme. She has not met her burden of proof to show that the misconduct was not fairly or properly attributed to her. The Tribunal is of the view that the finding of the Applicant's misconduct was justified as being more probable than not. On the evidence established, the Tribunal concludes that the misrepresentations, knowingly or recklessly made by the Applicant, and by the AAA agent to the Applicant's benefit, were designed to induce ADB to process and endorse her TEV application.

(iii) Did the Applicant act in good faith by not being more vigilant?

83. The Applicant states that she acted in good faith in relation to the TEV program and "*could not be expected to act with a diligence more than what she [had] already exercised in relation to her TEV importation*." She notes that the TEV program is "*institutionalized in the ADB"* and *"AAA […] is duly accredited by the ADB under a formal agreement*." She asserts that TEV importation through AAA had been ongoing for years without any reported issues even before the Applicant qualified to avail the privilege and there was no reason for the Applicant to be diligent about the actions of AAA or its representative. The proper presumption was for regularity and that everything was in order with regard to the procedures being undertaken by the AAA representative in coordination with OAIS-LM. The Applicant asserts that she "*had no hand in the false invoice presented by [the AAA representative] to OAIS-LM prior to the issuance of the RFEMV"*. The Applicant further asserts that nowhere in the guidelines and procedures for TEV importation does it require the Applicant to perform any form of verification concerning documents submitted by the broker. Rather, the OAIS-LM has this duty.

84. With respect to the OAIS-LM, the Applicant asserts that the contested decision failed to understand that the negligence on the part of OAIS-LM was the cause, or at the very least, contributory to the abuse of the TEV program. She asserts that OAIS-LM failed to inform staff of the specific definition of car value entitlement limit; failed to track any exceeding of the car value entitlement limit so that a change in policy could be recommended; failed to ensure that the service providers it had engaged, along with their personnel, conducted their business in a proper and ethical manner; and failed to verify documentation submitted for TEV importation. Having knowledge of the C.I.F. and that it was not to be included, the OAIS-LM should have denied the TEV application at the outset. "*If not for the failure of the OAIS-LM to exercise diligence in the TEV process, there would not have been any controversy to begin with and applicant would not even be the subject of an inquiry."* The Applicant asserts that Respondent has attempted to downplay its own liability and, in her Reply, she asks the Tribunal to revisit the AC minority view which argued that ADB supervision of the automobile sale was "inadequate", leading to an environment in which "TEV abuse became common."

85. The Applicant claims that, "*although characterized as a 'privilege' because TEV is essentially provided by the host country through tax exemption, it is actually part of the benefits of the employee which should be delivered by the employer free from any potential risk exposure to the employee.*"

86. In her Reply, the Applicant asserts that it is an injustice that staff who availed the TEV only in recent years, long after C.I.F. had been incorrectly included, were made to absorb the blame because it took so long for OAIS-LM to detect the anomaly.

87. The Respondent asserts that the Applicant is responsible for her actions and cannot shift the blame to others such as the AAA representative or OAIS-LM. Although the Applicant asserts the AAA representative supposedly provided her with misinformation about the TEV limit and produced the fraudulent invoice, the Respondent asserts that the Applicant was first and foremost responsible for ensuring her compliance with the relevant rules. She cannot assign these obligations to another. The Respondent relies on *Bristol, supra*, para. 29 where this Tribunal found that "[*a] staff member who signs a false certification … cannot shift [responsibility for having done so] to the Organization or to others by claiming ignorance (Liu, UNAT Judgment No. 490, (26 October 1990), para. VIII. Accord, Morales, UNAT Judgment No. 445, (24 May 1989), para. IV).*" The Respondent also notes that as a Senior NS, it was wholly unreasonable for her to have concluded that the AAA representative, rather than OAIS-LM could provide authoritative information on the scope of the ADB's tax-exempt vehicle privilege with the host country. The Respondent also notes that "*despite her long experience and professional expertise as an auditor and ethics investigator, Applicant made no effort to draw OAI's attention to this discrepancy.*" "*Ultimately, as a staff member who availed of the privilege granted to ADB, Applicant was directly and solely responsible for ensuring that the documents relating to her application of the TEV privilege submitted [..] on her behalf were consistent with the TEV rules ….*"

88. 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 the verification procedures put in place by OAIS-LM do not serve to divest the Applicant of her responsibility to ensure the

truthfulness of the submissions and that she was best placed to alert OAIS-LM to the misrepresentations. The Bank further notes that the Applicant misled OAIS-LM as to the value of the vehicle through "(i) *her signature of the Request to Import a Tax-Exempt Vehicle, which clearly states that the requests are only permitted up to a price limit of USD 24,000; (ii) [the AAA representative's] submission of the Fraudulent Invoice of Applicant's behalf; and (iii) Applicant's failure to inform OAIS-LM that the RFEMV did not reflect the genuine price.*"

Finding (2)(iii): Did the Applicant act in good faith?

89. The Tribunal finds that in the period of perpetration of the extensive fraud, the OAIS-LM did not meet its responsibilities to monitor and ensure proper use of the TEV procedures by Senior NS staff. The Bank admits that the responsibilities of OAIS-LM included "*ensuring that the acquisition, registration and disposal of ADB official vehicles and TEVs belonging to ADB staff conform to government requirements*." The Bank had, in the host country agreement, pledged to take every measure to avoid abuse in relation to such privileges, and yet sufficient checks and balances were not in place for the internal administration of the TEV privilege. With so many parties involved in the transaction and processes, it was particularly important to have robust controls in place. Moreover, the fraudulent scheme operated over at least six years, involving many NS staff, possibly lulling staff into thinking that disrespect for the TEV limit was tolerated. The Tribunal must take into account the failure of the Bank to monitor responsibly the practical operation of the scheme in considering the question of proportionality of the sanctions imposed.

90. However, having said that, staff are not relieved of their responsibilities under relevant rules. Various Bank rules emphasize the importance of not abusing the privileges granted. The Applicant had a duty to follow the rules, seek advice from the proper authority, and present accurate information to the Bank. She was at least reckless as to whether the value of the vehicle she had ordered exceeded the sum of USD 24,000 that had been set within the framework of agreements between the ADB and the host government. In addition, as a senior NS in the OAI, it was not reasonable for the Applicant to rely on the AAA representative rather than OAIS-LM to

provide authoritative information on the scope of the ADB's tax-exempt vehicle privilege with the host country.

91. Nor can she absolve her own responsibility on the ground that the AAA representative allegedly misinformed her about the TEV limit and produced the fraudulent invoice. As the Bank notes, the AAA representative was acting for the Applicant's benefit and the Applicant was first and foremost responsible for ensuring her compliance with the relevant rules. See *Bristol*, *supra*, where this Tribunal found that *"[a] staff member who signs a false certification … cannot shift [responsibility for having done so] to the Organization or to others by claiming ignorance* (*Liu,* UNAT Judgment No. 490, (26 October 1990), para. VIII. Accord, *Morales,* UNAT Judgment No. 445, (24 May 1989), para. IV).

92. The Applicant similarly tried to shift blame to the lax controls in OAIS-LM. While this office did not meet its responsibility of ensuring proper use of the TEV procedures by senior NS staff, this did not absolve the Applicant from complying with her duty to follow the rules and present accurate information to the Bank.

93. The Tribunal also notes that the Bank did not require the Applicant to use AAA as her vehicle supplier. In the Tribunal's view, various factors lend credence to the Bank's position that the Applicant was willing to turn "*a blind-eye to the fraudulent acts orchestrated for the purchase of her vehicle*".

94. As the Bank has noted, fraud is not simply prohibited by its internal policies, "*it is a corrosive practice that profoundly undermines ADB's mission to eradicate poverty in Asia*." In this case, the misrepresentation also involved causing harm to the relationship between the ADB and the host Government. The Applicant was disciplined in the present case because it was found, on a preponderance of the evidence, after an investigation in which she had an opportunity to present her position, that she knew of fraudulent documents enabling her to benefit from the TEV privilege for her vehicle purchase. These documents were intended to mislead OAIS-LM and the host Government. At least, the Applicant had engaged in a reckless misrepresentation for her

financial benefit. In addition, there were also indications that it was more probable than not that she was well aware of the steps being taken on her behalf to evade the TEV limit. The evidence uncovered in the OAI investigation made out a *prima facie* case of fraud which the Applicant has not convincingly rebutted. She seeks excuses in her workload and official travel schedule, while attempting to shift the blame to others. The role played by others such as OAIS-LM or Ms. S does not excuse her actions or inactions in relation to a transaction that benefitted her.

95. By placing the emphasis on good faith and alleged lack of malicious motive, the Applicant has attempted to redefine the standard of conduct set by the Bank's rules. While such elements may be relevant to the choice of sanction imposed in cases of misconduct, they do not alter how misconduct is defined with reference to para. 8 of the Staff Regulations and paras. 4.3(i), (ii) and (vi) of AO 2.02. Furthermore, misuse or abuse of privileges and immunities is listed as an example of misconduct under AO 2.04. The IPG includes misrepresentations that "*knowingly or recklessly mislead*" a party to obtain a financial benefit (Section 2A). This is precisely what occurred in this case, regardless of the Applicant's alleged motives.

96. In conclusion, the evidence as a whole demonstrates that it was more probable than not that the Applicant engaged in misconduct by abusing the TEV privilege, in violation of the Staff Regulations, AO 2.02 and the Integrity Principles and Guidelines of the Bank. The Applicant has not successfully rebutted this evidence. For these reasons, the Tribunal finds that the Bank was justified in finding that the Applicant engaged in misconduct.

Issue and Finding (3): Were the sanctions imposed by the Bank provided for by its law?

97. The sanctions imposed on the Applicant were dismissal, permanent ineligibility to work as a consultant or contractual employee employed by ADB or any ADB-financed activity, access to ADB premises allowed only with prior approval of the Director, BPHP and in the case of a tax liability, possible recovery of the amount from the Applicant. Aside from the recovery of tax liability, these sanctions are provided by the Bank's internal law pursuant to AO 2.04 paras. 4 (c), (g) and (h). Moreover, the sanction of dismissal is specifically foreseen by AO 2.04 para. 6.3 (cited

below), and AO 2.04 para. 7 grants the President the power to impose the disciplinary measure of dismissal for misconduct.

98. In the Tribunal's view, the Bank had grounds on which it could reasonably have barred the Applicant from other possible future contractual relationships, since the misconduct involved a breach of the Bank's trust of the Applicant. For the same reason, it was within the Bank's discretion to determine the conditions under which the Applicant could have access to ADB premises. The possibility of tax liability which the government would ask the Bank to recover from a staff member derives from the HQA and the memoranda relating to the TEV privilege. Accordingly, the Tribunal finds that the sanctions imposed on the Applicant had a proper legal basis.

Issue (4): Was the decision to dismiss the Applicant disproportionate to the misconduct?

99. The Applicant contends that the sanction of dismissal was disproportionate to the conduct involved and that, unfairly, 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 rejects reliance by the Bank on WBAT cases where dismissal was found to be a proportionate penalty for fraud. Rather, she notes the WBAT Decision No. 143, *Planthara,* [1995], para. 40, where the dismissal was found to be disproportionate in light of the modest amount of money involved, modest management responsibilities, the member's long service, diligent performance and positive performance reviews. The Applicant notes she has had no record of misconduct since she was first employed by the Bank in 2005, her performance has been "*exemplary"* with two promotions, she has fully paid the tax to the Bank so it did not suffer any monetary damage, and any reputational damage was not her wrongdoing. In that regard, she argues that it is obvious that dismissal is not proportionate to the alleged offense. The Applicant also notes that, in relation to the sanction, a minority of the AC concluded that the abuse of the TEV privilege did not warrant dismissal.

100. The Bank denies that the disciplinary measure imposed was disproportionate. Rather, the Bank contends that it properly considered all the relevant factors in the Applicant's case and

appropriately concluded that her serious misconduct warranted dismissal. Using the criteria in AO 2.04 para. 6.2 to assess the seriousness of the misconduct, the Bank asserts that:

a) the degree of the breach (para. 6.2(a)) was serious. It notes that the Tribunal held in *Abat*, Decision No. 78 [2007], VIII ADBAT Reports, para. 47, that "*fraud is always a most serious matter"*. In this case, the Bank asserts that the multiple use of fraudulent invoices is necessarily a serious matter.
b) the gravity of the adverse consequences (para. 6.2(b)) on the grant of the TEV privilege and the damage to ADB and its relationship with the Philippine Government "*cannot be overemphasized*." The Respondent asserts that the Applicant's actions have compromised the grant of the TEV privilege accorded to ADB under the HQA, potentially bringing ADB's name into disrepute; and
c) the Applicant held a position that entrusted her with responsibilities in matters to which the misconduct relates (para. 6.2(d)). The Applicant was a senior official in the Office of the Auditor General whose very responsibilities were at the heart of the institution's ability to protect against fraudulent activities. She was responsible for identifying potential risks and areas of fraud, required to be a model of integrity maintaining the highest ethical standards, and in light of her actions the Respondent lost confidence in her ability to perform the functions of her job.

101. The Bank stated that while 33 individuals were found to have abused the TEV privilege, the sanctions imposed pursuant to AO 2.04 were assessed in light of the circumstances of each case (para. 4.1 of AO 2.04) and the criteria set forth in AO 2.04 para. 6.2. In this case, the Applicant's serious misconduct warranted the disciplinary measure of dismissal. 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.

102. The Bank maintained that it had assessed the relevant factors in this case, and appropriately applied them to the Applicant. It noted that the nature of the Applicant's post as Senior Audit

Officer required her, as the Bank noted, "*to safeguard vital aspects of the Respondent's financial and administrative operations. Instead of reporting the abuse of the TEV privilege to relevant authorities, Applicant took advantage of the fraudulent scheme… These egregious acts were a fundamental violation of the standards of integrity expected of her and the only conceivable disciplinary measure was to dismiss the Applicant.*"

103. In its Rejoinder, the Respondent notes that this Tribunal has consistently upheld Respondent's decision to dismiss a staff member when the misconduct involved actions rooted in fraudulent and/or dishonest conduct (see *Domdom,* Decision No. 47, *Bristol*, Decision No. 75, *Abat,* Decision No. 78, *Gnanathurai,* Decision No. 79 and *Ahmad,* Decision No. 80).

Finding (4): Was the decision to dismiss the Applicant disproportionate to the misconduct?

104. In relation to a sanction imposed, the Tribunal observes 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*, *supra* 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."*

105. 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.

106. 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."*

107. In response to the Tribunal's second request for information about the sanctions imposed, the Bank stated that *"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. of 2.04."* The Bank argued that it had considered mitigating circumstances (assisting the investigation, admitting misconduct, expressing their willingness to mitigate the consequences of their actions). It also mentioned, as aggravating circumstances, the official position held by the staff member, abuse of the privilege on more than one occasion, and additional misconduct by engaging in obstructive practices during the investigation.

108. 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....*" The Tribunal finds that this was done with regard to the Applicant in the present case.

109. In considering the question of proportionality, the Applicant's conduct included documented misrepresentations about a vehicle with a value exceeding the TEV limit that she had purchased, enabling her to benefit from a privilege to which she was not otherwise entitled. Her conduct was fraudulent in violation of ADB rules and jeopardized the reputation of the Bank and its relationship with the host government. Although the fraud was not committed in relation to the Applicant's own work at the Bank, as a staff member she was expected to comply with the rules of conduct that involved invoking privileges that had been afforded to the Bank. The Tribunal finds the Bank's emphasis on the nature of the Applicant's senior position of trust as Senior Audit Officer as a relevant consideration in its decision to dismiss her from service. There was a reasonable basis for the Bank to conclude that the *"breach of trust [was] so serious that continuation of the staff member's services [was] not in the interest of ADB."* (AO 2.04, para. 6.3). These elements were, in the Tribunal's judgment, legitimate factors for the Bank to take into consideration when deciding upon proportionate sanctions for the misconduct.

110. Turning to another issue, the additional information provided by the Bank confirmed its earlier statement that it considered staff cooperation as a mitigating circumstance, and that it had not applied it in this case. The Bank referred as well to whether staff members had consistently acknowledged their misconduct, although AO 2.04, para. 6(h) refers to this only in relation to an admission prior to the date of its discovery (which applied to none of the 33 staff members investigated). This suggests to the Tribunal that when it came to the Applicant, the Bank amalgamated its perception of her degree of cooperation in the investigation on the one hand and her refusal to admit to wrongdoing on the other hand.

111. The Tribunal finds that the Bank has unfairly seen a lack of cooperation in the Applicant's steadfast but erroneous belief that the USD 24,000 limit was without legal basis and that she had thus done nothing wrong. Yet she gave full statements to the investigators. This display of

cooperation with the investigation should have been taken into account whether or not the Applicant maintained her innocence. However, in the Tribunal's view this cooperation would not have outweighed the key criterion of the erosion of the Bank's trust in the Applicant, given her position, on which the Bank reasonably relied. The sanctions imposed would still have been justified under the standard of review established in the Tribunal's jurisprudence of whether or not the dismissal was "significantly" or "clearly" disproportionate (see *Abat* and *Planthara*, *supra*) to the misconduct established. However, taking this situation into account, the Tribunal finds a basis for some compensation for intangible injury to the Applicant.

112. The Tribunal also notes that the Bank failed to consider or mention any extenuating circumstances in this case, in which the Bank itself had allowed a process to flourish for at least six years without adequate supervision. The Tribunal finds that the Bank's own role in failing to monitor (as noted above) over a number of years should have been taken into account when assessing sanctions to be applied to each individual involved in the scheme. However, in light of the factors that were considered by the Bank, the Tribunal does not, within its scope of review, see a basis for invalidating the decision taken by the Bank in the case of the Applicant.

113. For these reasons, when deciding upon the disciplinary measures to be applied, the Bank legitimately took account of relevant factors including the nature of the misconduct, the evidence gathered, the position held, and the erosion of its trust in the Applicant given her position. Accordingly, the Tribunal concludes there was not a "*clear disproportion*" (see *Abat, supra*) between the gravity of the offence and the severity of the penalties imposed on the Applicant.

Issue (5): Was the sanction of dismissal discriminatory in the Applicant's case?

114. The Applicant asserts she has been discriminated against because others similarly charged were given less harsh penalties than dismissal. 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 only four staff members to be dismissed. She contends that BPMSD considered certain factors when imposing less harsh penalties on the other eight staff

members, including demotion for those who 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." The Applicant contends that she should have been, but was not, given the same opportunities to mitigate the consequences of her alleged misconduct and therefore the way in which BPMSD handled her case (and that of the three others dismissed) was discriminatory.

Prioritization of those investigated

115. The Applicant asserts that the highest sanction by OAI of the "first batch" of staff misconduct, "*clearly indicates abuse of process and lack of full evaluation of the population based on severity of actual individual circumstances."* She contends that OAI could not have determined the full picture of the TEV process in the absence of a full investigation concluded for the entire population. She alleges that she has been "*pinned down on the basis only of her position*" and that OAI and BPMSD "*overlooked staff who had a more serious degree of misconduct.*"

Position of trust

116. The Applicant asserts that she has been sanctioned with dismissal "*based on [her] 'sensitive position' … as an auditor and a CPA rather than on actual circumstances and the severity of her involvement in the process*" and that this standard of using positions as a factor of disciplining is "*discriminatory*" and an "*arbitrary standard*" giving the employer wide discretion. In this regard she notes the minority view of the AC that the "*application of discretion extended so far as to be arbitrary*".

117. The Applicant asserts that her audit role, approving disbursements, does not involve fiduciary duties. Moreover, she contends that her position should not be a relevant factor because the rules should be followed by everyone and it is unfair that people in "s*ensitive*" positions are obliged to be more compliant than those in different functions.

118. In her Reply, the Applicant again refutes the Bank's contentions with regard to her position. She asserts that her position in the Bank "*had nothing to do with the TEV availment process itself and moreover, the alleged misconduct is not related to the functions of her position. … All of the eligible staff occupy the position of NS 3 and above. Their ranks are equally sensitive in their respective departments. Hence, to distinguish them further is tantamount to discriminating the Applicant."* The Applicant also notes that some staff from the controller's department who occupied sensitive positions as the auditors, and hence prioritized, were subject to the significantly less harsh sanctions of demotion.

119. The Bank has denied that the disciplinary measure imposed was discriminatory. The Bank asserted that it had determined disciplinary action 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".*

120. The Bank cited the decision in *Khelifati*, ILOAT Judgment No. 207 (1973) considerations, para. 7, in which the applicant challenged his dismissal when his colleagues had not been disciplined, even though all were found to have arrived at work drunk. The ILOAT rejected the Applicant's claim of unequal treatment, noting:

> *"… It is true that officials enjoy the protection, among other things 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."*

Finding (5): Was the sanction of dismissal discriminatory in the Applicant's case?

121. The Tribunal recalls that one of the elements of due process is fair and equal treatment, and that the imposition of a sanction may not be discriminatory [*Bristol, supra,* para. 45]. In the present case, all the staff members involved in the fraudulent scheme were, by definition of those entitled to avail of the TEV privilege, Senior NS. The disciplinary action was taken for the same underlying reasons, i.e. abuse of the TEV privilege, in all cases. There are two distinctions between *Khelifati*

and the current case: first, the disciplinary action was taken for the same reason in all cases (abuse of the TEV privilege); and second, all those found to have committed misconduct were subject to some disciplinary measures. This leaves their different circumstances to be examined in relation to a claim of discrimination.

122. The Applicant has raised the Bank's prioritization of the first group of persons to be investigated and sanctioned as a discrimination issue. As discussed above in relation to the investigation, with over 30 investigations undertaken by the Bank, the Tribunal holds there was nothing wrong in the Bank's decision to proceed against some individuals before completing the investigation into others. In light of the sensitive functions of auditing and treasury administration, the Bank had a reasonable basis for the prioritization of persons in positions of trust. The fact that some persons who were later investigated were not dismissed is not proof of discrimination against those in the initial group, since each case was evaluated separately, with several factors coming into play. The Tribunal finds no improper discrimination against the Applicant on this basis.

123. The Applicant has also raised the Bank's reliance on her position in support of her claim of discrimination. The Tribunal finds that the Bank's reliance on these considerations was not discriminatory against the Applicant in relation to other NS for the following reasons. As the Bank stressed, the Applicant was a Senior Audit Officer *"whose very responsibilities were at the heart of the institution's ability to protect against fraudulent activities. As a Senior Audit Officer, Applicant was responsible for assessing compliance with existing policies, systems and procedures, identifying weaknesses in control systems, and identifying potential risks and areas of fraud. This position requires Applicant to be a model of integrity and to maintain the highest ethical standards."*

124. Moreover, the additional information supplied by the Bank to the Tribunal on 16 July 2018 and 2 August 2018 provided details in relation to all the persons disciplined, including other persons whom it had considered to be staff in a "position of trust". With three exceptions, all of the other persons designated as holding "positions of trust" were dismissed for misconduct relating to abuse of the TEV privilege. The three holding such positions who were not dismissed were

Senior Financial Control Officers whom the Bank saw as having cooperated with the BPMSD and having consistently taken responsibility for their own actions. Those three staff members were sanctioned by demotion by one level with 10% salary reduction, conversion of TEV plate to a green plate, payment of taxes due, and permanent ineligibility to avail of the TEV privileges. They did not go unpunished. The important distinction between those three staff members and the Applicant was that the others had consistently taken responsibility for their actions whereas the Applicant never acknowledged that her actions constituted misconduct.

125. In the particular facts and circumstances of the case, the Tribunal concludes that the imposition of the penalty of dismissal for misconduct was not discriminatory. The Applicant's claims on these points are rejected, as are her challenges to the other sanctions imposed.

Relief

126. For the reasons cited above, the Applicant's claim fails, but the Tribunal finds that she has sustained intangible injury in relation to the Respondent's breach of AO 2.06 in three particular matters and in relation to the Respondent's non-consideration of certain mitigating factors. In accordance with Article X(1) of the Tribunal's Statute, the Tribunal has determined that compensation for intangible injury is to be awarded. In light of these determinations, the Tribunal considers it appropriate, under Article X(2) of the Tribunal's Statute, to award a portion of the Applicant's attorney fees.

DECISION

For these reasons, the Tribunal unanimously decides to:

1. Award the Applicant USD 10,000 in damages for intangible injury;
2. Award the payment of a portion of the Applicant's attorney fees in the amount of USD 3,000.
3. Dismiss all other claims.

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