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ADMINISTRATIVE REVIEW

1. Nature of Administrative Review

52. The Tribunal notes that the administrative review process set out in AO 2.06 is the first stage in the dispute resolution review and is not part of the judicial process. The process undertaken by DG, BPMSD finalizes the administrative decision and provides an opportunity for management to correct course, if circumstances warrant, before a dispute proceeds. The administrative review, which takes place after a decision has been made to terminate the Applicant’s employment, should not be confused with the second stage of the process which involves an examination by the Appeals Committee followed by a review by the present Tribunal. Drawing a parallel with the Panel procedure under AO 2.05 is inaccurate. Therefore, the Applicant’s allegation that the administrative review is unfair is not accepted.

2. Effect of Filing Appeal Against Decision

53. x x x The Bank’s regulations provide that the filing of any sort of appeal against a workplace decision does not suspend the implementation of the decision under review. According to A.O. No. 2.06, para. 4, “a request for . . . administrative review shall not suspend the implementation of the decision subject to administrative review.” The Tribunal finds this to be a reasonable rule, in light of the lengthy and potentially indefinite suspension of decisions on matters such as confirmation, reappointment, discipline and the like that would follow if the rule were otherwise, fostering inefficiency and other harm to the interests and mission of the Bank. Even so, the Tribunal clearly has jurisdiction to hear and rule upon applications that properly present sexual harassment and sexual discrimination grievances, for these clearly implicate an interpretation of a staff member’s contract of employment and terms of appointment, which include a ban upon such misconduct. (See Alexander, Decision No. 40, [1998], IV ADBAT Reports 41, para. 74.) A staff member ultimately vindicated through administrative review and Tribunal action can be made whole through the award of compensatory damages and other remedies. —Yamagishi v. ADB, par. 53, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, page 124. (See also Tribunal, Jurisdiction, Sexual Harassment Cases; Sexual Harassment, Tribunal Jurisdiction)
APPEALS COMMITTEE

1. Nature of Proceedings

11. To the extent that the Applicant is claiming that the Appeals Committee misunderstood certain of his contentions and misapplied the facts in the record before it, this claim too is not properly before the Tribunal. The Tribunal has often stated that proceedings before the Appeals Committee are intended to lead to recommendations that are an advisory component of the Bank’s internal grievance procedure, and that the conclusions of the Appeals Committee are not of an adjudicatory nature so as to be subject to review by the Tribunal. Under Article I of the Statute, the Tribunal has jurisdiction to decide whether personnel decisions by the Bank violate a staff member’s contract of employment or terms of appointment; the Tribunal is not given appellate jurisdiction over the Appeals Committee. See Alcartado, supra, para. 18. —Rive v. ADB, par. 11, Decision No. 44, 7 January 1999. ADBAT Reports, Volume 5, pages 18-19. (See also Tribunal, Jurisdiction, Limits to Jurisdiction, Appeals Committee Decisions)

3. x x x The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body (A.O. No. 2.06, Grievance and Appeals Procedures, paras. 9.2 and 15), albeit a most important one, that assists the Bank in the adjustment of grievances . . . (Decision No. 41, para.18) —Alcartado v. ADB (No. 2), par. 3, Decision No. 46, 19 December 1999. ADBAT Reports, Volume 5, page 33.

8. . . . As the Tribunal has noted time and again, including in Decision No. 41, it does not sit to review the determinations or recommendations of the Appeals Committee. Rather, it has jurisdiction to hear claims that decisions of officials acting on behalf of the Bank have violated a staff member’s contract of employment or terms of appointment. Nothing stated in Decision No. 41 passed judgment upon the reviewing authority of the Appeals Committee. The Tribunal’s reference, mentioned in para.3 above, to paragraphs 9.2 and 15 of the 1998 version of A.O. No. 2.06 were meant simply to support a dictum about which there is no dispute, i.e., that “The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body.” — Alcartado v. ADB (No. 2), par. 8, Decision No. 46, 19 December 1999. ADBAT Reports, Volume 5, page 35. (See also Tribunal, Jurisdiction, Limits to Jurisdiction, Appeals Committee Decisions)

2. Period to File Appeal

23. The essence of the Applicant’s grievance is that continuity of service from 22 June 1989 for all purposes was one of the terms of his contract of employment which the Bank did not honour. All his other complaints - lower seniority, reduced salary, and the refusal of a merit increase - stem from that grievance. The request which the Applicant made on 5 July 1991 for a merit increase was founded upon his claim to unconditional continuity of service. This was unequivocally rejected by the Bank on 25 July 1991, on the basis that continuity was only “in order that [he] could carry forward [his] pension credits, home leave credits and leave balances”, so that he would receive his first merit increase on his first anniversary. This was a final
decision, in respect of which the Applicant, if dissatisfied, should have lodged a grievance within six months, as required by the Administrative Order. The Tribunal holds that the Appeals Committee correctly decided that it had no jurisdiction because the Applicant had not submitted his grievance in time. It is an established principle that in order to fulfill the requirement of exhausting all other remedies available within an organization (imposed by provisions such as Article II, paragraph 3(a)), it is not sufficient merely to submit a grievance or an appeal to the internal appeal bodies. Such grievance or appeal must be submitted also in conformity with prescribed time-limits (In re Schulz, ILOAT Judgment No. 575 (1983); In re Michl, ILOAT Judgment No. 585 (1983); and In re Zahawi (No. 2), ILOAT Judgment No. 634 (1984)). —Behuria v. ADB, par. 23, Decision No. 8, 31 March 1995. ADBAT Reports, Volume 1, page 96.

3. Right to Legal Representation

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

67. The contention of the Applicant is that her right to a fair hearing is not merely confined to proceedings before the Tribunal but applies to all aspects of the internal justice system under which the merits of her case were judged. The Tribunal considers that her right to a fair hearing has not been denied simply because she was not given the right to legal representation in the internal stages of administrative review. Accordingly, the Tribunal rejects the Applicant’s contentions in relation to Decision No. 2. —Claus vs. ADB, pars. 66 – 67, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, page 67.
1. **Fundamental and Essential Terms of Employment**

   a. **In General**

   20. Fundamental terms are of two kinds. Some terms are so basic that they will always be implied, and perhaps are not even capable of express waiver save in extraordinary circumstances: that an employee must be paid for his services, that he is entitled to a weekly holiday and to leave, that due process must be observed before he is dismissed, and that on matters of remuneration, employees are entitled to a fair wage, one that assures “equal remuneration for work of equal value,” and one that does not discriminate between men and women. The International Covenant on Economic, Social and Cultural Rights, Article 7, provides for “equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”

   21. Apart from such terms which, by their very nature, are fundamental, there are others which are not intrinsically fundamental, but may become so if the parties so intend. As the International Labour Organisation Administrative Tribunal (“ILOAT”) stated in *Los Cobos and Wenger*, ILOAT Judgment No. 391 (1980):

       First, a right should be considered to be acquired when it is laid down in a provision of the Staff Regulations or Staff Rules and is of decisive importance to a candidate for appointment. To impair that right without the officials consent is to impair terms of appointment which he expects to be maintained. Alternatively, a right will be acquired if it arises under an express provision of an officials contract of appointment and both parties intend that it should be inviolate. Thus not all rights arising under a contract of appointment are acquired rights, even if they relate to remuneration: it is of the essence that the contract should make express or implied provision that the rights will not be impaired. Thus there may be an acquired right to application of the principle that an allowance will be paid, but not necessarily to the method of calculation - in other words, to the actual amount - of that allowance. (para. 6)

   In addition to the terms of the original contract of employment, it is also possible that a new term which is later incorporated into the contract or staff regulations - after a staff member entered into service - may become a fundamental and essential term, provided the above conditions are satisfied. And perhaps that could happen, through practice, and even without a written agreement, provided such practice is clear, unambiguous, consistent, and of significant duration, and is followed as a matter of obligation. See *de Merode*, supra, para. 23.

   22. It follows that a term, whether contained in the letters of appointment or staff regulations at the outset, or introduced later, will not be a fundamental and essential term unless it satisfies these tests. It is to this question, in the circumstances of this case, that the Tribunal turns. —*Mesch & Siy v. ADB (No. 4)*, pars. 20-22, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, pages 80-81.
24. The Applicant argues that, as he had no contract specifying the terms and conditions of the appointment, he is, in principle, subject to all rules and regulations applicable to ADB staff, in particular A.O. 2.01, section 13 (Extension of Fixed-Term Appointment; Regularization) and the procedures for performance as set out in A.O. 2.03 and the Implementing Guidelines.

25. Paragraph 18 of the 2003 policy paper stated that “Except as otherwise provided in the employment contract with ADB, [DG, OED] will be subject to, and covered by, all other rules and regulations applicable to ADB staff.” Thus, in the absence of an employment contract with ADB, indeed all rules and regulations applicable to ADB staff applied to the Applicant in principle. However, the position of the Applicant as DG, OED was special, and the above principle had to be adapted in view of his special position. —Bruce Murray v. ADB, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, pages 217-218.

58. The Tribunal concludes that Ms. D’s contract of employment is not confined to the ‘four corners’ of her contract, and that the PAIs formed part of the ‘ensemble of conditions’ that comprised the relationship between Ms. D and the Bank. —Ms. D vs. ADB [No. 3], par. 58, Decision No. 111, 28 February 2018. ADBAT Reports, Volume 10, page 179.

62. The distinction between essential and non-essential rights, fundamental and nonfundamental rights, or between acquired rights and other rights, or what upsets the balance of the contract and what does not, does not depend on staff members’ subjective expectations or on factors that might have induced them to accept or remain in employment with the Bank. This is even more pertinent for staff who have fixed-term contracts or who started employment with the Bank when they did not, or did not yet, have children. —Perrin, et al vs. ADB [No. 3], par. 62, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 210.

2. Advertisement of Vacancies

20. Accordingly, it is the conclusion of the Tribunal that the Bank’s decision to advertise the Librarian position only externally, purportedly because no staff members could qualify for the post, was an abuse of discretion and in violation of the Bank’s administrative orders and other controlling regulations. It is also likely that such decision resulted, ultimately, in a failure to give the Applicant full and fair consideration of her belated application for the position. Regardless whether the individual ultimately chosen for the post was of outstanding qualifications, and indeed might have been demonstrably more qualified than the Applicant (about which the Respondent has provided no evidence at all), the Applicant has been injured by these procedural violations. The Tribunal therefore concludes that the Bank should pay the Applicant $20,000 for all resulting economic and moral injury. The Applicant’s request for costs is denied, in view of her failure to prove that she actually incurred expenses in preparing for herself the very fine pleadings she filed in this case. —Isleta v. ADB, par. 20, Decision No. 49, 21 September 2000. ADBAT Reports, Volume 5, page 56.
16. At the outset, the Tribunal endorses some of the arguments or assertions of the Bank:

“The paramount importance of securing the highest standards of efficiency and technical competence” (para 4.1 of A.O. 2.03) is the overarching principle in appointment and promotion (para. 47, Answer).

“Appointment and promotion decisions are matters that are within the Bank’s discretion” (Guioguo, ADBAT Decision No. 59 (8 August 2003)) for which the Tribunal cannot substitute its own (para. 32, Answer).

However, the Tribunal cannot admit completely the reasoning of the Bank when it asserts that it followed step by step “the prescribed procedure in A.O. 2.03 from the posting of the vacancy to the notification of candidates of the outcome” (para. 4, Answer).

17. Actually, the evidence shows that as stated above, the vacancy posting issued on 22 January 2004 was for a position of “Senior Specialist.”

18. According to the Bank, this announcement was an administrative oversight: in fact, the position was that of a “Principal Specialist”, Level 6, and should have been so listed. But,

- Neither Mr. A nor the other candidates were formally informed of the oversight at the time they applied.
- The advertisement did not mention the Level - 5 or 6 - of the position.
- According to para. 5.3 of Appendix 1 of A.O. 2.03, that announcement contained “a brief description of the responsibilities of the position, reporting requirements and selection criteria.”

19. The selection criteria contained in the announcement were:

- “suitability to undertake the responsibilities mentioned above at the required level;
- a university degree . . . ;
- at least five years of relevant professional experience . . . ;
- experience working in development in multiple countries . . . ;
- excellent oral and writing communications skills in English . . . ”

None of these criteria suggested that the vacancy posting was not a position of a senior specialist or that it was a position of principal specialist with priority access, to applicants of
Level 6. Thus, Mr. A could reasonably have believed that he met the selection criteria mentioned in the vacancy.

20. According to para. 2(c) of Appendix 1 of A.O. 2.03: “the selection panel shall first consider the applicants who are in the same levels as those of the vacant position. If the panel considers that none of those applicants are suitable for the vacant position, it will record its observations and will consider applicants who are one level below that of the vacant position . . .” (emphasis supplied).

21. Contrary to the Bank’s assertion, that text set up a priority in the favor of the applicants who are in the same level as that of the vacant position.

22. Consequently, Mr. A - who, at the time of the announcement, had a position of Senior Specialist - could reasonably have believed that his application – as the applications of the three other applicants of Level 5 - would be considered first by the selection panel.

23. As stated above, on 15 April 2004, after examining all 15 applications and their accompanying documents against the selection criteria, the selection panel decided to take into consideration first the applicants of Level 6. The Tribunal is of the opinion that, because of the appearance created by the “clerical” oversight, the selection panel, having done so, did not abide by the selection process.

24. Before management approved the selection panel’s decision, Mr. A alerted BPMSD to an apparent oversight; instead of taking action and re-advising the position to correct the alleged mistake, the Bank decided not to do so. Because the Bank persisted in its mistake, Mr. A was compelled to bring this case before us. —Mr. A v. ADB, pars. 16-24, Decision No. 77, 02 August 2006. ADBAT Reports, Volume 7, pages 137-139.

58. The Tribunal has also taken account of the following points, which it regards as of significant weight in rejecting the Applicant’s claims. First, the Applicant was assigned what even he regarded as IT work because the list of his accomplishments on the six months review form, which he drafted, were mainly in the IT category. Second, the finance tasks assigned to him were consistent with the advertised job profile and were routine tasks to do with receipts, vouchers, purchase orders and the like. Third, the readvertised post did expand on the finance aspect of the post and indicated that preferably the appointee should hold a degree in “commerce or management” as well as IT. However, this appeared to be an attempt by the Respondent to clarify the requirements of the position in order to avoid any future misunderstanding. Fourth, in dealing with and dismissing this aspect of the Applicant’s case, the Tribunal found no evidence that the Respondent abused its discretion.

59. The Applicant’s allegation of misrepresentation of facts appears to be based primarily on his version of what was said at the selection interview. This is an issue on which there is a conflict of evidence between the Applicant and two supervisors who were present at the interview, namely Messrs. Y and X. The Tribunal considers it unlikely that the supervisors would have knowingly recruited an individual who wished to stay within a narrow band of tasks. However, it is possible that things might have been said or not said at the interview that were
open to different interpretations. At this distance, and without any contemporaneous record of what was said at the interview, the Tribunal cannot resolve the conflict of evidence, other than to conclude that the Applicant has not been able to discharge the burden of proving his allegation against the Respondent (Ms. D., ADBAT Decision No. 95 [18 September 2011], para. 37). However, in the Tribunal’s view this conflict of evidence is not central to the deliberation because the terms of the job were sufficiently clear from the evidence of the original advertisement.

60. In the light of the above, the Tribunal concludes that the Applicant’s work plan and/or the actual assignment of finance and administration work did not amount to a material change in the terms of his recruitment or a misrepresentation of facts. —Mr. E v. ADB, pars. 58 - 60, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 22.

78. While all vacancies within the Bank are advertised both internally and externally, it is good practice for management to advise candidates of opportunities within the ADB. Indeed, the role of the LHR Specialist with the BPMSD was presumably to assist staff in their career development. The Respondent was aware of the efforts over a period of years by the Applicant to seek promotion to Level 6. The Applicant had failed in several attempts to gain promotion to Level 6. The Respondent states that the failure to be promoted indicates that the Applicant did not have the skills necessary for appointment at the higher level, a view supported by the regular assessment of the Applicant as “satisfactory” only.

79. The Respondent has explained why it did not advise the Applicant of vacancies. With respect to the alleged second Level 6 position with OREI, the Respondent states “Simply put, Respondent did not and could not tell the Applicant about any other vacancy … because there was none”. In any event, any vacancy would have been announced in the normal course of events. —Mr. F v. ADB, pars. 78 - 79, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, pages 47-48.

3. Amendment of Terms

a. Job Description

18. Less need be said with respect to the Applicant’s contention that the process of deciding upon his job description, classification and level evaluation was flawed and constituted a denial of due process. The Respondent furnished the Applicant with the EDRC job description, in advance of submitting it for evaluation by Hay, and the Applicant objected and furnished his own job description which was also submitted to Hay. The Applicant, curiously, challenges this procedure as unorthodox and irregular. But the situation of the staff member complaining about the lack of any job description (while the Bank was relying upon a job description from more than ten years earlier) appears itself to have been out of the ordinary. It was not unreasonable for the Bank to tailor an ad hoc arrangement designed to assure that an informed external evaluator would provide an objective job evaluation and classification. In any event, the advance consultation with the Applicant and the submission of his own job description (particularly when it was on an anonymous basis, without attributing either of the two to him or to the Bank) can
hardly be said to have been unfair to the Applicant or to have caused him injury. —*Wilkinson v. ADB*, par. 18, Decision No. 10, 8 January 1996. ADBAT Reports, Volume 2, page 24.

b. Limitations

45. That the Tribunal so concludes does not mean that the Bank was altogether unfettered in the substance and process of the Resolution of the Board of Directors. The power to amend even a nonessential condition of employment, although within the discretion of the Bank, is subject to the substantive and procedural restrictions properly imposed on all such discretionary decisions. It is the duty of the Tribunal to ensure that this discretionary power is not abused, and that the exercise by the Bank of its discretion is not “arbitrary, discriminatory, unreasonable, improperly motivated, [and has not been] carried out in violation of fair and reasonable procedure.” (*Lindsey*, ADBAT Decision No. 1 [1992]). The World Bank Administrative Tribunal has formulated a number of more specific limitations upon the exercise of an institution’s power to amend nonfundamental and nonessential conditions of employment.

First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.

The principle of non-retroactivity is not the only limitation upon the power to amend ... The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing” the highest standards of efficiency and of technical competence.” Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal. (*de Merode*, supra, paras. 46-47) —*Mesch & Siy v. ADB (No. 4)*, par. 45, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, page 89-90. (See also Tribunal, Jurisdiction, Review of Management Decisions, Amendment of Contract of Employment)

36. It is a well-established legal principle that the power to make rules implies in principle the right to amend them unilaterally. This power flows from the responsibilities of the competent authorities of the Bank. ADB staff accept this principle when they sign the Affirmation upon Appointment. It is equally well established that there are limits to this power and that any changes must be reasonable and must respect the essential and acquired rights of staff. —*Perrin, et al vs. ADB [No.3]*, par. 36, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, pages 201-202. (See also Power to Amend)
c. Medical Insurance

24. The evidence in this case shows that the Applicant was appointed on 27 January 1978. At that time the GMIP, established in 1967 was in place solely for active staff and dependents on a voluntary basis. There was at that time no extension of its benefits to pensioners and their dependents, which did not come into effect until June 1985. Thus, although Mr. Suzuki undertook his employment with the reasonable expectation that the benefits of the GMIP would apply to him and his dependents as long as he remained an active employee of the Bank, he had no expectation at the time that its benefits would continue to apply to him, let alone his dependents, once he became a pensioner. Indeed at the time of his hire, the provision of healthcare protection during his retirement would have been a matter of private pursuit. The later expansion of the insurance program to cover pensioners was not an element which he had a reasonable expectation of enjoying at the time of his hire. It was clearly not an element of his contract of employment when he was hired. —_Suzuki et al. v. ADB_, par. 24, Decision No. 82, 25 January 2008. ADBAT Reports, Volume 8, page 65. (See also Medical Insurance, Extension of Benefits to Pensioners)

27. That reservation of the right to amend from time to time the terms of insurance for Bank employees is consistent with rulings of other tribunals in other international agencies. The ILOAT in _Dekker (No.3) ILOAT Judgment No. 1917_ (3 February 2000) in para. 7 decided that “the complainant has no specific claim to a specific system of health insurance” noting that changes made did not violate any acquired right. Thus we find that the details of coverage, charges and fees of the healthcare benefit under GMIP and PRGMIP in effect at any particular time are elements of a benefit which themselves are subject to change, and that employees were advised of that prospect when the economics of the program so justified. We must conclude that the ADB did not breach any obligation incurred by the Bank to Mr. Suzuki at the time of his hire when it later extended that healthcare program to pensioners with the potential for subsequent adjustment to retired employees and their dependents.

31. This Tribunal, acknowledging the responsibility of the Bank to maintain a viable healthcare program for active and retired employees and their dependents, recognizes the need for periodic adjustment in funding, benefits, premiums, and coverage. It is also alert to the requirement that the Bank be rational and fair in its treatment of the various groups who benefit from the healthcare system and that it not unfairly discriminate against any component group.

32. In examining changes in the plan’s funding, benefits, premiums and coverage to assure that they are fairly and reasonably apportioned, it is essential to assure that (i) the objective of such change is rational and legitimate, (ii) there is evidence to support the different treatment of various member groups, (iii) there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification, and (iv) the differential treatment is proportionate to the objective of the change (see _Mr. R v. IMF_, Judgment No. 2002-1 (5 March, 2002)).

38. In this case we find that the Bank’s action is in conformity also with standards prescribed in _De Merode, WBAT Decision No. 1 [1981]_, para. 88 where it showed that “this was not a hastily adopted reform but a change studied at length and most carefully prepared.” The
Bank after its earlier efforts in developing Decisions 1 and 2, investigated the issues further and undertook consultation with staff and pensioners prior to the issuance of Decision 3. Although the pensioners as a group did not endorse the changes, we are satisfied that the Bank enhanced the contributory role of those affected by the changes and that the changes set forth benefited from such consultation. —Suzuki et al. v. ADB, pars. 27, 31-32, 38, Decision No. 82, 25 January 2008. ADBAT Reports, Volume 8, pages 66-68. (See also Medical Insurance, Right to Amend)

d. Payment of Dependency Allowance

28. It is true that regardless of who was the Applicant’s legal spouse at the time, the Bank could not have made any mistake, had it paid the Applicant, because it was the Applicant himself who was, and continued to be, the one and only person entitled to receive payment of such benefits, in terms of Administrative Order No. 3.03, Article 2 on Eligibility:

A regular staff member or a staff member appointed for a fixed term of one year or more shall be eligible for the dependency allowance, in respect of dependent spouse. (emphasis added)

Likewise, Article 3.1 states:

An eligible professional staff member shall be entitled to a dependency allowance of 5 per cent of net annual salary but not to exceed $3500 per annum for dependent spouse... (emphasis added)

29. It is not in dispute that the Applicant had a spouse. The only question was whether his spouse was Gresilda or Carolina, and the answer depended on the validity of the decree of divorce.

30. It cannot therefore be accepted, as stated in the Respondent’s memorandum dated 5 September 1994, that the Bank was obliged to withhold the payment of dependency allowance to the Applicant:

Pending resolution of the issues raised by Ms. G.M. Chan’s 7 June letter, the Bank is obliged to withhold payment of any cash benefits to your dependent spouse ... 

Among the considerations for the Bank withholding any such payment is the possibility that the Bank would pay a person such cash benefits and then be informed by a court of law that the payment should have been made to another person.

Not only could the Respondent have continued to make dependency allowance payments to the Applicant but even if it had made a payment erroneously there was a procedure for recovery, set out in A.O. No. 3.03, Section 4.3. —Chan v.

e. Power to Amend

20. The issue that needs to be considered is not that formulated by the Bank, but a much narrower issue: namely, whether the Tribunal lacks competence to examine, review and invalidate, a decision of the Board of Directors which purports unilaterally to amend the contract of employment or terms of appointment of a staff member, even if that decision prejudicially affects a fundamental and essential term or condition of employment of a staff member, without the staff member’s consent, thereby violating his acquired rights.

21. The power of an organization to amend the contract of employment or terms of appointment has been lucidly set out in de Merode, WBAT Reports 1981, Decision No. 1:

35. [T]he Bank has the power unilaterally to change conditions of employment of the staff. At the same time, significant limitations exist upon the exercise of such power.

... 

40. ... The Tribunal notes that [the distinction between unilateral amendments which are permissible and those which are not] cannot rest on the extent to which a staff member accepted such power of amendment in his letter of appointment. Even if no reservation of the power of amendment were expressly included in the letters of appointment, such a power would be implied from the internal law of the Bank. Likewise, even if those cases where a power of amendment is reserved in terms which impose no limitation upon its exercise, this cannot be construed to accord to the organization an unrestricted power of amendment. The scope of the words as used in the exchange of letters must be read against the background of the Bank’s internal law, and it is not on the strength and extent of any individual’s acceptance that the power of amendment and its limitations may be defined.

...

42. ... Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally ...

44. ... The Tribunal prefers not to invoke the phrase “acquired rights” in order to describe essential rights ... It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls “the doctrine of acquired rights” does not constitute the cause or
justification of the unchangeable character of certain conditions of employment. It is simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment.

22. Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions. Without deciding whether that principle could have been excluded by the provisions of the Charter of the Bank, it suffices to note that the Charter does not do so, and therefore the powers of the Board of Governors and of the Board of Directors of the Bank are subject to that limitation. However, when the Bank was founded there was no institution which was empowered to compel the Bank to comply with that principle. And when the Statute of the Tribunal was adopted, that limitation already existed: it was not one imposed or deemed to have been imposed by the Statute. The Tribunal was given jurisdiction in respect of complaints by staff members alleging non-observance of their contracts of employment and terms of appointment. That Statute does not prescribe any pertinent exception or qualification in respect of the jurisdiction of the Tribunal, and so that jurisdiction extends to non-observance of contractual terms resulting from the infringement of that principle. —Mesch and Siy v. ADB (No. 3), pars. 20-22, Decision No. 18, 13 August 1996. ADBAT Reports, Volume 2, pages 124-126. (See also Tribunal, Jurisdiction, In General; Tribunal, Jurisdiction, Review of Management Decisions, Amendment of Contract of Employment)

14. There are two important principles upon which the Applicants and the Respondent agree. First, the Bank – as it states in the concluding paragraph of the Resolution – is bound to implement “the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally.” This principle is rooted in a longstanding series of formal published declarations – an Administrative Instruction in 1967, Administrative Orders beginning in 1972, a Personnel Policy Statement in 1990, and the Personnel Handbook for Professional Staff in 1991 – as recounted by the Tribunal in Mesch I, para. 12. A second undisputed principle is that the Bank may not unilaterally abrogate “fundamental and essential” terms or conditions of employment. With respect to the latter point, the Tribunal stated, in Mesch III, that:

Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions.

(Para. 22)

This principle of law is most fully discussed by the World Bank Administrative Tribunal (“WBAT”) in de Merode, WBAT Reports, 1981, Decision No. 1. —Mesch and Siy v. ADB (No.
36. It is a well-established legal principle that the power to make rules implies in principle the right to amend them unilaterally. This power flows from the responsibilities of the competent authorities of the Bank. ADB staff accept this principle when they sign the Affirmation upon Appointment. It is equally well established that there are limits to this power and that any changes must be reasonable and must respect the essential and acquired rights of staff. —Perrin, et al vs. ADB [No.3], par. 36, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 201-202. (See also Amendment of Terms, Limitations)

f. Protection of Employees

21. In considering the extent of the duty of an employer the Tribunal has been quite unable to find any support for the view that an employer is absolutely liable in contract to a staff member for injury suffered by the staff member whilst on the employer’s premises or otherwise performing the duties of an employee. The position is, rather, that, as a matter of the general principles of the law of employment, the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety whilst on the Bank’s premises. This is the same as saying that the Bank must not be negligent in constructing, equipping or maintaining its premises, or in making provision for the personal protection of its staff members on those premises against reasonably foreseeable risks.

22. An authoritative statement reflecting this general principle is to be found within the jurisprudence of international administrative tribunals in the decision of the Administrative Tribunal of the International Labour Organization in In re Grasshoff (Nos. I and 2), Judgment No. 402 (1980). The Tribunal there stated:

“I. It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. Staff Regulation 1.2, which provides that all staff members are subject to assignment by the Director-General to any of the activities or offices of the Organization, is to be read subject to this principle. If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment. It is unnecessary in this case to consider whether and in what circumstances an employee may refuse to accept an order to work in an unsafe place. It is sufficient to say that, if he accepts the order, as prima facie he is bound to do, and the employer has failed to exercise due skill and care in arriving at his judgment, the employee is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment.

2. This principle is to be applied with due regard to the nature of the employment. In some employments there are unavoidable risks. A doctor may have to risk infection and a soldier or a policeman to risk bombs. The question in each case is
whether the risk is abnormal having regard to the nature of the employment. In a case such as the present a reasonable test (though this is only one possible criterion) might be to consider whether an insurance company could, because of the civil war in East Pakistan (as Bangladesh then was), properly demand an additional premium for cover against the risk of injury in Dacca.”

23. The Tribunal recognizes that this quotation does not state in exact terms the proposition in support of which the Tribunal cites it. It is clearly authority for the proposition that an organization is not absolutely liable for injury suffered by a staff member in its service. But it necessarily follows from this that an organization is likewise not absolutely liable for injury suffered by a staff member on its premises. Rather, in both situations the obligation of the organization is only to take reasonable care.

XXX

25. True, the Bank has arranged, and in large part paid for, policies of insurance to provide compensation for its staff in the event that they suffer harm while in the Bank’s service. However, this is not done in discharge of any legal liability of the Bank itself to act as insurer of its staff, but only as the action of a concerned employer anxious to make sure that its staff are protected in all circumstances, irrespective of whether any fault can be attributed to the Bank, to any third party, or even to the staff member himself. The Bank’s duty is only to exercise reasonable care in every aspect of its activity that impinges or may impinge upon the safety, health and security of its staff.

26. This duty rests upon the Bank as a legal person. However, the Bank is an artificial legal person, not a natural one. It can act only through those whom it employs, whether as servants, agents or independent contractors. In selecting such persons to perform the functions with which it is charged, the Bank must of course use reasonable care to choose those who are fully capable of performing the functions for which they are employed or retained. It must, moreover, ensure that all who perform these functions themselves exercise reasonable care in doing so. Nevertheless, the Bank, having used reasonable care in the selection of its servants, agents or contractors, cannot afterwards say that it has thereby discharged the whole of its duty and is no longer obliged to see that those persons in their turn exercise reasonable care towards its staff. In short, though the Bank is free to hire a contractor to provide a service within the Bank that it might otherwise itself perform directly through its own employees, the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment.

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29. The Tribunal will first consider the Applicants’ contention that the Bank’s selection of the contractor, Protectors Services Inc., involved a failure to exercise due care in relation to the protection of Mr. Bares. The fact that the Bank chose to discharge its duty of care in the provision of security through the employment of a local security company does not by
itself support a suggestion of dereliction of duty. If the Bank had so chosen it could also have contracted out such services as cleaning, catering, maintenance of equipment, etc., provided always that recourse to such outside assistance did not adversely affect the maintenance by the Bank of the standard of reasonable care owed to its staff.

30. The same is true of the provision of security services. So long as reasonable care was used in the choice of a security company and reasonable supervision was continuously exercised to see that suitable standards were maintained by that company, no relevant fault can be attributed to the Bank. It is unnecessary for the Tribunal to follow the parties into their discussion of whether or not the Bank was obliged under Philippine law to hire the services of a security company. The only question in relation to this point is whether the Bank exercised due care in the selection of the company.

31. The Tribunal notes that the selection of PSI was not arbitrary or casual. The Bank was evidently concerned to make a careful choice of a security company, as is shown by the fact that the Bank had over the previous six years employed two other companies. In thus changing security companies the Bank was clearly aiming to maintain a reasonable standard of security or even to enhance it.

32. As to the selection process, tenders were invited from several companies. These were carefully considered in the Bank by reference to a number of factors such as the experience of the company, the numbers of personnel it proposed to allocate to the task, the equipment it intended to use, the wages that it proposed to pay its employees and its overall charges to the Bank. The Tribunal can find no evidence of any lack of care on the part of the Bank in choosing PSI.

x x x

35. The central and most important criticism by the Applicants of the conduct of the Bank relates specifically to the selection and supervision by PSI of Mr. Macalindong, the guard who was convicted of the homicide of Mr. Bares. In particular, it is said that Mr. Macalindong was not of an intellectual or psychological calibre suitable for retention as a security guard, that his security guard licence had expired some weeks before the event and that he had not obtained a new one, and that he was known to have committed a number of infractions of the rules governing the conduct of guards in that he regularly sought loans from other Bank employees, acquired supplies for resale, gambled and slept frequently in the drivers’ quarters. One of these infractions was brought to the attention of the Bank’s security officer in December 1991, but he decided not to impose any punishment.

36. The Tribunal will consider presently whether Mr. Macalindong’s behaviour on 7 January 1992 was treated with such lack of care by the Bank as to amount to negligence. But on reviewing the matters indicated above relating to Mr. Macalindong’s characteristics and behaviour during the period of his employment prior to that day, the Tribunal can find no evidence of negligence on the part of the Bank. The picture which appears from Mr. Macalindong’s psychological tests (which were carried out in accordance with Philippine Government requirements) does not suggest that in capability or reliability he fell below an
acceptable standard. Many regarded him as an agreeable, though occasionally persistent, individual. But there is nothing in the record to suggest that he had in him, or ever exhibited, an aggressive or violent strain that could lead him to kill someone. The Security Risks Report stated that “[w]hat may have made him capable of the violence he exhibited is still not completely understood.” In the light of this conclusion, reached after a close investigation shortly after the event and with that particular episode in mind, it cannot be said that the Bank, in carrying out no more than general periodic reviews, was remiss. Nor is there any substance in the complaint that Mr. Macalindong’s security guard licence had not been renewed. In fact, PSI had applied for a new licence in good time but it had not yet been issued. There is no reason to believe that, in the normal course of events, it would not have been forthcoming. —Bares, et al., v. ADB, pars. 21-23, 25-26, 29-32, 35-36, 42-43, Decision No. 35, 31 March 1995. ADBAT Reports, Volume 1, pages 58-62.

g. Tax Reimbursement (See Equal Compensation For Equal Work)

14. The resulting position may be summarized as follows. The Charter, By-Laws and Board Resolutions did not establish any obligation of the Bank in respect of the reimbursement of income tax levied on staff salaries; equally, however, those documents did not prohibit the adoption of any such obligation. Likewise, although the letters of appointment issued by the Bank to professional staff did not include any express undertaking to reimburse income tax, nevertheless they did not specifically exclude that prospect. There was thus no pronouncement by the Bank as to the exclusion of tax reimbursement. Moreover, the letters of appointment sent to staff members made the Bank’s administrative regulations part of the contract between the Bank and the staff members. Accordingly, from 1967 onwards, the principle of equal compensation for comparable work (contained in Administrative Instruction ADM-7) was part of the terms and conditions of all staff members; and by 1972 the Bank acknowledged the need to apply salary policies equitably throughout the Bank. Thereafter, the Bank accepted, in principle and in practice, that its professional staff were entitled to “equitable remuneration” both internally (in relation to their colleagues in the Bank) and externally (i.e., bearing “a reasonable degree of comparability” with the remuneration of their IBRD counterparts). —Mesch and Siy v. ADB, par. 14, Decision No. 2, 8 January 1994. ADBAT Reports, Volume 1, page 30.

35. The contention that the Resolution is invalid, as being a unilateral amendment of a fundamental term, can succeed only if tax reimbursement is either intrinsically fundamental or if it became fundamental in some recognized way. Neither nationally nor internationally has tax reimbursement been recognized as a condition of employment that is per se fundamental. Wherever it has been recognized as a fundamental and essential term it has been on account of express terms or pronouncements. The decision in Mesch I that tax reimbursement could have been excluded is consistent with the conclusion that it is not intrinsically fundamental. It has already been clearly concluded above (paras.24-25) that tax reimbursement did not become fundamental in one of the recognized ways - either by declarations by the Bank in its staff regulations or letters of appointment or by any pertinent past practice. —Mesch and Siy v. ADB (No. 4), par. 35, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, page 86. (See also Income Tax Reimbursement, Not a Fundamental and Essential Condition of Employment)
4. Equal Compensation for Equal Work

30. It is necessary to clarify the term “equal compensation for equal work,” because it is often used in more than one sense; for instance “compensation” is sometimes used narrowly to mean pay or salary, and at other times as including benefits; and “equal” is sometimes treated as equitable. In the strict sense “equal compensation for equal work” means “equal pay for work of equal value”; and then the application of the principle involves only a consideration of the “value” of the work to the employer. The fact that to another employer that work might have a greater or lesser value is irrelevant. Equally, the personal circumstances of the employee are irrelevant: thus the fact that, due to some physical disability, he has to incur additional expenses in coming to work does not entitle an employee to additional pay, because the value of his work to his employer remains the same. The employers obligation to treat his employees equally does not extend to remedying irregularities/discrepancies created by the conduct of the State of which the employee is a citizen.

31. Undoubtedly, in that sense, the principle of “equal compensation for equal work” is intrinsically fundamental, and must be implied in every contract of employment. When the Tribunal concluded in Mesch I that “the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement” (emphasis supplied), the Tribunal was clearly not suggesting that the principle of “equal pay for work of equal value” could have been excluded. Obviously, the Tribunal was referring to something else. —Mesch & Siy v. ADB (No. 4), pars. 30-31, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, page 84-85.

51. The Tribunal holds that the EA provisions, both old and new, apply equally to all International Staff and that similarly situated staff are treated in the same way. The reimbursement amounts themselves obviously differ per child, depending on a variety of factors, such as age, level of studies, place of studies, costs of studies, scholarships, only to name a few. This does, however, not amount to improper discrimination, as the Applicants submit. —Perrin, et al. vs. ADB [No.3], par. 81, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 213.

5. Negotiated Settlement of Disputes

32. Moreover, Mr. A’s situation resulting in his PIO promotion was, in the judgment of the Tribunal, particularly uncommon. His promotion was awarded in the context of: his having filed with the Tribunal an Application claiming an unlawful denial of a promotion in the face of repeated recommendations for promotion and reclassification; the Bank determining that several of his material contentions had merit; and the two parties reaching a settlement that brought about Mr. A’s two-level PIO promotion and the withdrawal of his Application before the Tribunal. On their face, these circumstances differentiate the situation of Mr. A from those of the Applicants here, and undermine their claim to identical treatment. —Canlas v. ADB, par. 32, Decision No. 56, 8 August 2003. ADBAT Reports, Volume 6, pages 51-52.
34. Although the Tribunal agrees with the Respondent that negotiated settlements of disputes are to be encouraged, and not unduly scrutinized by the Tribunal, there may well come a point at which the terms of a settlement might be so unjust or discriminatory as to constitute an abuse of the Bank’s discretion. This might be the case, for instance, were the Bank to use the device of settlement so as to set aside its applicable rules in an arbitrary manner or so as to provide unreasonable advantage to particular staff members.

35. The Tribunal concludes that the settlement here, although sharply criticized by the Applicants, is not such a situation. The two-level promotion on a present-incumbent only basis, without formal reclassification of his position, was responsive to the claims being pressed by Mr. A. Although the Applicants point out that Mr. A’s promotion deviated from several of the usual rules and procedures in the case of promotions, these departures were not unreasonable, given the extraordinary circumstances of the dispute, and given the Bank’s judgment, made in good faith, that settlement on the agreed upon terms was in the best interest of the Bank and was commensurate with the harm done to Mr. A. The Tribunal gives considerable weight to the fact that, although Mr. A as a level 7 Project Analyst was not eligible for a PIO promotion according to the rules in effect at the time of his application to the Tribunal, the Bank’s agreement in December 2001 to award him such a promotion was accompanied by a directive to review those rules and, soon after, by a newly declared policy extending eligibility for PIO promotion to all HQ support staff, regardless of grade level. —Canlas v. ADB, pars. 34-35, Decision No. 56, 8 August 2003. ADBAT Reports, Volume 6, pages 52-53.

36. The only other significant claim raised by the Applicants is that the Bank’s two-level PIO promotion for Mr. A was invalid because it lacked transparency as is required by a number of Administrative Orders. See paragraph 23, supra. There is no dispute that the terms of the 21 December 2000 settlement agreement were initially kept confidential, as the agreement itself required: “The parties agree that the terms of this Settlement Agreement shall be treated in a confidential manner and that no information thereon or copies thereof shall be released to any third party.” The Applicants point out that no public mention was made by the Bank of Mr. A’s promotion, as it allegedly should have been, in the February 2001 BPHR Personnel Announcement; and that it was not published until the 30 March 2001 announcement and only then because of the pressure exerted by the Applicants, then in the midst of administrative review. The Applicants also claim that the fact that Mr. A’s was a two-level promotion was not disclosed by the Bank until they had already taken their cases to the Appeals Committee. The Respondent acknowledges the lack of transparency in this matter, but excuses it as an incident of a good-faith settlement, which is to be encouraged, and as a means of protecting Mr. A’s privacy and “because the Respondent anticipated that if the promotions were made public, support staff colleagues of [Mr. A] might become upset and annoyed, and make [his] working situation difficult.”

37. The Tribunal agrees with the Respondent that a resolution of this issue involves an accommodation of the values of privacy and encouraging settlement of disputes, against the very high value placed by the Bank’s Administrative Orders upon transparency in personnel decisions including promotions. In making such an accommodation in this particular case, it is necessary to take account of any discernible injury to the Applicants. As to the Bank’s failure to publish a notice of Mr. A’s promotion until March 2001 rather than in February, it is not possible
to find any material injury to the Applicants. Indeed, the Applicants were by their own admission aware of the promotion no later than 8 February 2001, and they were already well along in the process of administrative review directed against that promotion when the February and March Personnel Announcements were published. —*Canlas v. ADB*, pars. 36-37, Decision No. 56, 8 August 2003. ADBAT Reports, Volume 6, page 53.

6. **No Compensation for Temporary Service**

16. With respect to the Applicant’s claim for compensation for his temporary service as Senior Executive Officer (a Level 5 position) and as Economist for Kazakhstan, he fails to demonstrate that the Bank customarily awards extra compensation for such service. As noted already in connection with the Applicant’s claim concerning one of the checklist items, “Planning and Organizing Work”, performing extra work appears to be what is normally expected of the Bank’s staff. The Personnel Handbook for Professional Staff states:

“3.7 Working Hours and Official Holidays

The Bank’s normal working hours are 8:00 am to 4:30 pm, Monday through Friday. It needs to be recognized, however, that, as for all executives and senior professionals, your task may involve working outside normal hours and outside the five-day working week.

It is not the Bank’s policy to pay you for this time; rather, it is regarded as part of your professional commitment.”

Although this refers only to working outside normal business hours, it is reasonable to hold that the principle of not making additional payment would apply also to the handling of work additional to one’s principal responsibilities. The Tribunal endorses the position that was articulated by the Appeals Committee in this case:

“It is not an infrequent occurrence in the Bank for a staff member to be the officer-in-charge of a division or even a department. It is also a common practice for professional staff to carry out the functions of other staff when such other staff are absent in addition to their own. These are time-honored practices in the Bank and professional staff are given recognition, not financial compensation, for such extra duties. . . .

[T]he Applicant’s] additional workload and any higher level responsibilities undertaken during that time were reflected in the PER under Dependability/Responsibility, where he was given the highest rating, and not in terms of compensation.” —*Behuria v. ADB* (No. 2), par. 16, Decision No. 11, 8 January 1996. ADBAT Reports, Volume 2, pages 32-33.
7. Post Termination Intervention

39. In respect of Applicant’s claim of “unlawful interference [by the Bank] in [his] employment opportunities after his resignation from the Bank”, relating to an employment position apparently available in a USAID project in Afghanistan, the Bank noted that it was the Afghanistan Government and non-government organizations (NGO) stakeholders who had informed the USAID about the Applicant’s professional abilities and shortcomings. The Tribunal considers that there was failure on the part of the Applicant to submit evidence of any kind to sustain this last contention of his. The record is bereft of any relevant document or any material other than private email correspondence by a personal friend to the effect that the Applicant had been selected by USAID to serve as Chief of Party (“COP”) for a project related to the Applicant’s areas of expertise; and a second private email from the same personal friend advising Applicant that the USAID had withdrawn its approval of Applicant’s candidacy as “COP” for the USAID project. Thus, the record is bare of anything to suggest any connection between the Bank and the USAID mission in Afghanistan. —Azimi v. ADB, par. 38, Decision No. 88, 23 January 2009. ADBAT Reports, Volume 8, page 186.

8. Resignations

29. x x x

b) Application

1) Pursuant to paragraph 11.3 of Administrative Order No. 2.01, the performance of Mr. Shimabuku was reviewed twice: on 17 January 2003, after the first six-month period of probation, and on 15 July 2003, after the twelve-month period. The assessments of each report were mixed; at that time Mr. Shimabuku did not comment on these assessments.

2) On 10 September 2003, Director, OIST, met with Mr. Shimabuku and informed him of his draft recommendation which was to not confirm the appointment. Mr. Shimabuku was invited before sending the recommendation to Director General, BPMSD, to submit his comments by 26 September 2003, and thus had the opportunity to make comments about the recommendation until 26 September 2003.

3) It is true that the letter of resignation was submitted directly to the Director, OIST, and not submitted to the Director, BPMSD, through Principal Director, OIST, as required by paragraph 4.4 of Administrative Order No. 2.05. The consequence of this mistake cannot be that the resignation was null. Indeed, the aim of paragraph 4.4 of Administrative Order No. 2.05 is for Director, BPMSD, to be warned about the resignation of a staff member: Director, OIST, forwarded at once the letter of resignation to Director General, BPMSD, who acknowledged receipt of it on 15 September 2003. Therefore, the letter of resignation was properly submitted.

4) According to paragraph 4.2 of Administrative Order No. 2.05, the Bank had the possibility to decline to accept the resignation. In fact, at first, on 15 September 2003, the Director General, BPMSD, had decided not to accept the resignation. The reason for this
decision was found in the rules regarding the decision of non-confirmation as quoted above: in this eventuality, the appointment of Mr. Shimabuku would have been terminated, according to paragraph 11.4 of Administrative Order 2.01 “on the day of the month which coincides with the end of the 15th month of his/her service with ADB”, i.e. on 15 October 2003, and therefore prior to the date of the effectiveness of the resignation (15 July 2004). A problem could have resulted if Mr. Shimabuku had withdrawn his resignation at that time since it had not yet been accepted. However, on 20 October 2003, before Mr. Shimabuku expressed his intention to withdraw his resignation, Director General, BPMSD, had written to him formally accepting his resignation. Therefore, resignation of Mr. Shimabuku was properly admitted.

30. a) The principles

First, the Tribunal affirms the following principles:

1) The person who claims lack of consent bears the burden to show it. “In a claim that a resignation was coerced, the burden of proving improper motive or coercion is on the Applicant.” (See Abbas v. Commissioner General of the United Nations, UNAT Judgment No. 874 (31 July 1998), para. VII.)

2) In order to ensure the security of the legal acts, not all kinds of pressure can be considered as evidence of duress: as a general principle of law, it cannot be admitted as lack of consent unless proof has been made that the pressures were unfair and illegal.

   In the examination of the impact of the pressures, the judge has to take into consideration, among other things, the age of the person, his intellectual level, and the fact that, after the alleged pressures had ceased, he reiterated his decision.

b) Application

1) It is for Mr. Shimabuku to prove that his resignation was invalid because the Bank had brought unfair and illegal pressures to bear upon him.

2) He was an employee of high level; he had been appointed as Head, Information Technology in the OIST, Level 6, and was responsible for more than 50 people. At his age and in those functions, Mr. Shimabuku was able to appreciate the impact of his decision.

3) Mr. Shimabuku contends that his resignation on 10 September 2003 was coerced by the Bank. But, after having taken this decision, he reiterated it:

   - On 15 September 2003 in his memo to Principal Director, OIST: “I... request that instead of recommending non-confirmation you will accept my letter of resignation “;
On 17 October 2003, Mr. Laksetich provided Mr. Shimabuku with his minutes of their meeting held the day before. In this document, Mr. Laksetich stated that “Mr. Shimabuku confirmed his willingness to pursue his intent of resigning on the terms indicated in his letter ... dated 10 September 2003.” Mr. Shimabuku made no comment on these minutes;

On 5 December 2003, Mr. Shimabuku signed - without any comment - the letter sent to him by Director General, BPSMD: “This is to advise you that the President has approved the extension of your probationary period up to 15 July 2004”; and

In his letter of 7 March 2004, Mr. Shimabuku informed the Director General, OIST, of his intention not to resign anymore, not because this resignation had been coerced by the Bank but just for the reason “that my personal and work situation have changed.”

4) Even if, during the meetings held on 10 September 2003 and before with, among others, Director, OIST, it had been suggested to Mr. Shimabuku that resignation was more attractive and less humiliating than the non-confirmation of the appointment, this cannot be considered as an unfair and illegal pressure.

31. According to paragraph 4.3 of Administrative Order. No 2.05, the resignation “which has been accepted may be withdrawn ... only in mutual agreement with the Bank”. If the withdrawal has to be agreed to by the Bank, it means necessarily that the Bank has the right not to accept it, which was the case. Moreover, this decision to deny the withdrawal of the resignation was not arbitrary. The Tribunal reminds that in the second PER, Director, OIST recommended not to confirm the appointment for reasons for which Mr. Shimabuku did not make any comment. If Mr. Shimabuku had not resigned, the Bank would have taken the decision not to confirm the appointment: in this eventuality, employment relations would have ceased in October 2003, i.e., eight months before the effective date of the end of the contract. —Shimabuku v. ADB, pars. 29-31, Decision No. 72, 19 August 2005. ADBAT Reports, Volume 7, pages 55-59.

75. The Applicant’s letter was addressed to the Country Director. It stated that he was “forced to resign” due to his alleged “continuous severe harassment” and “complete mismatch with my current work profile with the advertised profile.” It also specifically requested the Country Director “to accept my resignation letter with immediate effect.” Thus, on the one hand, the letter included a complaint of harassment, although it was not a formal complaint. On the other hand, it asked that the resignation be accepted with immediate effect.

76. The Applicant’s approach to this issue is contradictory. He specifically asks the Respondent to accept his resignation letter immediately. When the Respondent complies with his request, he says that this is tantamount to an improper procedure, retaliation, and an abuse of discretion. The Applicant cannot have it both ways, even though his letter included an informal complaint of harassment. Moreover, the Tribunal is mindful that the resignation letter was written shortly after an adverse performance review and that its date coincided exactly with the
commencement of the Applicant’s new post at the Canadian High Commission. In the circumstances, the Tribunal rejects the Applicant’s claims that the Respondent followed an improper procedure or abused its discretion in accepting his resignation immediately, or that the immediate acceptance was an act of retaliation. —Mr. E v. ADB, pars. 75 - 76, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 26.

9. Right of Access to Documents

75. Staff members have a right of access to documents that relate to their personal or individual files under AO 2.08 para. 2.2.

“AO 2.08 (Access to personnel files)

2.2 “Working papers” means preparatory materials generated by supervisors or managers for their use in exercising their managerial responsibilities or prepared by [BPMSD] in the performance of its personnel management function. Recommendations concerning individual staff actions cease to be working papers following consideration of the recommendation by the President or other authorized officer and shall be copied to the staff member … and be included into the personnel files.”

76. The Applicant has no right to receive “working papers” that are defined as preparatory materials generated for the exercise of managerial responsibilities, or those that deal with general staff matters. The documents claimed by the Applicant – Annexes 3 and 4 of the Answer – are not subject to the obligations under AO 2.08 para. 2.2 because they do not relate to an “individual staff action”. —Mr. F v. ADB, pars. 75 - 76, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 47.

10. Short-Term Contracts

a. In General

27. The Tribunal holds that recourse to successive short-term or temporary contractual appointments to jobs which are essentially of a permanent nature is not a fair employment practice, particularly if such appointments can be shown to have been made only to deny employees security of tenure or other conditions and benefits of service. Such appointments are permissible only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration. —Amora v. ADB, par. 27, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 7.

42. In the present case, the Tribunal finds no functional reason whatsoever, justifying the recourse to short-term contracts, in the face of a continuing relationship. It is clear that the
work done by the Applicant for the Bank was a continuous whole, even though he had held different positions during his career in the Bank, just as regular staff members do. Thus the separation of his work with the Bank into individual yearly contracts was a pure fiction.—Amora v. ADB, par. 42, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 10.

b. Abuse of Power (detournement de pouvoir)

43. The use of successive MOAs is an abuse of power, more precisely a “détournement de procedure” which is a specific category of the more general “détournement de pouvoir”. According to precedents of international administrative tribunals summarized by Dr. C.F. Amerasinghe:

Where it emerges from the facts that there was a positive purpose different from the purpose underlying the power that was exercised, the exercise of the power is vitiated. This improper purpose demonstrates that the proper purpose had been supplanted. This is the usual situation in which abuse of purpose occurs.

There is, however, another legal possibility. The proper purpose may be absent even when no positive irregular purpose is proved to be present. The ILOAT [In re Gale, ILOAT Judgment No. 474 (1982)] found that no good reason had been given for the action taken and therefore the decision was invalid .... No positive reason had been given. The tribunal, therefore, inferred the absence of a lawful motive. It was not found to be necessary to point to a positive irregular purpose, it being sufficient in law that a permitted objective was absent. (1 C.F. Amerasinghe, The Law of The International Civil Service 293) (2nd ed. 1994) (emphasis supplied)

Here, as no reason exists objectively, and no good reason was provided by the Bank, for the use of annual contracts for what was in reality a long-term employment, the Tribunal concludes that the use of annual contracts without any functional justification is an abuse of power. Thus, the true legal relationship of the Applicant to the Bank was that of a staff member holding a regular appointment.

The President therefore had no power to deny the Applicant the benefits of the Staff Regulations and, accordingly, the exemption clauses in the MOAs were inoperative.—Amora v. ADB, pars. 43-44, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, pages 10-11.
11. Types of Employment

a. Fixed-term Appointment

i. Due Process in Performance Evaluation

6. Where a legitimate expectancy exists the Bank must honour it and give due consideration to each case. Such consideration involves examination of the facts and this examination itself must be carried out in accordance with due process. Indeed, the Bank has promised this to all staff in paragraph (xiii) of its Personnel Policy Statement, approved in December 1990: “The Bank will observe due process in all areas of personnel administration ...” The scope of this undertaking is not reduced by the footnote to Section 5.1 (“the Performance Review Process”) of the Personnel Handbook for Professional Staff which states:

“The process described in Section 5.1 generally applies to Professional Staff in Levels 1-6. Senior Staff in Levels 7-9 have a modified process.”

The “modified process” mentioned in the footnote does not appear to be elaborated elsewhere, but the basic concepts laid down for Levels 1-6 are capable of being applied in all major respects to Levels 7-9 and in principle, therefore, must apply to these higher Levels also. —Lindsey v. ADB, par. 6, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, pages 2-3. (See also Types of Employment, Fixed Term Appointment, Legitimate Expectancy of Renewal or Regularization)

7. The application of such due process must involve a fair and balanced scrutiny of the staff member’s qualifications, as well as of his performance during the period he has already served. It is now a very common feature of the employment practices of international organizations that periodic written assessments or evaluation reports are prepared on the performance of staff members. These reports detail both the satisfactory and the unsatisfactory features of the employee’s performance and, if criticisms of performance are made, they are required to be accompanied by a clear indication of the steps which the staff member should take to improve the situation. Experience has shown that this practice is an important element in the avoidance of administrative arbitrariness or discrimination. (See, for example, the decisions of the World Bank Administrative Tribunal in Saberi, WBAT Reports 1981, Decision No. 5, para. 23; Buranavanichkit, WBAT Reports 1982, Decision No. 7, para. 28; and Thompson, WBAT Reports 1986, Decision No. 30, para. 28.) —Lindsey v. ADB, par. 7 Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 3.

10. Any enquiry into the performance or conduct of a staff member must be carried out in accordance with the requirements of due process of law, in such a way that the establishment of the truth or falsehood of allegations is not itself a subject of discretion but is the consequence of an objectively verifiable and rationally explicable examination of the facts. Where the continuance or not of a staff member’s livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections. —Lindsey v. ADB, par. 10. Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 4.
47. The principle of non-discrimination requires that staff members in “the same position in fact and in law” be treated equally. See In re Vollering, ILOAT Judgment No. 1194 [1992], para. 2. Equality of treatment is not required when the circumstances of the persons concerned are different. Paragraph 18 of the 2003 policy paper formed the basis of the Applicant’s appointment. Because of differences between the position of the Applicant and that of normal staff members, the procedures on extension of fixed-term appointment applicable to normal staff members stipulated in A.O. 2.01, section 13 did not apply to the Applicant, and the difference in treatment was justified. The Tribunal finds that the Bank did not arbitrarily discriminate against the Applicant compared to other staff members seeking an extension of their fixed-term contract. —Murray v. ADB, par. 47, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, page 223.

51. A critical feature of due process is impartiality of any decision-making body, particularly in view of the provisions of AO 2.02, para. 2.14. The Appeals Committee had the opportunity to consider the impartiality of the Review Panel, but failed to do so. Although the Appeals Committee said it addressed the allegation of impartiality of the Review Panel, it restricted its review to whether or not “ADB’s relevant regulations, AOs, policies and procedures have been correctly applied” and did not address the broader structural (member composition) problem of the review itself. It failed to consider that the Review Panel was comprised of exactly the same members, so its conclusions did not cure the earlier composition defect in proceedings. Although the Tribunal does not require an altogether different composition, the membership of the Review Panel for its second meeting should not have included all of the same members and in particular, should not have included the officer who made the initial recommendation to include the Applicant in the ESP.

52. Therefore, after reviewing the record, the Tribunal concludes that the second review by the same members of the Review Panel did not meet the Bank’s own requirements of “confidence in the integrity of the process” and in particular, the broad requirements of due process. —Mr. I v. ADB, pars. 51 - 52, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, page 232.

ii. Legitimate Expectancy of Renewal or Regularization

5. In general, a staff member serving on a fixed-term appointment is entitled to employment only for the agreed term. Exceptionally, circumstances may exist which create in the staff member a legitimate expectancy either that his employment will be extended for a further fixed period or that it will be converted into a position of indefinite duration. Although it is possible that such circumstances may give rise to an unconditional expectancy, in which case the conversion or extension must of course take place unconditionally, the greater likelihood is that the expectancy will be subject to a condition, in terms related to the performance of the staff member or to the needs of the Bank at the time. —Lindsey v. ADB, par. 5, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 2.
6. Where a legitimate expectancy exists the Bank must honour it and give due consideration to each case. Such consideration involves examination of the facts and this examination itself must be carried out in accordance with due process. Indeed, the Bank has promised this to all staff in paragraph (xiii) of its Personnel Policy Statement, approved in December 1990: “The Bank will observe due process in all areas of personnel administration ...” The scope of this undertaking is not reduced by the footnote to Section 5.1 (“the Performance Review Process”) of the Personnel Handbook for Professional Staff which states:

“The process described in Section 5.1 generally applies to Professional Staff in Levels 1-6. Senior Staff in Levels 7-9 have a modified process.”

The “modified process” mentioned in the footnote does not appear to be elaborated elsewhere, but the basic concepts laid down for Levels 1-6 are capable of being applied in all major respects to Levels 7-9 and in principle, therefore, must apply to these higher Levels also. —Lindsey v. ADB, par. 6, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, pages 2-3. (See also Types of Employment, Fixed Term Appointment Due Process in Performance Evaluation)

6. The Applicant had no legal right to, or expectancy of, renewal. However, while the Bank had a wide discretion whether or not to renew, yet the Bank was under an obligation to the Applicant to exercise that discretion in the best interests of the Bank and in accordance with the Bank’s staff rules and regulations. —Toivanen v. ADB, par. 6, Decision No. 51, 21 September 2000. ADBAT Reports, Volume 5, page 70.

41. The Applicant was appointed to the position of DG, OED for a fixed term of three years. While admitting there was no legal obligation on the Bank to reappoint him for a further two years, the Applicant argues that there was “a conditional expectation” that, based on satisfactory performance, there could be an extension of up to two years. He relies on A.O. 2.01, section 13.1, which states that “a fixed-term appointment will generally be extended … when the following criteria are met .... ADB is satisfied with his/her performance” (italics added). However, a general expectation is not a guarantee. Moreover, as explained above, because of differences between the position of the Applicant and that of other staff members, A.O. 2.01, section 13 did not apply to the Applicant. The Tribunal is not persuaded that there exists any “conditional expectation”. The broad discretion of the President in the appointment of the Applicant extended to his reappointment as well; the Applicant’s generally satisfactory performance did not give him a right to reappointment. —Murray v. ADB, par. 41, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, page 221.
iii. Regularization, Extension and Renewal of Fixed Term Appointment

4. The Bank’s Administrative Order (“A.O.”) No 2.01 makes the following provisions in regard to the regularization, extension and non-renewal of fixed-term appointments:

13.1 The Bank is under no obligation to extend or convert a fixed-term appointment of a staff member. Such appointment may be extended or converted to a regular appointment, when the following criteria are met:

a. The Bank decides that it will continue to require the staff member’s particular blend of skills and experience for the foreseeable future; and

b. The Bank is in all respects fully satisfied with his/her performance and suitability for further employment.

13.2 Heads of Departments/Offices are required to make a recommendation to the Director, BPMSD, not later than seven months prior to the expiry date of a staff member’s fixed-term appointment, as to its regularization, extension or non-renewal, which shall be copied to the staff member. In cases where the extension or non-renewal of the staff member’s fixed-term appointment is recommended, such recommendation shall be discussed with the staff member, who shall be given five working days to submit comments. The Director, BPMSD, in consultation with the concerned Vice-President, will make a recommendation to the President, to which the staff member’s comments are to be attached. Whenever feasible, the staff member will be informed of the Bank’s decision at least six months prior to the expiry date of his/her fixed-term appointment. (emphases added)

5. Accordingly, the Bank had a discretion to renew the Applicant’s appointment if three criteria were satisfied:

a. that the Bank was fully satisfied with the Applicant’s past performance;

b. that the Bank was fully satisfied with her suitability for further employment;

and

c. that the Bank required her particular blend of skills and experience for the then foreseeable future. — *Toivanen v. ADB*, pars. 4-5, Decision No. 51, 21 September 2000. ADBAT Reports, Volume 5, pages 69-70.

43. Section 13.2 of A.O. No. 2.01 requires the following steps: a recommendation by the Head of a Department for the non-renewal of a staff member’s appointment must be discussed with him; the staff member must be given five working days to submit comments; and the Director, BPMSD, must make a recommendation to the President, attaching the staff member’s comments.
44. The purpose of a discussion is to give the aggrieved staff member an opportunity, on the one hand, to obtain clarifications as to the basis of the adverse recommendation, and, on the other hand, to controvert misstatements and to dispel misapprehensions. That purpose will not be satisfied by means of discussion with other officials in the same Department or in BPMSD. Further, section 13.2 contemplates only one such recommendation. However, if circumstances make a materially amended recommendation necessary, the purpose of the rule will not be satisfied unless there is a further discussion with the staff member. As for the staff member’s comments, the phraseology of section 13.2 indicates that the discussion must precede the comments. Obviously, the staff member can make more meaningful comments after a discussion with the official concerned.

45. The safeguards provided in section 13.2 were denied to the Applicant. She was not offered an opportunity to discuss the Treasurer’s Recommendation with the Treasurer himself. Neither her Manager’s offer on 17 December 1998 to discuss the Recommendation with her Manager, nor the discussion with officials of BPMSD, satisfied section 13.2. Moreover, the insistence by the Head, CASU, that she should submit her comments on 22 December 1998 resulted in her having only three (instead of five) working days to submit her comments. The Tribunal acknowledges that a stipulated time period may, in appropriate circumstances, be shortened; but when it is so short as five days, and affects the continuation of a staff member’s livelihood, it must be regarded as mandatory – especially considering that the Treasurer took over five weeks to make his Recommendation and over three weeks to respond to the Applicant’s memorandum of 22 December 1998.

46. The Applicant’s memorandum of 22 December 1998 resulted in the Treasurer maintaining his recommendation, but emphasizing the need for new skills rather than past performance. While that highlights the value of an exchange of views, it also suggests that a face-to-face discussion might have been even more productive for the Applicant. Accepting that the Treasurer was entitled to make what in substance was an amended Recommendation, section 13.2 by necessary implication entitled the Application to a further discussion before she made her comments. That too was denied to her.

47. In lieu of an opportunity to discuss the Recommendation with the Treasurer the Applicant was only allowed a discussion with BPMSD officials on 1 February 1999. However, the comments which she made on that occasion were not forwarded to the President by the Director, BPMSD. —*Toivanen v. ADB*, pars. 43-47, Decision No. 51, 21 September 2000. *ADBAT Reports, Volume 5*, pages 85-86.

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

74. It is true that the DG, BPMSD, used the word “termination”, However, that did not change the character of the Applicant’s contract. This was a fixed-term contract and it was brought to an end on the expiration of the fixed-term. Therefore the termination procedure within paragraph 10, AO .2.05 was not applicable to the Applicant’s case and she was not entitled to rely on it. This Tribunal in Alexander Decision No. 40 [1998] IV ADBAT Reports 41, para.38 has held that “[t]he Bank’s discretion in deciding whether to regularize a fixed-term appointment is somewhat greater than in a decision to terminate a staff members continuing employment In the instant case, the Applicant bears the burden of proving abuse of discretion.” This Tribunal concludes that the expiration of the fixed-term contract did not involve the Bank in abusing its discretionary power or acting arbitrarily or improperly. —Claus vs. ADB, pars. 73 – 74, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, page 69.

b. Regular Employment

30. There are several tests which traditionally are applied in order to determine whether a person is an independent contractor, engaged under a contract for services, or an employee, working under a contract of service.

31. Although every MOA under which the Applicant worked contained references to his services, it is quite clear that he was not engaged under a contract for services to perform a specified piece of work, for a stipulated fee or price, under his own responsibility and according to his own methods, without being subject to the control of the Bank (except as to the results of his work), and investing his own resources, in regard to tools, equipment, materials and the like.

32. The MOAs did not describe the work which the Applicant was required to do; he was to work, in the Bank’s premises, under the direction of the Bank’s officers and in accordance with their instructions; he was not to be paid for the job or the result, but was to receive a regular, stated monthly remuneration; indeed, he even received increments mid-way through several contracts, just like an ordinary employee; he had to work full-time in accordance with the Bank’s working hours, and could even be required to work overtime or on shifts; and he was entitled to annual, medical and casual leave. One of his obligations was at all times [to] refrain from actively engaging in any political activity (emphasis supplied). All along, the Applicant was neither carrying on an independent business nor could he assign the performance of the work to anyone else. On the contrary, his work was part of, or ancillary to, the Bank’s business.

33. The Tribunal finds that all the relevant tests applicable to the situation under consideration indicate that the Applicant was not an independent contractor. On the contrary, all these features, being totally inconsistent with the Applicants status as an independent contractor, are consistent only with his being an employee of the Bank. —Amora v. ADB, pars. 30-33, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, pages 7-8.
38. The next step is to determine in which category of staff members the Applicant belonged. This determination is of utmost importance, as it is only in relation to contractual staff that the President has the power to exclude the Staff Regulations acting under Section 26 thereof:

The President may, in individual cases, establish particular exemption from the provisions of the Staff Regulations for staff members appointed on contractual basis . . .

39. From that Section, it follows that staff members of the Bank include not only employees holding regular appointments but also those appointed on contractual basis. The former category, i.e. staff members in regular employment, are those staff members whose appointment is of indefinite duration. However, the duration of the employment of those appointed on contractual basis is limited by the contract itself; and it is only in respect of these employees that the President could establish particular exemption from the Staff Regulations.

40. The distinction between a post of limited duration and one of unlimited duration has been explained in the following manner:

A post is of limited duration if the instrument which creates it or controls its length prescribes for it a fixed period, whether long or short. If there is no such prescription, the post is of indefinite duration, whether it is expected to last a long or a short time. Where a post is attached to a project and the length is not specifically prescribed, its length will be the length of the project; if the project is of limited duration, the post likewise will be of limited duration. (*In re Vargas*, ILOAT Judgment No. 515 (1982))

The decision in *In re Morris*, (IOAT Judgment No. 891 (1988)), shows that a post which began as a post of limited duration could become one of indefinite duration if it was prolonged, or extended, after the period for which it had been created. —*Amora v. ADB*, pars. 38-40, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 9.

12. Violation of Terms

a. In General

19. Looking at this case in terms of contract and contract alone, the Tribunal must consider whether there was some failure on the part of the Bank to fulfill an obligation expressly or impliedly laid down in the contract of employment properly interpreted and applied. The Applicants have understandably laid heavy emphasis upon the fact that the death of Mr. Bares was the result of deliberate homicidal conduct by a security guard employed on the Bank’s premises to protect the staff of the Bank against, amongst other things, precisely the kind of attack that was made upon Mr. Bares. But the facts that the attack was deliberate, that it was made by one of the Bank’s guards and that it happened on the Bank’s premises do not by themselves make the Bank liable unless it can be shown that the contract between the Bank and the staff member has been broken and that that breach was the cause of the death of Mr. Bares.
In considering the extent of the duty of an employer the Tribunal has been quite unable to find any support for the view that an employer is absolutely liable in contract to a staff member for injury suffered by the staff member whilst on the employer’s premises or otherwise performing the duties of an employee. The position is, rather, that, as a matter of the general principles of the law of employment, the Bank owes to all members of its staff a contractual duty to exercise reasonable care to ensure their safety whilst on the Bank’s premises. This is the same as saying that the Bank must not be negligent in constructing, equipping or maintaining its premises, or in making provision for the personal protection of its staff members on those premises against reasonably foreseeable risks.

An authoritative statement reflecting this general principle is to be found within the jurisprudence of international administrative tribunals in the decision of the Administrative Tribunal of the International Labour Organization in In re Grasshoff (Nos. I and 2), Judgment No. 402 (1980). The Tribunal there stated:

“1. It is a fundamental principle of every contract of employment that the employer will not require the employee to work in a place which he knows or ought to know to be unsafe. Staff Regulation 1.2, which provides that all staff members are subject to assignment by the Director-General to any of the activities or offices of the Organization, is to be read subject to this principle. If there is doubt about the safety of a place of work, it is the duty of the employer to make the necessary inquiries and to arrive at a reasonable and careful judgment, and the employee is entitled to rely upon his judgment. It is unnecessary in this case to consider whether and in what circumstances an employee may refuse to accept an order to work in an unsafe place. It is sufficient to say that, if he accepts the order, as prima facie he is bound to do, and the employer has failed to exercise due skill and care in arriving at his judgment, the employee is, subject to any contrary provision in the contract, entitled to be indemnified in full against the consequences of the misjudgment.

2. This principle is to be applied with due regard to the nature of the employment. In some employments there are unavoidable risks. A doctor may have to risk infection and a soldier or a policeman to risk bombs. The question in each case is whether the risk is abnormal having regard to the nature of the employment. In a case such as the present a reasonable test (though this is only one possible criterion) might be to consider whether an insurance company could, because of the civil war in East Pakistan (as Bangladesh then was), properly demand an additional premium for cover against the risk of injury in Dacca.”

The Tribunal recognizes that this quotation does not state in exact terms the proposition in support of which the Tribunal cites it. It is clearly authority for the proposition that an organization is not absolutely liable for injury suffered by a staff member in its service. But it necessarily follows from this that an organization is likewise not absolutely liable for injury suffered by a staff member on its premises. Rather, in both situations the obligation of the
organization is only to take reasonable care. — *Bares, et al., v. ADB*, par. 22-23, Decision No. 5, 31 March 1995. *ADBAT Reports*, Volume 1, pages 58-59.

46. The liability of the Bank has had to be assessed exclusively in terms of the contractual relationship between Mr. Bares and the Bank. If the jurisdiction of the Tribunal had extended to obligations in tort then consideration would obviously have been given to the question of vicarious liability. — *Bares, et al., v. ADB*, par. 46, Decision No. 5, 31 March 1995. *ADBAT Reports*, Volume 1, page 65.

**b. Disclosure of Documents in the Employee’s Personal Files**

19. Apart from the propriety of the substantive comments made in the two disputed documents, the Applicant claims that the Respondent clearly violated Section 5 of A.D. No. 2.08, when it included those documents in his personal file without so informing him or providing him with copies. The pertinent terms of that provision are as follows:

> The contents of all documents and notes which form part of the personal file of a staff member, written by their [sic] Managers and other officers in various functions should be divulged to and made known to the staff member concerned at an early stage. It is, therefore, essential that such documents or notes be copied to the concerned staff member upon the completion of said documents in order to avoid misinterpretation and to enable the staff member to comment or take such action as is allowed to rectify any inaccuracy contained in said documents.

The Respondent has explicitly acknowledged, in its pleadings, that it violated this Administrative Order. It denies, however, that this was done deceitfully, with an intent to hide the documents from the Applicant, and because of the intervention of persons external to the Bank. The Tribunal agrees that the Applicant’s later contentions are merely speculative and without factual basis in the record.

20. Even so, the Respondent’s acknowledged violation is a serious one, particularly because it appears to have been done quite consciously and intentionally. During the proceedings before the Appeals Committee, the Committee directed a number of questions to BPMSD; as pertinent, BPMSD answered in part as follows:

> Both the memorandum and the e-mail were included in the Appellant’s 201 file, [to] which he has access. It is not our practice to copy memoranda from Director, BPMSD to Management requesting approval of the transfer, redesignation, or promotion of staff in consideration of confidentiality, i.e. if we sent to staff such memoranda, it is possible that the contents may become common knowledge within the office. Therefore, we do not provide such memoranda directly to staff members.

Despite its concerns about loss of confidentiality, it is not for BPMSD unilaterally to ignore - indeed systematically to overrule - the mandates of an Administrative Order, the terms and rationale of which are stated unequivocally.
21. This case could hardly be bettered as an example of the circumstances for which the Administrative Order was intended. Had the Applicant promptly received a copy of the 3 June 1996 memorandum and the 9 July 1996 cc:Mail, he could just as promptly have challenged the evaluative comments, such as that he was not a “strong” performer, as well as the factual assertions, such as that he had been so informed and that he had acknowledged that his past performance was unlikely to warrant a future promotion. Because of the Respondent’s failure to comply with the explicit requirements of A.O. No. 2.08, its withdrawal of the challenged material was delayed by more than a year, during which period there was some risk of unintended exposure of the material and, in any event, of the fading of recollections so as possibly, under other circumstances, to have made prompt correction difficult.

22. The Tribunal therefore concludes that the Bank acted improperly in failing contemporaneously to provide the Applicant with material placed in his personal file in June and July 1996, and that much of that material was at least misleading and at worst inaccurate. As noted above, however, there is no evidence of tangible injury suffered by the Applicant during the pertinent period, between June 1996 and September 1997. Moreover, the Respondent acted promptly to remove the challenged material when the Applicant brought the matter to its attention.

23. There is thus no basis for providing to the Applicant the full remedies that he seeks, in particular the amendment of the 3 June 1996 memorandum so as to state, inter alia, that “he is considered to be a strong staff member”; indeed, it is doubtful that the Tribunal has the authority to issue such an order. Nor is there a basis for his retroactive promotion to Level 5, or the award of damages in the amount of three times his basic salary. Nonetheless, the nonobservance by the Respondent of the Applicant’s contract of employment or terms of appointment is clear and was in significant measure a product of a consciously and systematically implemented policy, Surely it is reasonable to conclude that the Applicant suffered at least intangible injury when he discovered the negative comments in his personal career file upon a chance perusal in September 1997. For that he should be compensated. —Rive v. ADB, pars. 19-23, Decision No. 44, 7 January 1999. ADBAT Reports, Volume 5, pages 21-23.

c. Effect of ex gratia payment

63. The fact that the Bank offered this ex gratia payment to the Applicant, purely for “humanitarian reasons” connected with “regularization” - and not for reasons related to retirement - does not discharge or reduce the Bank’s obligation to pay the entitlement and compensation ordered by the Tribunal on account of the breach of the Applicants terms and conditions of employment. —Amora v. ADB, par. 63, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 15.
d. Gender Discrimination

i. In General

74. The rules of the Bank make it clear that gender discrimination by supervisors against staff members is altogether improper and a violation of the terms of employment. Administrative Order No. 2.02, paragraph 2.4, provides: “The employment, promotion and assignment of staff shall be made without discrimination on the basis of sex, race or creed. “Essentially identical language appears in Section 9 of the Staff Regulations issued by the President of the Bank. The Tribunal has consistently stated that it may review discretionary Bank decisions to determine whether they are discriminatory and therefore an abuse of discretion. Obvious examples of such discrimination are decisions to terminate an appointment, or not to make an appointment permanent, because of the staff member’s nationality, religion or gender, for such decisions can have no tenable connection to legitimate performance-related standards. Proof of discrimination, including gender discrimination as claimed in this case, is often difficult, for it turns upon motives and attitudes which are not always apparent on the surface of behavior. It is almost uniformly necessary to prove the illicit subjective state of mind by recourse to elements of circumstantial proof, most obviously by a demonstration that the woman staff member has been treated less favorably, with respect to such matters as performance evaluation rating, salary increase or reappointment, than are men of essentially equivalent abilities. —Alexander v. ADB, par. 74, Decision No. 40, 5 August 1998. ADBAT Reports, Volume 4, page 63.

ii. Burden of Proof

32. This Tribunal has noted the difficulty of proving discrimination which often requires “circumstantial proof, most obviously by a demonstration that the woman staff member has been treated less favorably with respect to such matters as performance evaluation rating, salary increase or reappointment than are men of essentially equivalent abilities.” (Alexander, Decision No. 40 [1998], IV ADBAT Reports 41, para. 74). Normally the Applicant has the burden of proving gender discrimination. Despite the efforts of the Bank to overcome its acknowledged problems of gender discrimination, the Tribunal finds that the Applicant had a reasonable perception that she was the victim of gender discrimination within CTL. That perception was based in part on her seniority and the fact that despite performance ratings of “Fully satisfactory” she had not been promoted although she had applied for such 35 times. Taking into consideration this convergence of events, the Tribunal finds it reasonable that the Bank should show that the Applicant had not been denied the promotion on the basis of gender. —Ms. A v. ADB, par. 32, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 165.

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

62. At the same time, the Tribunal has reservations about the position taken by the Bank on this issue. The Respondent argued that Article II of the Statute of the Tribunal confines the Tribunal to an examination of the application of an individual staff member, without hearing or passing judgment upon what the Bank has termed “general matters of the Respondent.” The Tribunal notes that an allegation of discrimination in contravention of paragraph 2.4 of AO 2.02 may require it to examine allegations of treatment of other staff members. This may be necessary in order to establish whether or not, by appropriate comparison, an applicant has suffered discrimination on a prohibited ground.

63. In light of the above, the Tribunal considers that discrimination was raised as an afterthought and in any event, the Tribunal is not persuaded by the substance of the Applicant’s claim on this point. —*Claus vs. ADB*, pars. 61 – 63, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, page 66.

iii. Efforts to Reduce Inequality

34. Despite the Applicant’s claim that the Bank has been lax in undertaking measures to reduce gender discrimination, the evidence shows that the Bank has made substantial progress in its effort to reduce gender inequity in its professional staff particularly in senior positions. The Bank’s efforts in placement of women in higher positions, while still open to further improvement, has shown significant success.

35. The evidence shows that in the period since the *Alexander* Decision, the Bank has intensified its efforts to combat the problems of gender discrimination. In that year, 1998, it initiated its first GAP which by its termination in 2002 had increased total representation of women to 26.1%, the highest number to date in both absolute and percentage terms. In the GAP II from 2003 to 2005, women’s representation increased from 27.5% at the beginning of 2003 to 29.6% by 30 June 2006, while women in the pipeline levels (Levels 5 to 6) increased from 19.6% in 2002 to 29% by mid 2006, and in the senior levels (Levels 7 to 10) more than doubled from 6.2% in 2002 to 12.6% by mid 2006. Women professional staff, Bank-wide, were promoted at a higher rate than men for four of the five years from 2003 to 2006.

36. Since the Applicant has joined the ADB, the representation of women has increased from 12% to 29%, an increase of 144%, the number of women occupying Level 5 positions has gone up from 12.7% to 32%, and the number of women occupying Level 6 positions has risen from 1% in 1998 to 25% in 2007. —*Ms. A v. ADB*, pars. 34-36, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 166.
EMPLOYEE BENEFITS

1. Educational Grants

   a. Purpose

   Section 1 of Administrative Order (“A.O.”) No. 3.06 (revised 1 November 1993) states that “it is the policy of the Bank to provide education grants to partially compensate a professional staff member whose duty station is outside his/her home country, for the additional costs involved in the education of the staff members [dependent] children.” A dependent child is “an unmarried child… under the age of 24, who is a full-time student and obtains more than half of his/her support from the staff member.” —De Armas v. ADB, par. 9, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, page 11.

   The expenses which the Bank reimburses are described in Administrative Circular No. C-I which was issued in order to implement A.O. No. 3.06. They include tuition and other enrollment fees; cost of prescribed text books; library, sports, laboratory and other fees; costs of course-related materials, equipment and educational trips; supplementary tutorial fees; and cost of school supplies and publications. In addition, the costs of board, lodging, subsistence, and utility charges are allowed in the home country. The Bank reimburses 75% of these expenses, for primary, secondary or tertiary education, either in the duty station or in the home country, subject to the relevant duty station or school country limit.

   The Tribunal is not persuaded that the mere reimbursement of part of the expense of education adequately compensates for the disruption of and inconvenience to the education of the children of expatriates. The Tribunal holds that such reimbursement is neither unreasonable nor discriminatory. —De Armas v. ADB, pars. 48-49, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, page 24.

2. It is the policy of the Bank to provide Education Grants to partially compensate a professional staff member whose duty station is outside his/her home country (“expatriate staff member”) for the additional costs involved in the education of dependent children. —De Armas v. ADB (No. 2), par. 2, Decision No. 45, 19 December 1999. ADBAT Reports, Volume 5, page 25.

   The objectives of the 2015 Comprehensive Review were explained to staff to include, amongst others: (i) assessment of the competitiveness of the Bank’s compensation and benefits policies with reference to global or local employment markets from which the Bank recruits its staff; (ii) assessment of sustainability and cost efficiency of ADB’s compensation and benefits policies and its effectiveness in supporting talent acquisition, staff development and retention; and (iii) identification of areas where changes in the staffing, compensation and benefits policies are required to support the Bank’s business needs and changing workforce demographics.

   The Bank was also seeking to ensure that the compensation and benefits were consistent with the Bank’s mission of eradicating poverty and supporting poor people in the
region; to pay attention to greater equity amongst staff so as not to overemphasize benefits of IS with children in higher education; and to bring the benefits more in line with its comparators such as other International Financial Institutions.

68. The Tribunal considers the stated objectives appropriate and valid. They are rational and legitimate. It is recalled that the overall compensation package was reviewed, resulting in some negative and positive changes in the EA for some staff, but a salary increase for all staff.

69. The Tribunal does not see any evidence that by adopting the package as it did, the Bank abused any of the discretionary powers or violated any of its responsibilities and obligations vis-à-vis the staff. —*Perrin, et al vs. ADB [No.3], pars. 65 - 69, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 211.*

b. Apprenticeship

52. The Applicants also complain that the Bank extends travel grants and subsistence allowances in respect of apprenticeship overseas “even though it is not an integral part of the degree or diploma”. But even then the Bank, quite properly, allows that benefit only where it “is required to qualify for a vocation where government licensing is required or to meet requirements of a professional body”. The Tribunal holds that it was within the Bank’s discretion to treat apprenticeships as falling within the scope of tertiary education.

53. Finally, the Tribunal notes that the costs of the benefits, considered in the context of a staff member’s average annual basic salary of US$85,941, have some relevance to the question whether the Bank has acted arbitrarily or unreasonably in allowing them.

54. As already noted (paras. 27 to 30), in 1995 the average education grant exclusive of travel amounted to US$8,184 per child. The school country limit for 1995/96 for the Philippines (which would have been the duty station for most expatriates) was US$12,470. The other school country limits ranged from US$8,893 (Afghanistan) and US$9,015 (New Zealand) at the lowest, to US$23,877 (Japan) and US$16,820 (Switzerland) at the highest; in between were Australia (US$11,509), Canada (US$ 10,343), France (US$14,210), Germany (US$14,500), U.K. (US$12,857), and U.S.A. (US$12,810). In 1995, 324 children received education travel grants for 521 trips (1.6 trips per child), at an average cost to the Bank of US$3,658. As a proportion of average annual basic salary each of these benefits may well be considered generous, but that does not make them arbitrary, unreasonable or discriminatory. As for the frequency of travel, the Tribunal is of the view that the 1.6 trips per child per year are reasonable, particularly considering that they are in lieu of trips due under the home leave travel benefit. —*De Armas v. ADB, pars. 52-54, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, page 25.*
c. Third Country Tertiary Education Grant

4. The rationale for the reimbursement of third country tertiary education costs for an expatriate child was that it is reasonable to provide such education for a child who, having undergone a prolonged period of schooling at the duty station, would face difficulties in being assimilated back into his home country tertiary education system.

5. The Tribunal held, however, that such difficulties in assimilation are not faced by expatriate children who had received their secondary education in their home country; and that if the Bank allows reimbursement of third country tertiary education expenses in respect of such expatriate children, it must allow it for similarly circumstanced non-expatriate children (i.e., those who had received their secondary education in their home country). Accordingly, the Tribunal directed the Bank to eliminate discrimination in that respect. —*De Armas v. ADB (No. 2)*, pars. 4-5, Decision No. 45, 19 December 1999. ADBAT Reports, Volume 5, pages 25-26.

d. Travel Grants In Relation To Educational Grants

50. The Tribunal must now turn to the travel grants allowed in the case of children being educated in the home country: a one-time “education placement grant” and an annual travel grant for two visits to the duty station, as well as the associated travel and baggage allowances. The Tribunal must observe that a child living with his parents in the duty station is periodically allowed home leave benefits in order to renew family, social and cultural links with his home country, and thereby to compensate somewhat for the disadvantages of separation from his home country. A child who is being educated in the home country suffers what may be an even greater deprivation, of separation from his parents in his formative years; he is not entitled to home leave travel because his problem is not separation from his home country. His is a greater need, to maintain his links with his parents. To allow every child to visit his parents twice a year may well be generous, but is hardly arbitrary, unreasonable or discriminatory.

51. The Applicants complain that since September 1994 the Bank had allowed a staff member and his spouse to utilize their child(ren)’s annual education travel entitlements without any restriction. The Applicants point out that earlier parents were allowed one round-trip per dependent child up to a maximum of two roundtrips per year per family, and that, too, only where the child was unable, for reasons satisfactory to the Bank, to travel to the duty station. The rationale of the education travel facility is to allow the child to maintain his links with his parents. Accordingly, it is not unreasonable for the Bank to let family convenience alone, as determined by the staff member’s family, decide whether the child should visit his parents, or *vice versa*: it makes no difference to the Bank, from the point of view both of principle and cost, whether the child makes all the visits or the parents. The Tribunal holds that the relaxation of the restrictions was not improper. —*De Armas v. ADB*, pars. 50-51, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, pages 24-25.
e. Reimbursement Procedure

66. A.O. No. 3.06 provides for reimbursement only of 75% of educational expenses. The provisions of the memoranda of September 1994 and September 1996 may result in an expatriate receiving 75% of tuition and enrollment fees, as well as a flat allowance of 65% of the school country limit, even if that allowance exceeds 75% of his actual expenses for board, lodging, etc. Consequently, he may receive reimbursement in a sum exceeding 75% of total educational expenses. To that extent, those provisions are inconsistent with A.O. No. 3.06. The Bank’s Administrative Orders and Circulars prevail over memoranda issued by BPMSD and other Departments, and accordingly the latter must be implemented so as to ensure compliance with the former. While convenience may justify an initial advance of 65% of the school country limit, yet, unless and until A.O. No. 3.06 is duly amended, the Bank must take appropriate steps to ensure that the grant does not exceed 75% of the staff member’s total expenses, and the school country limit.” —De Armas v. ADB, par. 61, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, page 30.

2. Force Majeure Protection Program

85. The Tribunal agrees that the Bank’s policy does not distinguish between Filipino staff members and non-Filipino staff members, but between expatriate staff and staff working in their home country. The Tribunal has therefore to consider the two factors on which - according to the pleadings - that distinction is sought to be justified: the risk of loss and damage, and the capacity to recover such loss and damage.

86. It is not the Bank’s position that only expatriates are exposed to the force majeure risks, and that locals are not; or that although both groups are exposed to risk, the former are exposed to a high risk while the latter are exposed only to negligible risk. Indeed, the Bank’s contention is that even for expatriates the risk “is not very high”, and that they are “more vulnerable”. The Tribunal notes that in some situations, non-expatriates share those very characteristics (ethnic, religious or otherwise) which expose expatriates to risk.

87. In regard to the capacity to recover loss and damage, it is not the Bank’s position that locals have remedies while expatriates have none; the Bank recognizes that it can make a claim on behalf of its expatriate staff. It is true that non-expatriate staff have remedies in their capacity as voters, which expatriates do not. On the other hand, expatriates have remedies through the States of which they are nationals, which non-expatriates do not. Thus both local and expatriate staff do have remedies, although they may differ in nature and efficacy. Indeed, the purpose of providing protection, in the nature of insurance, is precisely because existing legal remedies are inadequate or ineffective.

88. The Tribunal holds that, since the benefit does not consist of a fixed allowance, but is in the nature of insurance, the Bank’s liability to make payments will vary proportionately to the levels of risk and the capacity to recover loss and damage. Thus, all professional staff must be considered to be similarly circumstanced, and force majeure protection should have been
afforded to local staff as well. —De Armas v. ADB, pars. 85-88, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, page 36.

3. Home Leave Travel

73. The Tribunal notes that the Applicants do not claim that home leave travel is in principle discriminatory, or that the frequency of travel and the amount of the allowances are excessive. Undoubtedly, staff members working outside their home country forgo the advantages of the frequent family, social and cultural contacts with their home country and community, which nationals working in their home country never cease to enjoy. Home leave, therefore, cannot be equated to an annual vacation, because its primary purpose is significantly different from a vacation, or mere “rest and recreation”. The Tribunal holds that the Bank was entitled in principle to take note of the loss of those advantages and to provide reasonable compensation for those disadvantages, inter alia, in order to recruit and retain staff with the highest standards of efficiency and technical competence. And in determining the amount of such compensation, the Bank was entitled to take note of the fact that a staff member on home leave would not only incur the expense of travel to his home country, but other expenses (e.g., accommodation and local travel) as well. —De Armas v. ADB, par. 73, Decision No. 39, 5 August 1998. ADBAT Reports, Volume 4, pages 32-33.

4. Housing Benefits

a. In General

23. It is true that A.O. 3.07 became effective only on 1 November 1993. That A.O. replaced A.O. 3.13 of 1990 which, in turn, replaced Administrative Circular No. C-7 of 1975. Neither of the latter excluded rental subsidy where a property was owned by the staff member’s spouse. The Bank has in this connection argued that although the 1975 circular and the 1990 A.O. did not expressly exclude rental subsidy where a staff member was living in the property of the staff member’s spouse, its “underlying policy” nonetheless was the same. The policy was laid down in a memorandum of 1975 from the Director of Administration to all professional staff in connection with the first rental subsidy scheme. According to that policy:

The rental subsidy scheme provides assistance, on a selective basis, to professional staff members who are unavoidably paying an excessive portion of their salary in rent for suitable housing. It does not absolve professional staff members from responsibility for exercising normal prudence and care in the choice and cost of their housing, nor does it afford relief from excessive housing costs without some sacrifice from the professional staff. The assistance provided herein is a temporary measure effective for a period of one year. (emphasis added)

The Tribunal observes that it was a pre-condition to the payment of rental subsidy that a staff member should have actually paid rent for his housing. Therefore, it is unnecessary for the Tribunal to decide the further question whether the policy did or did not exclude a staff member
whose spouse owned property from the rental subsidy scheme. The Applicant adduced no
evidence whatsoever before the Bank that the Powells had concluded a rental arrangement
between themselves, or that payments of rent had actually been made by the Applicant to his
spouse. It was not unreasonable for the Bank, once it concluded that Mrs. Powell was the owner,
to regard payments made to Mr. E. as having been made on some other account and not by way
of rent. —Powell v. ADB, par. 23, Decision No. 50, 21 September 2000. ADBAT Reports,
Volume 5, pages 65-66.

7. The investigation thus indicated the possibility of a substantial link between the
owner of the condominium, YGC, and the Applicant. In particular, it raised the question of
whether the rental subsidy paid to the Applicant had been in accordance with the Bank’s
regulations as provided under Administrative Order (“A.O.”) No. 3.07, para. 2.3 (revised 1 July
1998). According to that provision:

Staff members are not eligible for housing assistance if they own residential
property suitable for self accommodation within reasonable commuting distance from the
Bank’s Headquarters, whether such property is owned in their own name, in the name of
the staff member’s spouse or jointly by the staff members and his/her spouse.

x x x

21. x x x In effect, on 22 June 2000 the Administrative Order No. 3.07 was revised so as
to deal with this problem as follows:

A Staff member requesting rental subsidy for a residential property owned by one
or more close relatives as defined in A.O. No. 2.01 or owned by a company in which the
staff members has a substantial financial interest, has an obligation to disclose such
information. As a general rule, in these cases, the staff member will not be eligible for
rental subsidy unless otherwise authorized by the Director, BPMSD. —de Alwis v. ADB,
pars. 7 & 21, Decision No. 57, 8 August 2003. ADBAT Reports, Volume 6, pages 59,
63-64.

28. A.O. 3.07 was revised on 22 June 2000 and provided: “A staff member requesting
rental subsidy for a residential property owned by one or more relatives ... or owned by a
company in which the staff member has a substantial financial interest, has an obligation to
disclose such information. As a general rule, in these cases, the staff member will not be eligible
for rental subsidy. “Despite that obligation, the Applicant claimed rental subsidy in August 2000
and again in August 2001 without disclosing his financial interest in Richland. The Applicant
argues that he did not know about the 2000 revision until August 2002, when he voluntarily
stopped claiming rental subsidies.

29. Staff of the ADB have an obligation to become aware of and to abide by its
administrative regulations. In fact, when the Applicant joined the ADB, he signed an Acceptance
of Appointment in which he agreed to be governed by present and future administrative
regulations. “[I]gnorance of the law is not an acceptable excuse for misconduct.” See Planthara,
WBAT Judgment No. 143, (19 May 1995), para. 35. More specifically, “[a] staff member who
signs a false certification ... cannot shift [responsibility for having done so] to the Organisation 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).

30. The Respondent advised staff of changes to A.O. 3.07 via an office-wide email distributed on 27 June 2000. The Applicant claimed that he did not receive the email. However, during a meeting with the Director, BPCB, in July 2003 when shown a copy of this email, the Applicant “accepted that [he] appeared to have been mistaken on this issue.” —Bristol v. ADB, pars. 28-30, Decision No. 75, 11 January 2006. ADBAT Reports, Volume 7, pages 118-119.

27. Under the version of A.O. 3.07 effective until June 2000, renting from a company owned by close relatives of a staff member was not formally prohibited. On 22 June 2000, A.O. 3.07 was revised to read as follows:

A staff member requesting rental subsidy for a residential property owned by one or more close relatives as defined in AO 2.01 or owned by a company in which the staff member has a substantial financial interest, has an obligation to disclose such information. As a general rule, in these cases the staff member will not be eligible for rental subsidy unless otherwise authorized by the Director, BPMSD

The Bank argues that the Applicant failed to disclose the fact either that he retained a substantial interest in YGC or that members of his immediate family, the sole shareholders of YGC, were the owners of this company. —de Alwis v. ADB (No. 4), par. 27, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, page 108.

24. The Bank had an obligation to provide the Applicant a rental subsidy until 30 September 2008 and therefore is obligated to compensate her for any housing expenses she incurred while in Islamabad offset by any housing subsidy provided by her interim employer, if any. However, once the Applicant decided to move to Islamabad, having been denied reinstatement, she has no grounds for claiming the cost of home leave, relocation, travel benefits and allowances, shipping or insurance costs related to a return to Manila. —Ibrahim v. ADB, para. 24, Decision No. 86-B, 19 August 2009. ADBAT Reports, Volume 8, page 150.

b. Burden of Proof

38. This Tribunal has held that “[i]n case reasonable doubt emerges as to the correctness of the statements made by staff members when applying for a benefit, it is incumbent on the staff member to substantiate the basis for his claim.” (de Alwis, supra, para. 27). The Applicant highlighted the phrase “when applying for a benefit” contained in this statement and argued that the rule did not apply to him because seven years had elapsed since he made his first claim. The self-serving interpretation put forward by the Applicant is unacceptable. When reasonable doubt emerges as to the correctness of a staff member’s claim of a benefit, it is incumbent on the staff member to substantiate the basis for his claim. —Bristol v. ADB, par. 38, Decision No. 75, 11 January 2006. ADBAT Reports, Volume 7, pages 120-121.
c. Duty of Caution

19. It is implicit in the opinions expressed by counsel on both sides that in the Philippines (as indeed in most other legal systems), the registration of a sale of real property performs a number of functions, among them providing notice to third parties about the ownership of real estate. Third parties are entitled to rely on the information included in the public register. This Tribunal has held that the Bank has a “duty of caution” when it examines the evidence put forward by a staff member as the basis for a claim of entitlement. As the Tribunal pointed out, the Bank might even “be held responsible for not having exercised due diligence in case it recognizes a fabricated certificate” (R. Chan, Decision No. 20 [1997], II ADBAT Reports 139, 153, para. 58). Although the Bank cannot make pronouncements on disputed questions of legal status under Philippine or other national law, it must nonetheless be reasonably assured that it administers staff entitlements on the basis of correct information. The Tribunal holds that it was not unreasonable for the Bank to rely on the information provided in the public register on the ownership of the property, that is to say, on the information provided in the Certificate of Title. —Powell v. ADB, par. 19, Decision No. 50, 21 September 2000. ADBAT Reports, Volume 5, page 64.

d. Substantial Financial Interest

31. The Applicant argued that “substantial” financial interest should be interpreted as majority interest and that 40% interest was not substantial. The A.O. could have specified that it applied to a “majority” rather than “substantial” financial interest. In using the term “substantial,” it is clear that the intent was to apply the proscription to something less than a majority interest, and we find that 40% ownership is indeed a substantial interest. Moreover, the Applicant, together with his wife, owned 80% of Richland. Thus, there is no doubt that the Applicant had sufficient financial interest in the company precluding his eligibility for a rental subsidy. In fact, in a communication sent to the Director, BPCB, on 17 March 2003, the Applicant admitted that, upon learning of the revised A.O. 3.07, he “believe[d] that the [revised] rules made [him] ineligible for rental subsidy.”

32. Accordingly, the Tribunal finds that the Applicant violated A.O. 3.07 in 2000 and again in 2001 when he failed to disclose his substantial financial interest in Richland when requesting rental subsidy.

33. In the de Alwis case, this Tribunal held that the 1998 version of the A.O. 3.07 (that is, before the revision in 2000) did not exclude from rental subsidies staff members with some type of substantial involvement or control in an entity owning the property where the staff member lived, and that the 1998 version could not through interpretation be extended to cover cases which, on the face of it, it plainly did not cover (de Alwis, supra, para. 21). The penalty and administrative action imposed on the Applicant for rental subsidies in 2000 and 2001 was based on his violation of A.O. 3.07 in the 2000 version and not in the pre-2000 versions. Thus, the President’s decision was not inconsistent with our holding in the de Alwis case. —Bristol v. ADB, pars. 31-33, Decision No. 75, 11 January 2006. ADBAT Reports, Volume 7, page 119.
5. **Medical Insurance and Pension Contributions**

25. Her improper removal on 6 March 2008 was the proximate cause of her loss of medical insurance coverage, and her need to expend personal funds for a benefit that would have otherwise been paid for by the employer. She is entitled to reimbursement of the amount expended by her for the substitute insurance coverage she secured prior to 30 September 2008. Similarly in the area of pension contribution, the Bank by improperly terminating her deprived the Applicant of the matching contribution to her pension fund to which she would have been entitled but for that termination. The Bank shall make that contribution reflecting what it would have paid into the fund for the period at the adjusted salary rates as provided above, from March 2008 until the date of its decision not to reinstate. In ordering such payments for medical and pension coverage, the Tribunal is not reinstating her or otherwise mandating any form of specific performance for the period in question, but merely directing her reimbursement for benefits of which she had been improperly deprived. —*Ibrahim v. ADB*, para. 25, Decision No. 86-B, 19 August 2009. ADBAT Reports, Volume 8, pages 150-151.

24. The Applicant is to be granted “the level of compensation she could reasonably have expected to achieve and not to provide her with any windfall beyond her losses.” (Decision No. 86-B, supra, para. 21). It is axiomatic that a person cannot simultaneously receive a salary as an ADB staff member and a pension as a Bank retiree. The pension payments, like the separation package she received, were amounts that the Applicant would not have received if her employment had not been terminated under the ESP. As income that was received rather than lost, both types of payments constituted proper deductions from what the Bank owed her under Decision No. 115. The deduction of the severance package applied only to the make whole remedy. In implementing Decision No. 115 and calculating the amount to be paid to the Applicant for all lost earnings, the Bank took the relevant elements into account in its stated methodology (see para. 4 above), and should apply it to reflect the Bank’s additional pension contributions owing for the period between the termination of the Applicant’s employment and the date on which she began to draw benefits under the Bank’s pension scheme (16 December 2016 to 22 August 2018).

25. It appears to the Tribunal that the Applicant has misunderstood one aspect of the Bank’s implementation of the decision in her case. What she might have received as a voluntary participant in the ESP is irrelevant to what the Tribunal has awarded to her in Decision No. 115. The Applicant is in effect seeking additional compensation for which there is no basis. —*Ms. Cruz v. ADB [No. 2]*, pars. 24 - 25, Decision No. 121, 28 February 2019. ADBAT Reports, Volume 10, page 394.
**Fixed Term Appointment (See Types of Employment)**

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**Gender Discrimination (See Contract of Employment, Violation of Terms)**

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**Hiring of Employees**

1. Pre-Advertisement Assessment

9. The question is therefore whether the failure to advertise internally in particular instances constitutes an abuse of discretion, by virtue of being arbitrary, discriminatory or carried out without fair process. In this case, the Respondent contends that, before it decided to advertise the Librarian position externally only, it examined the qualifications of staff members within the Bank and determined that none—including the Applicant—met the requirements of the position.

10. The Bank, in the exercise of its discretion, may indeed determine that the qualifications for a posted position are sufficiently unique or demanding that there is a need to turn to external advertising for suitable candidates. A.O. No. 2.01, para 2.2, for example, refers to “the paramount importance of securing the highest standards of efficiency and technical competence,” and A.O. No. 2.03, para 3.1, directs that “[p]romotion will be based on merit and capacity to assume increased responsibilities.” But before the Bank makes such a determination, it is clear from the administrative orders quoted above that it must treat staff members fairly, and that any assessment of their qualifications that is undertaken must therefore be fair in both substance and process.

11. It is the conclusion of the Tribunal that the pre-advertisement assessment of possibly eligible staff members, purportedly undertaken by the Bank in this case, fails to satisfy those requirements. There is, for example, no contemporaneous evidence in the record presented by the Bank that shows that any such assessment, let alone a full and fair one, was undertaken. It may be, as the Bank states, that there is no formal provision for committee review at such a stage; but other than after-the-fact assertions, there are no memoranda or other documents that reflect even an informal review of the qualifications of the pertinent staff members - and in particular when, by what means, and by whom such an informal review was carried out. —Isleta v. ADB, pars. 9-11, Decision No. 49, 21 September 2000. ADBAT Reports, Volume 5, pages 52-53.
IMMUNITY FROM SUIT (SEE TRIBUNAL, ADMISSIBILITY OF APPLICATION)

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INCOME TAX REIMBURSEMENT

1. In General

14. The resulting position may be summarized as follows. The Charter, By-Laws and Board Resolutions did not establish any obligation of the Bank in respect of the reimbursement of income tax levied on staff salaries; equally, however, those documents did not prohibit the adoption of any such obligation. Likewise, although the letters of appointment issued by the Bank to professional staff did not include any express undertaking to reimburse income tax, nevertheless they did not specifically exclude that prospect. There was thus no pronouncement by the Bank as to the exclusion of tax reimbursement. Moreover, the letters of appointment sent to staff members made the Bank’s administrative regulations part of the contract between the Bank and the staff members. Accordingly, from 1967 onwards, the principle of equal compensation for comparable work (contained in Administrative Instruction ADM-7) was part of the terms and conditions of all staff members; and by 1972 the Bank acknowledged the need to apply salary policies equitably throughout the Bank. Thereafter, the Bank accepted, in principle and in practice, that its professional staff were entitled to “equitable remuneration” both internally (in relation to their colleagues in the Bank) and externally (i.e., bearing “a reasonable degree of comparability” with the remuneration of their IBRD counterparts). —Mesch and Siy v. ADB (No. 2), par. 14, Decision No. 2, 8 January 1994. ADBAT Reports, Volume 1, page 30.

2. Balancing of Interests

17. In balancing in the present case the equities as between the Bank and its staff, the Tribunal considers that more weight should be given to the interests of the employee than to those of the employer, if only because the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement. But it never did so. Any ambiguity or uncertainty in this respect, wherever appearing in documents emanating from the Bank must, therefore, be resolved contra proferentem and in favor of the staff. —Mesch and Siy v. ADB (No. 2), par. 17, Decision No. 2, 8 January 1994. ADBAT Reports, Volume 1, page 31.
3. **Not a Fundamental and Essential Condition of Employment**

24. The Tribunal concludes that, although there are a number of elements of the facts in this case that might be thought to point to tax reimbursement as a “fundamental and essential” condition of the Applicant’s employment, it is far more significant that there is no provision - or indeed any reference whatever - expressing an obligation on the part of the Bank to make such reimbursement in the Bank’s Charter, or its By-laws, or any resolution of the Board of Directors, or in staff regulations, or in administrative orders, or in the written offers and acceptances that constituted the staff members contracts of employment. Nor is there any pattern or practice of making such reimbursement, let alone one that is clear, unambiguous, consistent and of significant duration. Indeed, the practice of the Bank prior to the decision of the Tribunal in *Mesch I*, in January 1994, was entirely to the contrary. It can therefore hardly be said under the facts of this case that tax reimbursement was reasonably assumed by staff members to be central to their contract of service or that they had a reasonable expectation of its continuation, in light of the fact that the Bank, over the decades since its formation in 1966, had never implemented such a benefit. — *Mesch and Siy v. ADB (No. 4)*, par. 24, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, pages 81-82.

35. The contention that the Resolution is invalid, as being a unilateral amendment of a fundamental term, can succeed only if tax reimbursement is either intrinsically fundamental or if it became fundamental in some recognized way. Neither nationally nor internationally has tax reimbursement been recognized as a condition of employment that is *per se* fundamental. Wherever it has been recognized as a fundamental and essential term it has been on account of express terms or pronouncements. The decision in *Mesch I* that tax reimbursement could have been excluded is consistent with the conclusion that it is not intrinsically fundamental. It has already been clearly concluded above (paras.24-25) that tax reimbursement did not become fundamental in one of the recognized ways - either by declarations by the Bank in its staff regulations or letters of appointment or by any pertinent past practice. — *Mesch and Siy v. ADB (No. 4)*, par. 35, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, page 86. Please note Dissenting Opinion, pages 93-109. (See also Contract of Employment, Fundamental and Essential Terms of Employment, Tax Reimbursement Not a Fundamental and Essential Condition of Employment)

49. The Tribunal holds that reimbursement of national income taxes is not a fundamental and essential condition of employment; that the Bank therefore had the power unilaterally to amend the condition as to tax reimbursement; and that the Board of Directors Resolution was valid. — *Mesch and Siy v. ADB (No. 4)*, par. 49, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, page 91. (See also Contract of Employment, Amendment of Terms, Tax Reimbursement)

4. **Obligation to Reimburse Income Tax**

18. The Tribunal accordingly holds that the terms and conditions of employment of the Applicants require the Bank to reimburse income tax levied on their salaries. — *Mesch and
5. **Scope of Reimbursement**

23. It hardly needs saying that the concept of “tax reimbursement” means reimbursement only for income tax actually payable and paid in respect of salaries received from the Bank. Each Applicant’s entitlement to such reimbursement in each case must be restricted to the amount of income tax payable and paid by him on the assumption that the salary received from the Bank constituted his total income. Further, in determining the reimbursable amount of income tax paid by each Applicant, any tax credits or benefits to which he is entitled under his national tax system must be applied first in respect of his salary from the Bank. —*Mesch and Siy v. ADB* (No. 2), par. 23, Decision No. 2, 8 January 1994. ADBAT Reports, Volume 1, pages 32-33.

### MEDICAL INSURANCE

1. **Bank’s Obligation**

27. A.O. 3.10, Section 3 Coverage, in describing the nature and extent of services provided under the Retainer Plans notes that in general, it seeks to provide staff members basic and routine services such as annual physical examinations, periodic check-ups and x-rays, routine medical consultations, diagnosis and other treatments, referral to specialists, laboratory tests, inoculations and routine dental care. In this case, the Applicants seek relief from the ADB for the alleged failure of those responsible for administering the Medical Retainer Plan to discover in a timely fashion irregularities in chest x-rays, which the Applicants contend resulted in late detection of the deceased’s lung cancer. A.O. 3.10, Section 5.1 however is explicit in excluding the Respondent from responsibility for the acts of those providing services under the Plan. It specifies that the responsibility for rendering the services in accordance with the Medical and Dental Retainer Plans lies with the Medical Retainer and ADB assumes no responsibility for the diagnosis made and for the treatment given by the Medical Retainer.

28. The Applicants in this case, instead of proceeding against the Medical Retainer, undertake to pursue their action against the ADB on the basis of an alleged failure to properly manage and supervise the medical services provided under the deceased’s contract of employment invoking an implied breach of that contract of employment, thus presumably creating a liability of the principal for the acts of an entity which is contracted to provide a particular service. When the Bank undertakes to provide a service or benefit to its staff, it can not simply immunize itself from the responsibility to exercise all necessary and proper care in providing that service or benefit by simply outsourcing the supply thereof or by designating an independent contractor to render that service and direct the staff member to that contractor for any relief, wiping its hands of all responsibility for any errors or omissions. Since the provision of access to medical and dental services to staff members is an undertaking of the Bank, A.O.
3.10 para. 5.1 does not shield the Bank from liability for errors and omissions proximately due to its failure to exercise all necessary and proper care in selecting and supervising the activities of the providers of those services. —*Chang v. ADB*, pars. 27-28, Decision No. 84, 25 January 2008. ADBAT Reports, Volume 8, page 96.

2. Difference in Treatment

The Tribunal is persuaded that the undertaking of the Bank to distinguish between active employees and pensioners was not only appropriate, but also essential and legitimate in order to assure the survival of the healthcare benefit for active as well as retired employees. The evidence set forth above of the escalating cost of coverage for pensioners as they increased in number and age and expanded in geographic distribution, shows that such demographic and economic variations constituted a very real threat to the prospect of the healthcare program having sufficient funds to continue provision of benefits to even its active employees and for those entering the pensioners’ group in the future. Failure to make what it perceived to be crucial adjustment in funding for pensioners as their costs increased so rapidly and dramatically ran the very real risk to the viability of the program for all.

The propriety of the view that there may be legal differences in treatment between active staff and pensioners is underscored by the decision of the WBAT in *Sylvie M. Brebion (No. 2) vs. IBRD*, WBAT Reports [1999], Decision No. 212, para. 8

It is inherent to a pension plan that staff in different situations will be treated differently. In this connection it is quite evident that staff members who have left the service of the Bank need not be treated the same as staff who are still in service on a given date… it is simply because equality of treatment is not required when the circumstances of different groups of staff members are different, such that their equal treatment could be unreasonable.

Thus in this case the different treatment is not only appropriate under the Administrative Orders, it is also non-discriminatory given the above distinguishable circumstances involving the cost of such insurance for staff members and for pensioners. It is vital that any changes in such programs be tailored to the resolution of problems which if not corrected might jeopardize the survival or health of those programs, and that the changes, even though they may be different among groups thereunder, are made in good faith, and that they not discriminate in an unjustifiable manner between or among covered individuals or groups.

The substantial variation in cost of healthcare for pensioners compared to active staff constitutes a rational nexus for the Bank to recognize and respond to, if it is to be able to continue to provide healthcare for both groups. As noted by WBAT in *Maurice C. Mould v. IBRD*, WBAT Decision No. 210 [1999], “Differential treatment is not necessarily discriminatory if there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification.”
Further, as in the decision in *Yang-Ro Yoon v. IBRD*, Decision No. 221 (28 January 2000), “There is nothing discriminatory in treating differently situated groups of staff members differently. This is particularly common in pension plans and retirement schemes, where participants acquire different rights according to their age bracket and the fulfillment of different conditions.” —*Suzuki et al. v. ADB*, pars 33, 35-37, Decision No. 82, 25 January 2008. ADBAT Reports, Volume 8. pages 68-69.

3. Extension of Benefits to Pensioners

24. The evidence in this case shows that the Applicant was appointed on 27 January 1978. At that time the GMIP, established in 1967 was in place solely for active staff and dependents on a voluntary basis. There was at that time no extension of its benefits to pensioners and their dependents, which did not come into effect until June 1985. Thus, although Mr. Suzuki undertook his employment with the reasonable expectation that the benefits of the GMIP would apply to him and his dependents as long as he remained an active employee of the Bank, he had no expectation at the time that its benefits would continue to apply to him, let alone his dependents, once he became a pensioner. Indeed at the time of his hire, the provision of healthcare protection during his retirement would have been a matter of private pursuit. The later expansion of the insurance program to cover pensioners was not an element which he had a reasonable expectation of enjoying at the time of his hire. It was clearly not an element of his contract of employment when he was hired. —*Suzuki et al. v. ADB*, par. 24, Decision No. 82, 25 January 2008. ADBAT Reports, Volume 8, page 65. (See also *Contract of Employment, Fundamental and Essential Terms of Employment, Medical Insurance*).

4. Right to Amend

27. That reservation of the right to amend from time to time the terms of insurance for Bank employees is consistent with rulings of other tribunals in other international agencies. The ILOAT in *Dekker (No.3)* ILOAT Judgment No. 1917 (3 February 2000) in para. 7 decided that “the complainant has no specific claim to a specific system of health insurance” noting that changes made did not violate any acquired right. Thus we find that the details of coverage, charges and fees of the healthcare benefit under GMIP and PRGMIP in effect at any particular time are elements of a benefit which themselves are subject to change, and that employees were advised of that prospect when the economics of the program so justified. We must conclude that the ADB did not breach any obligation incurred by the Bank to Mr. Suzuki at the time of his hire when it later extended that healthcare program to pensioners with the potential for subsequent adjustment to retired employees and their dependents.

31. This Tribunal, acknowledging the responsibility of the Bank to maintain a viable healthcare program for active and retired employees and their dependents, recognizes the need for periodic adjustment in funding, benefits, premiums, and coverage. It is also alert to the requirement that the Bank be rational and fair in its treatment of the various groups who benefit from the healthcare system and that it not unfairly discriminate against any component group.
In examining changes in the plan’s funding, benefits, premiums and coverage to assure that they are fairly and reasonably apportioned, it is essential to assure that (i) the objective of such change is rational and legitimate, (ii) there is evidence to support the different treatment of various member groups, (iii) there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification, and (iv) the differential treatment is proportionate to the objective of the change (see Mr. R v. IMF, Judgment No. 2002-1 (5 March, 2002)). —Suzuki et al. v. ADB, pars 27, 31-32, Decision No. 82, 25 January 2008. ADBAT Reports, Volume 8, page 66-68. (See also Contract of Employment, Amendment of Terms, Medical Insurance)

5. Selection and Supervision of Medical Retainer

We are not persuaded by the Applicants’ claim that there was breach of duty of care in the selection of AMCSI. The evidence shows the bids were properly advertised, that the offering elicited 12 responses, and that number was appropriately winnowed to those providing documentation as to experience, scope of operations, qualification of personnel, and financial standing. The evidence shows that the applicants were evaluated, subjected to unannounced visits, with appropriate emphasis on technical competence and financial strengths, before reducing the number of providers under examination to 2, bypassing the lower financial bid to secure a higher level of medical and dental competence. It notes that the decision to continue the services of AMCSI in 2006 was made by a different institutional Procurement Committee and a different compensation and Benefits Division Evaluation Team underscoring the reasonableness of its initial selection. We are mindful of the caveat contained in the Bares decision that

“... the Bank must exercise reasonable care in the selection of the contractor and then maintain a sufficiently close supervision over the latter to ensure that the latter itself uses reasonable care. The employment of a contractor does not reduce the level of care to which the staff member is entitled under the contract of employment. (para. 26)”

We are not persuaded either that there was a breach of duty of care in the supervision of AMCSI. The fact that the evaluation of the bidders focused on 80% for their technical competence and 20% for their financial competence, with AMCSI scoring 55 points out of a possible score of 80, demonstrates the care with which the Bank examined the medical competence of the service provider.

The evidence shows periodic monitoring as to performance standards and effective response to problems. Each time a problem occurred according to the record, the Bank took appropriate action. Thus in February 2003 it purchased a colposcope after a complaint of a missed polyp diagnosis, in November 2003 it removed a physician following provision of wrong information on treatment equivalence, and in May 2006 it removed the radiologist who examined the Applicant and implemented a new system of double x-ray reading by two different radiologists and accompanying recall and rereading of the prior years x-rays.
33. The evidence also shows ongoing involvement of the ADB Medical Doctor in observing and discussing issues at AMCSI, the provision of periodic staff solicitation for input and comment, and even its system for reading x-rays all constituted normal and reasonable practice. We note that the contract between AMCSI and the Bank allowed ADB’s medical doctor to screen the CVs of medical personnel assigned to the ADB Medical Center and that it had screened the CV of the radiologist who reviewed the Applicants x-rays, a senior and respected medical practitioner connected not only with AMCSI but also with the Makati Medical Center.

34. There has been no persuasive showing by the Applicants that any deficiencies in selection or supervision caused the missed diagnosis. Indeed as the Respondent points out, even after the deceased sought further examination of his condition at multiple alternative facilities, the subsequent x-rays were still no more effective than those administered at AMCSI in detecting the cancerous condition. In March and April 2005 the Applicant underwent three medical evaluations, in two Medical Centers (Cardinal Santos and St. Luke’s Medical Center) none of which detected the lung cancer.

35. Additionally we are not persuaded that there was a demonstrable breach of duty of care in the spouse of the ADB Medical Doctor having worked as AMCSI’s public relations consultant. Any role she played at AMCSI from 31 March 2005 to May 2006, occurred well after the earlier x-rays that the Applicants allege were the precipitating factors for the alleged misdiagnosis, and could not have impacted on discovery of the tumor. —Chang v. ADB, pars. 30-35, Decision No. 84, 25 January 2008. ADBAT Reports, Volume 8, pages 97-98.

MISCONDUCT

1. In General

26. Determination of whether the facts in the present case, assuming they have been ascertained conformably with applicable requirements of due process, legally amount to misconduct on the part of the Applicant, may be addressed fairly quickly. The relevant basic norm found in A.O. 2.02 (30 June 2003) includes among the duties and responsibilities of staff members the following:

“(4.8)(vi) Benefit from ADB Transactions prohibited

Neither staff members nor members of their immediate family shall accept benefits, favors or gifts from sources external to ADB with respect to any ADB transaction, whether by way of compensation, commission, favorable buying or selling arrangements, gift, employment or otherwise…” (Emphasis added)

A.O. 2.04 (as it existed in 9 July 1998) expresses the underlying policy of disciplinary sanctions and describes “misconduct” and “unsatisfactory conduct” in the following manner:
“1. Policy

(1.2): The purpose of the disciplinary measures is to protect the integrity and efficiency of the Bank which may be jeopardized by the unsatisfactory conduct or misconduct of a staff member. Disciplinary measures shall be imposed only following a thorough investigation of the facts and after affording the staff member concerns an opportunity to state his/her case.

2. Examples of Unsatisfactory Conduct or Misconduct

(2.1): Disciplinary measures may be imposed whenever there is a finding of unsatisfactory conduct or misconduct. Misconduct constitutes unsatisfactory conduct which is particularly serious and may warrant the staff member’s dismissal or summary dismissal in accordance with paragraphs 4.2 (g) and (h), 6.3 and 6.4. Unsatisfactory conduct or misconduct does not require malice or guilty purpose. Unsatisfactory conduct or misconduct includes, but is not limited to, the following acts and omissions:

…

(d) Abuse of authority or trust to the detriment of the Bank, or any conduct of such character as may be detrimental to the name of the Bank;

(e) Misuse of official position, authority, Bank funds or other public funds for improper purposes, pecuniary gain or advantage for the staff member or others;”

… (Emphasis supplied) —Gnanathurai v. ADB, par. 26, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, pages 26-27.

30. Section 6.2 of A.O. 2.04 “Disciplinary measures and procedures” provides namely

6.2 In assessing the seriousness of the unsatisfactory conduct, the following criteria should be taken into consideration:

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

…

(d) the official position held by the staff member …

…

(f) whether the unsatisfactory conduct was a deliberate act;

The breach of the standard of conduct

31. The Applicant was previously sentenced for lack of prudence and economy in his rental subsidy application. Despite this “warning”, he continued trying to obtain a benefit to which he knew he was not entitled.
The position held by The Applicant

32. Prior to his dismissal, the Applicant held the position of Senior Financial Analyst; his behaviour has provoked a loss of confidence in his integrity and betrayed the ‘trust of his colleagues.

The misconduct was deliberate

33. As stated above, the Tribunal is convinced that the misconduct of the Applicant was deliberate. Para.6.3 of A.O. 2.04 provides:

“6.3 The disciplinary measure of dismissal for misconduct is particularly appropriate when the unsatisfactory conduct is serious ... Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's services is not in the interest of the ADB.”

In this case, the unsatisfactory conduct was serious; because of the breach of trust, it was not in the interest of the Bank to continue the services of the Applicant. Thus, the sanction of dismissal was provided for in the law of the Bank. —de Alwis v. ADB (No. 4), pars. 30-33, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, pages 109-110.

The Applicant’s actions constitute serious misconduct within the meaning of A.O. 2.04. The Applicant’s theft from a fellow staff member was a deliberate act and not an accident. The Applicant also deliberately lied to OAGI investigators until shown that there was a record of his misconduct. A.O. 2.04, para. 6.3 provides that “[d]ismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member’s services is not in the interest of ADB.” —Cahutay v. ADB, par. 32, Decision No. 90, 23 January 2009. ADBAT Reports, Volume 8, page 211.

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. —Ms. M v. ADB, par. 82, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 368. (See also Misconduct, Offenses, Purchasing a TEV through Fraudulent Practices)

2. **Access to Employees’ Emails During Investigation**

18. Most of the support for the charges against the Applicant is founded on emails he sent or received on his computer. The Applicant argues that OAGI’s access to his computer was improper. First, the Tribunal emphasizes the fact that the computer was the property of the Bank. It was essentially a work tool. At the time of the investigation, Administrative Order (A.O.) 4.17 dated 3 August 2000 stipulated the rules for the use of computers as follows:

“6.1 Proprietary: All electronic information originating in ADB, including electronic mail, is the property of ADB, and is therefore governed by ADB’s policy, rules and procedures for access to and disclosure of information. ADB reserves the right to access them where there is an authentic business need to do so. Other than the user, only the Head of Department/Office or the Manager of the user has the authority to access messages in a user’s mailbox and only in those circumstances when there is an urgent business need.

6.2 These circumstances are the same as users would expect in the case of other types of business correspondence stored in their office.

... (c) There is an official investigation which requires access to a user’s mailbox.

6.3 In the event where the Head of Department/Office or the must access a user’s mailbox, a request stating the justification to do so must be sent to Director, BPMSD, Chief, OIST and Chief, OAS and copied to the user concerned. Upon agreement of two of these three Department/Office Heads, the Email Administrator will reset the password of the user’s mailbox and provide the requested information by copying the relevant message(s) to the Head of Department/Office or Manager, and informing the user concerned”.

The A.O. does not require notification to an employee when, as here, the access is required as part of an official investigation. With regard to this interpretation, the Tribunal shares the opinion
of the Bank. If the employee was notified of access to his mail account in the course of an official investigation, it would risk destruction of the evidence through the deletion of the emails. While A.O. 4.17 gives no special definition of an “official investigation”, the Tribunal considers that an investigation officially as here started and led by the Office of the Auditor General after approval of the Director General, BPMSD is an “official investigation” for the purpose of paragraph 6.2(c) of the A.O. After receiving on 30 August 2005 the complaint from a staff member, the Officers in Charge of OAG requested approval of the Director General, BPMSD to access the emails of the Applicant:

1. In accordance with current interpretations of AO 4.17, we request your approval for OAGI to access [the Applicant’s] email account as part of an OAGI investigation, without notice to [the Applicant].

2. OAGI is investigating an allegation that [the Applicant] is abusing his position as Counsel, OGC through a conflict with a personal interest involving the Asian University for Women. The Applicant is the Vice Chair of the University Board of Directors.

4. As part of its investigation, OAGI seeks approval to examine [the Applicant’s] ADB email account to ascertain whether there is evidence of improper influence as well as the scope of his activities on behalf of the university while working at ADB. OAGI considers this investigative step to be urgent to ensure that evidence is not destroyed.

5. Upon receiving your approval, OAGI will contact the Principal Director, OIST to fulfill its request”.

The signature of Director General, BPMSD beside his name on this mail indicated his approval. Taking into consideration the fact that “all electronic information originating in ADB, including electronic mail” is the property of the Bank, that in the case of an official investigation neither a notification to the user nor a fortiori his authorization is required, and that the investigation started on 31 August 2005 was an official investigation, the Tribunal decides that the email evidence was properly obtained.

19. Thus, despite the procedural arguments made by the Applicant, the Tribunal finds the requirements of A.O. 6.1 and 6.2 (c) were fully complied with and that the access to the disputed emails was appropriate. —Ahmad v. ADB, pars. 18-19, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 39-41.

3. Anticorruption Policy

27. Even if the alleged records of the Bank’s lighter discipline against staff members for fraudulent medical claims in the 1990’s were to be subpoenaed, reviewed and found relevant by the Tribunal, and were indeed in support of the Applicant’s claim of penalties less than dismissal being imposed for similar offenses in the 1990s, we do not believe that such
documentation would be controlling in the case presently before us. As an international development bank in Asia, ADB attached particular importance to combating corruption including fraud and introduced the Anticorruption Policy in 1998. One of the three pillars of that new Policy was “ensuring that ADB projects and staff adhere to the highest ethical standards,” and the Policy announced that “staff violations of the ADB’s Code of Conduct or other relevant guidelines will be dealt with severely.” Thus, ADB expects staff to behave in an exemplary fashion and, according to the Respondent, has since 1998 steadily increased its efforts to combat corruption and “is making every effort to institute a zero tolerance policy on fraud and corruption, including fraud committed by ADB staff members.” The Tribunal considers such a tightening of the Bank’s stance toward corruption as reasonable and an appropriate exercise of its fiduciary responsibility, as long as the disciplinary measure is proportionate to the misconduct. The Tribunal does not find it unfair for the Bank to impose more severe disciplinary measures for fraud now than prior to the adoption of the Anticorruption Policy in 1998, in as much as the Bank provided due notice to employees of its new stricter norms. “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.” (Khelifati, ILOAT Judgment No. 207 (14 May 1973)). —Abat v. ADB, par. 27, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 7.

4. Committee of Inquiry

14. At the threshold, the Respondent contends that any procedural flaws or lack of due process in the BPMSD investigation are immaterial and should be disregarded by the Tribunal, because the COI conducted an altogether independent investigation and made altogether independent findings, purposefully ignoring any fruits of the antecedent BPMSD investigation. The COI did indeed express concerns about the fairness of the BPMSD investigation following upon the issuance of the Show Cause Notice on 27 May 1993, and concluded: “[T]he Committee decided that it was unsafe to rely on any documentary evidence provided by Mr. Chaudhry after 27 May... . Rather, the Committee focused on the alleged misrepresentations in the 23 February Memorandum and the RRBT, respectively, and sought to establish the facts by independent Inquiry.”

15. The contention of the Respondent on this issue cannot be sustained. It may well be that neither the COI nor the President in later imposing discipline was tainted by any alleged procedural improprieties in the antecedent investigation by BPMSD, and that their conclusions with respect to fraudulent misrepresentations are substantively unassailable. Nonetheless, it is conceivable that there might have been antecedent procedural shortcomings that were so unfair to the Applicant, and that so disadvantaged him in responding to the Show Cause Notice, that it would be proper for the Tribunal to provide him with a remedy in order both to rectify tangible or intangible injury and to serve as a deterrent to the Respondent in comparable future cases. For those shortcomings may constitute a breach of the terms and conditions of his employment -- which, as the Tribunal has held, encompass inter alia general principles of law, Staff Rules and Regulations of the Bank, Personnel Handbooks for professional and support staff, and Administrative Orders and Circulars. (Lindsey, Decision No. J [1992], para. 4.) If so, then the
Tribunal has the power to issue an appropriate remedy. —*Chaudhry v. ADB*, pars. 14-15, Decision No. 23, 13 August 1996. ADBAT Reports, Volume 2, page 176.

32. The Tribunal concurs in what it perceives to be common ground between the COI Observations and the Reply of the Assistant General Counsel: that there are certain cases in which the alleged offense is so trivial, the likely discipline so minor, and the facts so straightforward, that it might reasonably be viewed as an abuse of discretion for the Bank to initiate an elaborate investigatory proceeding. In those circumstances, what might be regarded as due process could otherwise be viewed as an unreasonable exhaustion of the resources and energies of the accused staff member as well as of those sitting in judgment, as well as of the Bank and of its staff who participate in the disciplinary proceedings. In other words, the principle of proportionality may sometimes apply not only to the substantive sanction but also to the disciplinary procedures themselves. [*Asian Development Bank vs. Latif M. Chaudhry*]

33. The Tribunal concludes, however, that the present case does not involve such disproportionality. Here, although most of the facts were undisputed, there was an issue relating to the Applicant’s state of mind when he made the misrepresentations concerning telephone charges -- a matter about which he was persistent in his defense and to some extent evasive (e.g., his reason for routing family calls through the Bank operator rather than dialing them directly). Moreover, when the proceedings before the COI were initiated, the nature and quantum of the Applicant’s wrongdoing could not have been regarded as clearly trivial, and the discipline that was contemplated, although not at the level of termination of employment, was such as possibly to have resulted in considerable monetary and reputational harm to the Applicant. In all of these circumstances, it cannot be said that the Bank acted arbitrarily or abused its discretion in conducting its investigation with the assistance of the COI. It should be pointed out, moreover, that the COI held very limited hearings and heard only two witnesses (one of them by telephone) other than the Applicant and his Manager. It can therefore be said that the COI acted with reasonable dispatch and economy of proceedings. —*Chaudhry v. ADB*, pars. 32-33, Decision No. 23, 13 August 1996. ADBAT Reports, Volume 2, page 183.

5. **Confidentiality of Proceedings**

51. The Applicant’s contentions relating to the breach of the confidentiality of Bank documents in his case are, in the view of the Tribunal, more troubling. The Applicant claims that, despite the Bank’s acknowledgment at every stage that all communications and proceedings were to be strictly confidential, there was wide and careless disclosure that caused direct injury to the Applicant and that influenced the decisions made by BPMSD and by the COI. It is indisputable that the disciplinary procedures contemplated by the Bank’s pertinent instruments are to be carried out with the utmost discretion and attention to confidentiality. That is particularly true in a case such as this, in which there are charges of serious ethical wrongdoing and in which those charges have been contested and remain technically unproven until the end of a lengthy process of investigation. —*Zaidi v. ADB*, par. 51, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, page 105.
6. Cooperation in Disciplinary Inquiry

50. The Respondent has made convincing reference to staff rules and Tribunal decisions of other international organizations to support the principle that staff members may be required to cooperate in a disciplinary inquiry and that failure or refusal to do so may at the least give rise to an adverse inference and may indeed constitute independent grounds for disciplinary action. See, e.g., World Bank Staff Rule 8.01; In re Saunoi (No. 4), ILOAT Judgment No. 1085 (1991), para. 3; Wallach, UNAT Judgment No. 53 (1994), para. 7. —Zaidi v. ADB, par. 50, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, pages 104-105: cf. also Chaudhry v. ADB, par. 21, Decision No. 23, 13 August 1996. ADBAT Reports, Volume 2, page 178.

42. Likewise the Applicant’s marked reluctance to provide immediate access to her computers is hardly the response one would expect from someone cooperating in such an investigation. Her statement that she had to have Mr. Sharma’s permission to provide the computers was at variance with her statement that the computers were hers. When offered the opportunity to contact Mr. Sharma for permission to provide them to the investigators she demurred. Instead she evidently felt the need to examine the computers in private before surrendering them to the investigators the following day. —Hua Du v. ADB, par. 42, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 98.

7. Dismissal as Disciplinary Measure/Penalty

28. The question whether the sanction imposed (i.e., dismissal from the service) is provided for in the law of the Bank, may similarly be disposed of quickly. A.O. 2.04, Section 4 provides in part as follows:

“4. Disciplinary Measures

…

(4.2): Depending on the circumstances of the case, one or more of the following disciplinary measures may be taken by the Bank when unsatisfactory conduct or misconduct is determined to have occurred, provided the disciplinary procedure against the staff member is initiated within one year from the date the unsatisfactory conduct or misconduct is discovered and brought to the attention of the Director, Budget, Personnel and Management Systems Department (BPMSD):

…

(g) Dismissal for misconduct” (Emphasis supplied)

A.O. 2.04, Section 4 outlines criteria for imposing disciplinary measures including dismissal. The basic requirement is proportionality between the offense and the penalty:

“6. Criteria for imposing disciplinary measures

6.1 The disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct.” (Emphasis added)
In applying the requirement of proportionality, A.O. 2.04 identifies factors to be taken into account by the decision maker:

“6.2 In assessing the seriousness of the unsatisfactory conduct, the following criteria should 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 caused to the Bank, its staff or any third party;

(c) the recurrence of unsatisfactory conduct by the staff member, particularly when there is a repetition of unsatisfactory conduct 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 unsatisfactory conduct relates;

(e) collusion with other staff members in the act of unsatisfactory conduct;

(f) whether the unsatisfactory conduct was a deliberate act;

(g) the situation of the staff member and the staff member’s length of satisfactory service; and

(h) the staff member’s admission of the unsatisfactory conduct prior to the date the unsatisfactory conduct is discovered and any action taken by the staff member to mitigate any adverse consequences resulting from his/her unsatisfactory conduct.”

(Emphasis supplied)

29. A.O. 2.04, Section 6 goes on to say:

“6.3 The disciplinary measure of dismissal for misconduct is particularly appropriate when the unsatisfactory conduct is serious or recurrent, or has jeopardized, or would in the future be likely to jeopardize, the reputation of the Bank and its staff, in case of serious threats of staff members against their supervisors or other staff members, when it is found that a staff member has misused funds of the Bank or other public funds, or if the staff member has, prior or subsequent to appointment, deliberately misled the Bank through false statement, misrepresentation or fraud (including a misleading omission from a Personal History Form or a Medical history Form). 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 the Bank.” (Emphasis supplied)
43. The Applicant finally alleges that the ADB has unfairly discriminated against him in imposing dismissal as a penalty, considering that another ADB staff member who was “implicated” in a “fraudulent claim” was not meted out the same penalty. The Appeals Committee examined in camera the files of the case alluded to by the Applicant. The Committee concluded that that case was quite different from the Applicant’s and that there was no arbitrary discrimination against him in imposing upon him the penalty of dismissal from the service. The applicable rule is succinctly stated in *Khelifati*, ILOAT Judgment No. 207 (14 May 1973) in the following terms: “[O]fficials enjoy the protection ... of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances.” The Tribunal is satisfied that, regardless of the penalty in the other case, the penalty here, given the circumstances of the present case, is neither unfair nor discriminatory. —*Gnanathurai v. ADB*, par. 43, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, page 33.

44. The Tribunal endorses para.6.3 A.O. which provides:

“6.3 The disciplinary measure of dismissal for misconduct is particularly appropriate when the unsatisfactory conduct is serious … or has jeopardized, or would in the future be likely to jeopardize, the reputation of the Bank and its staff, … Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member’s services is not in the interest of the Bank” —*Ahmad v. ADB*, par. 44, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 52.

75. The Tribunal notes that the President has the power to summarily dismiss a staff member for serious misconduct in accordance with AO 2.04, para.7.1. It also notes that the DG, BPMSD, as the duly authorized officer, notified the Applicant of this decision in writing through its 18 November 2015 memo including the reasons. —*Mr. H vs. ADB*, par. 75, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 127.

81. The Tribunal considers that the Applicant has not presented evidence of discrimination or an abuse of discretion. The Tribunal earlier stated that “the burden of proof rests on the person who makes allegations, namely, the Applicant …” (see *Mr. E*, Decision No.103 (12 February 2014), *Ms G*, Decision No. 106 (23 September 2015), para. 36). The Tribunal also noted in *Azimi*, (Decision No. 88 [2009], ADBAT Reports Vol VIII, para. 31) that “…[m]ere belief by the Applicant that the Respondent acted in improper motive does not produce a sufficient proof for the dismissal decision to be considered as arbitrary or abuse of power.” In this case, the Tribunal is not convinced by the argument that the dismissal one week before the Appeals Committee findings demonstrates discrimination because the chain of events shows that dismissal was triggered immediately upon knowledge that the Applicant had filed his
criminal complaint and issued the subpoena to a staff member. — *Mr. H vs. ADB*, par. 81, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 129.

84. The Tribunal finds that the Applicant has not shown that the President took into account irrelevant considerations or failed to consider relevant considerations. The Tribunal therefore determines that the dismissal decision was not discriminatory, an abuse of discretion, or retaliatory. — *Mr. H vs. ADB*, par. 84, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 129.

8. **Double Jeopardy**

39. Assuming the rule of double jeopardy is applicable to disciplinary procedures (See UNAT, Judgment No.1 066 Ragan (2002) para. 5), it implies that the same person cannot be punished twice for the same wrongdoing. But, that is not the case here: the present case involves the Applicant’s rental subsidy application for 2003 under the A.O. 3.07 in June 2000 and not the rental subsidy applications for 1998 and 1999 under the then applicable A.O. 3.07. He had already been disciplined for the earlier wrongdoing. The current discipline arises from the subsequent wrongdoing and in particular his failure to heed the warning inherent in that earlier penalty. — *de Alwis v. ADB (No. 4)*, par. 39, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, page 111.

9. **Due Process**

10. As a matter of fact, the Applicant has advanced two main arguments against the disciplinary measure in question:

a) The arbitrary changing of the charges against Applicant was procedurally improper and violated his right to due process.

11. As to (a), the charge was not, in the first place, changed arbitrarily. It was done after taking into consideration the explanation offered by the Applicant. This was neither procedurally incorrect nor in violation of the principle of due process. Secondly, the reduction of the charge was to the benefit of the Applicant.

12. The Applicant wrongly asserts that under para. 9.2(f), the Bank had only three options. In fact the Bank had four. The very first option was to nominate a Review Officer or Review Committee to investigate the charges against the Applicant; and this course was duly adopted. The Review Committee was not seized of the charge of misappropriation but only of “negligence.” It is an admitted fact that the Applicant was afforded an opportunity to defend himself which he duly availed of. The second charge of negligence, being based also on the same set of events as admitted by the Applicant, no evidentiary hearing was needed. Therefore, no procedural impropriety was involved in the process; and the Applicant having defended himself
throughout and availed of all the intra Bank remedies prescribed under the rules, there was no failure of due process, either. The Applicant further argues that “reputation risk” was an altogether new charge which he was not given an opportunity to defend against. The Bank’s reputation risk was not in fact a charge. It was mentioned only as a consequence of “negligence” on the part of the Applicant. Whether the kind of unsatisfactory conduct involved in this case entailed a risk to the Bank’s reputation was so adjudged by the management of the Bank and we agree therewith. The disciplinary proceedings were held against the Applicant not on the charge of ‘reputation risk’ but on that of “negligence.”

13. The Applicant argues that the international labor laws have been violated inasmuch as the charge was vague and the foreclosure procedure was not irregular. But the Tribunal disagrees. The charge was not vague. The Applicant knew exactly what was being alleged against him. He in fact admitted the facts which proved the allegations. As to the regularity or irregularity of the foreclosure procedure, it is true that the Bank calls the procedure irregular. As a matter of fact, according to Annex 5 to the Application, it was not. The charge relates to something done by the Applicant after the foreclosure procedure was over. Then the matter was between the Bank and the Applicant, not between the debtors and the creditors. But the fact remains that the Applicant admitted having retained the paintings in his possession for one year without informing the Bank in writing. This is the crux of the charge, not the regularity or irregularity of the foreclosure procedure. It is, therefore, wrong to say that the charge was vague.

14. The reliance placed on the ILOAT judgments in the cases of Limage, ILOAT Judgment No. 1639 (10 July 1997), and Wadie, ILOAT Judgment No. 1384 (1 February 1995), by the Applicant is inapt. In these cases there was a clear violation of the principle contained in audi alteram partem. In the case in hand, the principle was assiduously adhered to.

15. The Applicant further argues that the charge could not be changed. It could only be annulled under A.O. 2.04. This is not true. Another alternative was to refer the matter to the Review Committee (as stated earlier) to which the Bank resorted. The ILOAT judgment in International Telecom Union, ILOAT Judgment No. 2414 (2 February 2005), has no bearing on any of the issues involved in the present case. Similarly, the cases Durand-Smet (No. 2), ILOAT Judgment No. 1832 (29 January 1999), and Giordimaina, ILOAT Judgment No. 2116 (30 January 2002), referred to by the Applicant, are irrelevant. —Lim v. ADB, pars. 10-15, Decision No. 76, 02 August 2006. ADBAT Reports, Volume 7, pages 130-131.

42. As noted earlier we find no violation of due process in the Bank’s handling of the preliminary investigation. Statements made by the Applicant in that proceeding, even if damaging to her case and later regretted, we find, were made of her own free will. A.O. No. 2.04, sections 8 to 10 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, including the right to be informed in writing of the charges, the opportunity to provide explanations in response to those charges, and so forth. The Bank may, in the exercise of an employer’s administrative control and supervision over its employees, conduct a preliminary investigation about a staff member’s misconduct and meet with him or her to seek information. In this case, the Tribunal does not find it violative of due process that in the preliminary
investigation the staff member was not accompanied by another staff member or counsel. The Bank may properly use the information the staff member provided of his or her own will during the preliminary investigation, subsequently in formal disciplinary proceedings against the member. The Applicant did not request counsel either at the time of the preliminary investigation or at the formal disciplinary proceedings and has not demonstrated that her rights to due process were violated at either stage. Thus, the Applicant’s claim for deprivation of due process has no merit. —Abat v. ADB, par. 42, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 11.

31. The tribunal turns to the most important contention of the applicant: that the procedures followed by the Bank in the establishment and evaluation of the operative facts were not consistent with the requirements of due process. The claim of the Applicant that he was denied due process has more than one dimension. He asserts that he was required by the Respondent to prove that he was innocent, that the burden of proof in the disciplinary proceedings was improperly laid on his back. In disciplinary proceedings, the respondent organization must of course bear the burden of showing that the official or employee charged did commit the acts constituting the misconduct or unsatisfactory conduct imputed to him. It is a widely recognised rule that 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. The Applicant has several times insisted in his submissions that there was no direct evidence showing that he had received an improper payment from Kjaer. His contention is that the evidence against him was merely hearsay or double hearsay and that he had no opportunity to confront the Kjaer officials in respect of their statements that Kjaer had reimbursed to the Applicant the amount of the provisional receipt. —Gnanathurai v. ADB, par. 31, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, pages 29-30.

39. Assuming the rule of double jeopardy is applicable to disciplinary procedures (See UNAT, Judgment No.1 066 Ragan (2002) para. 5), it implies that the same person cannot be punished twice for the same wrongdoing. But, that is not the case here: the present case involves the Applicant’s rental subsidy application for 2003 under the A.O. 3.07 in June 2000 and not the rental subsidy applications for 1998 and 1999 under the then applicable A.O. 3.07. He had already been disciplined for the earlier wrongdoing. The current discipline arises from the subsequent wrongdoing and in particular his failure to heed the warning inherent in that earlier penalty. —de Alwis v. ADB (No. 4), par. 39, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, page 111.

38. The Tribunal is the ultimate guarantor in the ADB system of due process in disciplinary proceedings. It considers, however, that the proposition advanced by the Applicant is too sweeping to be persuasive. The fact that a staff member charged with misconduct has had no realistic opportunity to cross-examine some of the witnesses against him does not, by fact alone, automatically vitiate the disciplinary proceedings as a deprivation of due process. The applicable principle, in the view of the Tribunal, is simply that the evidence submitted against a staff member must be such as to give rise to a reasonable inference that the 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. —Gnanathurai v. ADB, par. 38, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, page 32.

51. The Tribunal finds that the Applicant was afforded requisite due process. The Tribunal finds that the Bank was under no obligation to continue its questioning of Mr. Sharma or his alleged associates, and that Mr. Sharma was not "permitted to leave" but rather was dismissed. The Tribunal notes that the Bank could have mentioned the deletion of the ‘Louvre file’ prior to the President’s decision to dismiss, but the evidence was introduced tardily only as a rebuttal to her assertions that she had not deleted the file. We find that the Bank’s late introduction of the alleged deletion of the ‘Louvre file’ was insufficient to diminish the weight of other evidence that established the misconduct. The Applicant was given an opportunity to explain her conduct and present evidence on her behalf. The Tribunal finds that the requirements of A.O. 2.04 on Disciplinary Measures and Procedures were met. —Hua Du v. ADB, par. 51, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 101.

76. With regard to the lack of an investigation, paragraphs 8 to 11 of AO 2.04 provide for the investigative process, formal disciplinary procedures and the decision-making process regarding disciplinary measures. However, the Tribunal notes that paras. 8 to 11 of AO 2.04 address cases of allegations of misconduct. Unlike cases such as theft or physical assault where the conduct on which the disciplinary measures are taken must first be investigated for the determination of a fact before the President makes a decision, in this case the facts were not in doubt. The criminal complaint had been filed and a subpoena issued. Harm had already been inflicted upon the Bank, as well as the accused persons, and there seemed to be little need for undertaking an investigative process and other procedures to assess the facts that led to the dismissal decision.

77. A critical concern of the Applicant was that in his view the President was not aware of his personal circumstances. In fact, the Tribunal finds the President was provided with the criminal complaint that included details of the Applicant’s personal circumstances and “nature and reasons behind the complaint” such as the alleged damage to the Applicant’s “integrity and reputation as a professional” and “sleepless nights, wounded feelings, debilitating stress, high anxiety, moral shock and social embarrassment”. Therefore, these personal details of the Applicant were properly before the President when he made his decision.

78. The Tribunal, therefore, does not find a violation by the Respondent of Applicant’s due process rights. —Mr. H vs. ADB, pars. 76 - 78, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 128.

61. With respect to the OAI investigation, the Tribunal finds, firstly, the omission of interviewing the AAA’s representative is regrettable, although it is not outright illegal. The minority view in the AC made a reservation to the majority view by maintaining that the failure to interview the witness may have resulted in missing some crucial information that could have had an impact on the decision. The Tribunal, however, considers that as internal bodies without police powers, neither the OAI nor the AC could compel her to participate in the investigation or other proceedings. The Tribunal finds that the Bank made reasonable efforts to locate her, and even in her absence took the measure of posting her name in connection with the fraudulent
scheme. The Bank was more successful in relation to obtaining information from her former employer, the car sales firm, which the Bank also sanctioned. The Tribunal finds no violation of due process in this respect.

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

63. In the unique circumstances, the Tribunal finds that the OAI investigation met the due process requirements. —Ms. J v. ADB, pars. 61 - 63, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 264.

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

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

68. Thirdly, the AC report included inaccurate references, such as suggesting that the Applicant held a CPA and was a Senior Audit Officer or erroneously referring to e-mail correspondence which did not pertain to Applicant. The Tribunal notes that the Applicant had been prioritized for investigation due to her multiple offences and not for her “position of trust”. It also notes that the error was eventually corrected at the end of the Report when it recommended a disciplinary measure with a reference to the Applicant’s correct position.

69. The Tribunal finds that irregularities at the appeals process level did not amount to improper process or denial of due process as a whole. However, the Tribunal also observes that the Appeals Committee did not follow the Bank’s own rules, for which the Applicant should be entitled to compensation. —Ms. J v. ADB, pars. 66 - 69, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 265.

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

“[O]fficials enjoy the protection ... of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances.”

Upon receipt of the additional information supplied by the Bank on 2 August 2018 on all 33 staff who were disciplined, the Tribunal has noted a case of a staff member who was in the same situation as the Applicant (namely, not in a position of trust, availed himself/herself of the TEV entitlement more than once, and had no mitigating factors) but was not dismissed. Given that the disciplinary action was taken for the same underlying reasons, i.e. abuse of the TEV privilege, the Tribunal considers that this amounts to a failure of the Respondent to exercise its disciplinary sanction without discrimination. The Tribunal is, therefore, bound to rescind the Respondent’s decision to dismiss the Applicant. — *Ms. J v. ADB*, par. 95, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 271.

60. 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 must have a reasonable opportunity to show that he did not commit such misconduct.”

72. The Tribunal finds that no due process violation occurred in this respect. The shortcomings on the part of the Bank in its supervision of the TEV arrangement did not relieve the Applicant from her obligation to follow Bank rules. She always had the opportunity to do this by choosing a model of vehicle from another manufacturer, with a total cost that fell under the TEV limit. She also could have checked the AAA agent’s interpretation of the TEV limit with the proper authority in the Bank, OAIS-LM. — *Ms. L v. ADB*, pars. 60 and 77, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 328.

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.” —Ms. M v. ADB, par. 50, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 360.

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. —Ms. M v. ADB, par. 52, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, pages 360-361.

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. —Ms. M v. ADB, par. 54, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 361.

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 Decision No. 119 Ms. M v. ADB 24 Asian Development Bank Administrative Tribunal 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. —Ms. M v. ADB, par. 59, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, pages 362-363.

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. —Ms. M v. ADB, par. 61, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 363.

10. Further Disciplinary Measure

94. The Tribunal is not persuaded by the Applicant’s argument that the additional measure cannot be imposed because at the time it was imposed he was no longer an employee. The disclosure of confidential information which attracted the sanction was committed when the Applicant was still an employee. At the time he filed his criminal complaint with the Mandaluyong City Prosecutor’s office he disclosed eight internal Bank documents including the redacted version of the notes of the VP Panel. Such disclosure could only be made by authorized persons. As the Bank was aware of this disclosure at the same time as it was aware of the criminal complaint, any additional disciplinary measure should have been imposed at the time of the dismissal and not a few months later. When the case is reviewed in totality, this sanction appears to the Tribunal to be, if not unlawful, then unjustified. —Mr. H vs. ADB, par. 94, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 131-132.

11. Liability of Employer for Misconduct of Another Employee

However, one of our members has expressed a differing view as to our jurisdiction in this matter. In the view of the said panel member, even if Mr. Q was held to be guilty of sexual harassment, he would be guilty of misconduct as shown in A.O. 2.02. Misconduct of one employee does not constitute the violation of the terms and conditions of employment of another employee. An employee, guilty of misconduct, is liable to be proceeded against as a disciplinary measure by the employer; but the employer cannot be held responsible for an employee’s misconduct unrelated to official duties. Misconduct unrelated to official duties, by definition, is not a part of an employee’s official business. The alleged misconduct of Mr. Q by itself does not bring this case within the scope of Article II of the Statute of the Tribunal. The rules and regulations referred to therein are only those which pertain to the terms and conditions of the aggrieved party’s employment. —Ms. X v. ADB, par. 53, Decision No. 74, 11 January 2006. ADBAT Reports, Volume 7, page 109. (See also Contract of Employment, Violation of Terms, Misconduct of Another Employee)
12. Negligence and Unsatisfactory Conduct

17. Now a word about the charge of ‘negligence.’ If “gross negligence” can be cited as an example of ‘misconduct’ (under para. 9.2(f) of A.O. 2.04), ‘negligence’ certainly falls within the meaning of the expression, “unsatisfactory conduct.” But it would be neater if the Bank used the term, “unsatisfactory conduct”, as the charge instead of ‘negligence.’ It may be noted that the President of the Bank himself never used the term ‘negligence.’ He always considered the fault on the part of the Applicant to be “unsatisfactory conduct”, never named it as ‘negligence’. A.O. No. 2.04 deals with only misconduct and unsatisfactory conduct. However, we are of the view that no prejudice has been caused to the Applicant inasmuch as the facts leading to the charge were clearly known to him, which he duly answered in his defense. —*Lim v. ADB*, par. 17, Decision No. 76, 2 August 2006. ADBAT Reports, Volume 7, page 131.

13. Offenses

a. Damage to Reputation of ADB and ADB Staff

40. Applying that standard to the case before the Tribunal, the evidence as a whole shows that it is more probable than not that the Applicant had knowledge of and was involved in the Kumar emails and committed the misconduct with which she was charged. Regardless of whether the Applicant herself wrote the emails, her declarations, that she was unaware of them and innocent of any knowledge of their having been written or sent, lack credibility. Any doubt as to her culpability is resolved by examination of her behavior once the existence of the emails was revealed to her.

41. The Applicant’s responses during her initial interview were not what one would have expected from an innocent party. Her testimony was that her line manager had shown her one of the emails some three months earlier, but that she could barely remember its contents. Given her previous whistle-blowing, and her seniority and prominent position within the Bank, the laziness of her recollection was not credible. Nonetheless she continued to claim that she was unaware of the existence of the full sequence of the emails, their content and even the possibility that it might have been linked to her or produced on her computer. She reacted by saying that she “was trying to figure out what is the reason, who’s trying to frame me, who’s trying to get me”. The Applicant’s reaction was, however, consistent with someone who already know of the emails and their content and source and realized they had been discovered. —*Hua Du v. ADB*, pars. 40 – 41, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 98.

46. In view of the foregoing the Tribunal finds that: 1) the Applicant’s claims are not credible on the evidence available; 2) the Applicant’s behavior is indicative of close knowledge and participation in the preparation and sending of the emails; and 3) the emails were a deliberate attempt to malign the Bank and its senior officials. The Tribunal concludes that the actions of the Applicant constitute misconduct. —*Hua Du v. ADB*, par. 46, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 99.
48. The Tribunal notes that although the Applicant challenges the Bank’s dismissal action as discriminatory, the investigation was instituted as the result of an investigation of a suspicious email and with results that were endorsed by an independent forensic investigator. We find no basis for concluding that the Respondent’s decision was discriminatory on the basis of gender, culture, or nationality. Dismissal of the Applicant by the Bank is amply supported by the evidence establishing her complicity in the emails. —*Hua Du v. ADB*, par. 48, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 100.

b. Use of Diplomatic Pouch

Misuse of ADB’s diplomatic pouch

33. The pouch service is a diplomatic privilege granted by the member countries in the interest of ADB’s official business. Paragraph 4.3 of A.O. 2.02 provides:

“(t)he privileges, immunities, exemptions and facilities enjoyed by staff members under the Agreement Establishing the Asian Development Bank and the Government of the Republic of the Philippines regarding the Headquarters of the Asian Development Bank and any other agreements entered into between ADB and governments of member countries are granted in the interest of ADB and not for the personal benefit of the individual”.

Equally, Article 13, section 49 of the Headquarters Agreement between ADB and the Government provides that “(t)he privileges, immunities, exemptions and facilities accorded in this Agreement are granted in the interest of the Bank and not for the personal benefit of the individuals themselves”. The Applicant did not abide by this rule. Indeed, on two separate occasions he used the diplomatic pouch service for AUWSF—he sent AUWSF related materials to the Bangladesh Resident Mission (BRM) and to Mr. Braseh Panth, Senior Education Officer at BRM, who had expressed an interest in the AUW project. In his Application, the Applicant acknowledges “having imprudently used the pouch for private Purposes”. —*Ahmad v. ADB*, pars. 33, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 48.

c. Disclosure of ADB Document

27. Section 4.4(i)(a) of A.O. 2.02 states that:

“(i) …

Except in the course of their official duties by express authorization of the President, staff members may not:

(a) communicate any unpublished information known to them by reason of their official position to any person within or outside of ADB whom they know or should know is not authorized by ADB to receive such information”.
On 22 August 2005, the Director General, Regional and Sustainable Development Department (RSDD) sent to the President of the Bank a memorandum referring to a letter of Mr. Friedman, chairman of AUWSF dated 31 May 2005, in which ADB’s assistance was sought “for convening a meeting of potential supporters”. Recommending the support of ADB, a draft letter of positive response to be signed and sent by the President to Mr. Friedman was attached to this memorandum. This letter was unsigned. The Director; RSDD gave the Applicant a copy of the memorandum and the draft response. The same day, on 22 August 2005, the Applicant provided without authorization the memorandum and the unsigned draft response to persons who were members of the board of the AUWSF, i.e. the Government of Korea; the Gates Foundation; Morgan Stanley; Goldman Sachs; Japan Healthcare Policy Institute; Pace Law School; Bangladesh Women’s Institute; Enterprise Institute; and UNDP. They were not “authorized persons” for the application of section 4 of A.O. 2.02 quoted above. The Applicant did not have the authorization of the President to send this document to anyone outside the ADB. This behavior—not disputed by the Applicant in his Application—was a violation of staff rules. In his Reply, the Applicant writes:

“The Applicant was given the memorandum of 22 August 2005 recommending the sponsorship of a donor conference, signed by the VPKM and DG, RSDD, by the VPKM himself. The Applicant maintains correctly that this was done in his capacity as an AUWSF Board member not in any ADB official capacity. The Applicant then advised his AUWSF counterparts of ADB Management’s recommendation”.

This response shows, once again, the deliberate confusion created by the Applicant: asserting that he was acting as an ADB staff member; while in reality he was functioning on behalf of the AUWSF board. —Ahmad v. ADB, par. 27, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 46.

d. Disclosure of Internet Password

28. Twice, on 18 and 21 August 2005, the Applicant disclosed the ADB Lexis password to Mr. Whisnant, an employee of AUWSF. The fact, which is a violation of section 4.4(i)(a) of A.O. 2.02, is not disputed: in his Application and Reply, the Applicant acknowledges “having disclosed an ADB password to an unauthorized person”. —Ahmad v. ADB, par. 28, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 47.

e. Employment of ADB Family Member

45. As noted earlier we do not subscribe to the Applicant’s position that the wide range of problems, which she has faced since her employment with the Bank and Institute, constituted sexual harassment. While it may indeed be true that this case is an outgrowth of lax administration at the Institute, the Applicant’s claim that “bad management is within the scope of harassment” does not give the Tribunal jurisdiction in the absence of persuasive evidence of violation of the Administrative Orders by the Bank.
46. Rather, we are governed by A.O. No. 2.11, paragraph 4.1, which defines sexual harassment as follows:

Sexual harassment is conduct of a sexual nature, which is unwanted by the recipient, and which the perpetrator knew or should have known was offensive to the recipient. Sexual harassment is defined as any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature (i) which reasonably results in physical, sexual or psychological harm or suffering of another person in the Bank workplace … (ii) which reasonably interferes with work or work productivity; or (iii) which is made a condition of employment, promotion or other personnel action or creates and intimidating, hostile or offensive environment …. The following forms of conduct, if unwelcome, may be considered sexual harassment:

i. Physical conduct of a sexual nature which may range from unwanted touching, kissing, pinching, groping or patting, to assault and coercing sexual intercourse …

ii. Verbal conduct of a sexual nature …

iii. Non verbal conduct of a sexual nature which may include, among other things, sexually offensive pin-ups sexually offensive pictures or other offensive material, objects or written materials, leering suggestive looks, whistling and gestures which are sexually suggestive or rude. —Ms. X v. ADB, pars. 45-46, Decision No. 74, 11 January 2006. ADBAT Reports, Volume 7, page 106-107. (See also Contract of Employment, Violation of Terms, Misconduct of Another Employee)

34. On 6 March 2003, Director General, BPSMD issued a “reminder on prohibition on spouses/family members as representative agent in transactions with and/or within ADB”:

“1. There have been reports that some spouses of staff members are acting as representatives or agents of firms in transactions involving ADB (i.e. consulting contracts) or in transactions with staff members conducted within ADB premises. In this regard, we wish to remind all staff of their duty to avoid any action that may reflect unfavorably upon their position as employees of ADB.

2. In particularly we draw your attention to the following provisions in Administrative Order (AO) No. 2.02 and Project Administration Instruction 2.01 which strictly mandate staff, their immediate family members, and even their close relatives (as defined in AO 2.01) to exercise tact and discretion and avoid situations involving conflict of interests”.

The Applicant, who had been hired 3 months before, must have been aware of this prohibition. Nevertheless, prior to 15 April 2005, he placed an advertisement in the ADB Spouse’s network soliciting the services of a grant writer to revise and edit a proposal to ADB’s poverty Reduction Fund for funding on behalf of the AUWSF. Ms. Kondratiev, I whose husband was an employee
at ADB, responded to the advertisement and informed the Applicant that she was on “friendly terms” with Ms. Tanaka, Senior Poverty Reduction; Specialist in RSDD. In this capacity, Ms. Tanaka would initially review and evaluate the proposal for funding. The possibility of a conflict of interest was thus evident. —Ahmad v. ADB, pars. 34, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 49.

f. Failure To Seek Approval For Directorship

41. A.O. 2.02 was revised in May 1998 (effective in January 1999) and provided: “Staff members ... shall not serve as a director, officer or partner of any entity, other than as an authorized representative of the Bank or with the prior approval of the President. Such prior approval shall not be required with respect to services performed as a director or officer for a charitable, social or religious entity” (para. 4.6(i)(a)). The Applicant interpreted the 1998 amendment to mean that staff members who intend to apply or are applying for rental subsidy for the first time will not be allowed to seek a position of a director, and that it did not cover staff members who were already a director. He alleges that he did not seek approval for his directorship because he was already a director.

42. The restrictive interpretation of A.O. 2.02 put forward by the Applicant runs counter to the ordinary meaning of the terms of the provision in their context. The provision prescribes that staff members shall not “serve as” a director of any entity without the prior approval of the President and specifically makes exception for a director for “a charitable, social or religious entity.” It is therefore logical to interpret the provision as requiring a staff member serving as a director of any entity other than a charitable, social or religious entity to obtain approval of the President, regardless of whether he is already a director or is seeking the position of a director.

43. Accordingly, the Tribunal finds that the Applicant violated A.O. 2.02 in its 1999 version for failing to seek approval for his directorship. It is not unreasonable to suspect that the Applicant had reasons for not wanting to reveal his link with Richland. The Tribunal notes that the Respondent did not argue that this breach only should constitute dismissal but that it confirmed the Applicant’s disregard for ADB’s regulations and “is consistent with (and indeed, facilitated) his fraudulent conduct under A.O. 3.07.” —Bristol v. ADB, pars. 41-43, Decision No. 75, 11 January 2006. ADBAT Reports, Volume 7, pages 121-122.

g. Filing of Criminal Complaint against Bank staff members

69. The Tribunal considers that the filing of a criminal complaint against ADB and/or members of the ADB management team or staff in the national legal system is a grave issue for an international institution particularly as the Applicant’s grievance had not yet been resolved within the internal justice system. This is a violation of a staff member’s duties and responsibilities to ADB under AO 2.02, para 4.3 (iii), which states:

“Administrative review and appeals procedures for the review and settlement of the claims of staff members concerning the terms and conditions of their employment are set out in AO 2.06, and AO 2.07 provides for a right of appeal to ADB’s Administrative Tribunal. Staff
members who have such claims and had access to the foregoing procedures may not resort to national courts or other tribunals outside ADB to resolve such claims.” —Mr. H vs. ADB, par. 69, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 126.

71. Moreover, the Tribunal notes that the Applicant seeking monetary damages amounting to 50 million pesos (approx. USD $1 million) from his colleagues when making the criminal complaint provides evidence that he was motivated to achieve more than merely reporting a crime.

72. In view of the foregoing, the Tribunal finds that the Applicant’s initiation of the criminal proceedings before the Mandaluyong City Prosecutor constitutes serious misconduct as contemplated by AO 2.04. —Mr. H vs. ADB, pars. 71 - 72, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 127.

h. Misrepresentation of Claims

11. As to the first issue, the Tribunal concludes that there was more than adequate proof that the Applicant had intentionally misrepresented personal telephone calls as official, and thus sought reimbursement for nearly US$400 to which he was not entitled. It was therefore proper for the Bank to conclude that the Applicant was responsible for “unsatisfactory conduct” for which discipline is appropriate. The Applicant violated Section 2.12 of A.O. No. 2.02 as it was then written:

The Bank has the right to require staff members to conduct themselves at all times in a manner befitting their status as employees of an international organization. They are expected to maintain a high degree of integrity and concern for the Bank’s interests and to avoid situations and activities which may reflect adversely on the institution, compromise its operations, or lead to conflicts of interest.

The Applicant also disregarded the administrative order that deals with reimbursement of expenses; Section 4.3 of A.O. No. 4.01 provides:

(b) Incidental expenses incurred abroad by staff on official Bank business such as communication charges, transportation and other reasonable expenses related to official business, are reimbursable upon submission of a Request for Reimbursement - Business Travel (RRBT) and receipts.

(c) For every seven (7) day period that a staff member is away from the duty station on official mission, such staff member is entitled to claim the reimbursement for a personal telephone call to or from the duty station. . . . The duration of each telephone call is not expected to exceed six minutes.

Although the Applicant contends that this language is ambiguous and can reasonably be interpreted to allow reimbursement of exigent family phone calls, the Tribunal disagrees. The quoted language in Section 4.3(b) clearly allows for reimbursement of communication charges only when “related to official business.” Personal telephone calls while away on mission are
treated separately in Section 4.3(c) which limits them to one each week and to six minutes in length. Obviously, those latter limitations were exceeded by the Applicant. —Zaidi v. ADB, par. 11, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, pages 92-93.

24. The Tribunal is of the view that intentionally misrepresenting reimbursement claims in order to secure undeserved moneys from the Bank is by no means a trivial offense. It constitutes a lack of honesty and integrity in dealing with the Bank. Moreover, in determining whether a discipline is disproportionate and thus an abuse of discretion, it is obviously necessary to consider not only the gravity of the staff member’s wrongdoing but also the severity of the sanction imposed. Here, that was not termination of employment or even a reduction in rank or salary. Rather, it was a brief postponement of the Applicant’s salary increase. It should be noted that unlike a reduction in rank or salary, the postponement would appear to have no continuing impact on salary calculations and increases in subsequent years. —Zaidi v. ADB, par. 24, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, pages 96-97.

35. As pointed out above (para. 31), the Applicant was aware in 2002 that the revised A.O. 3.07 made him ineligible for rental subsidy. Since that is the case, he must have been aware also that he had received rental subsidy in violation of A.O. 3.07 in 2000 and 2001. Even if he did not know about the revision to A.O. 3.07 until 2002, he was obligated not only to stop applying for rental subsidies but also to inform the ADB that he had received rental subsidies in violation of A.O. 3.07 in the previous two years. It is not up to the Applicant to give “ADB the benefit of the doubt.” “When a staff member does not come forward immediately to bring to the attention of the Organisation [an error resulting in overpayment] and refund the overpayment, but waits until the situation is discovered by the Organisation before doing anything to rectify the situation, such conduct is per se intentional fraud and thus serious misconduct warranting summary dismissal.” See Morales, UNAT Judgment No. 445, (24 May 1989), para. IV. The Applicant’s failure to alert the ADB that he had received rental subsidies in 2000 and 2001 in violation of A.O. 3.07 while quietly keeping them was in fact a deliberate and intentional fraud and serious misconduct. His actions constituted improper retention of funds that were not his but belonged to the ADB. —Bristol v. ADB, par. 35, Decision No. 75, 11 January 2006. ADBAT Reports, Volume 7, page 120.

39. Accordingly, the Tribunal finds that the Applicant’s fraudulent alterations of the receipts are properly regarded as misconduct according to A.O. No. 2.04, section 2 (Examples of Unsatisfactory Conduct or Misconduct). The fact that A.O. No. 2.02, section 4 (Duties and Responsibilities of Staff Members) was not discussed by the Bank does not help the Applicant’s case in as much as A.O. No. 2.02 is incorporated in A.O. No. 2.04, para. 2.1 (a). —Abat v. ADB, par. 39, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 10.

47. With regard to para. 6.2 (b), the Applicant stresses that the actual pecuniary damage was very limited, amounting to roughly US$350. The Respondent, whilst acknowledging that this was indeed the actual damage to Vanbreda (PHP18,264), points out that the Applicant’s fraudulent inflation of receipts amounted from 200% to 5000% and that the total amount attempted to be defrauded was PHP37,040. In this regard, the Tribunal concurs with the World Bank Administrative Tribunal’s statement that “fraud is always a most serious matter. This is particularly true where, even if the amounts improperly claimed as compensation are not
large, the conduct consists of repeated acts of unethical behavior.” (see Carew, Decision No. 142, WBAT Reports (1995) para. 43.). —Abat v. ADB, par. 47, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 12.

i. Prospective Employment Outside ADB

23. Section 4.6(iii) of A.O. 2.02 states that:

“(iii) Prospective Employment

Staff members who are seeking, negotiating or have an arrangement concerning prospective employment other than at ADB shall not exercise any responsibility with respect to an ADB transaction in which a prospective employer has or may have an interest of the kind set forth in the preceding paragraph.”

The “preceding paragraph” lists the following “interests”:

“(i) a recipient or beneficiary of ADB financing, investments or guarantees
(ii) a guarantor of any such financing; or
(iii) a supplier of good or services to ADB, except as authorized by the President”.

The paragraph 4.6(iii) quoted above does not give a definition of the “transaction”. The meaning of this word has to be sought in the light of the purpose aimed at by the rule. It is obvious for the Tribunal that this paragraph is intended to prevent a possible conflict of interest:

“Staff members who are … negotiating … an arrangement concerning prospective employment … shall not exercise any responsibility with respect to an ADB transaction in which a prospective employer … may have an interest.”

The fact that the transaction was unsuccessful does not remove the conflict or the possibility of conflict of interest. So, for the application of paragraph 4.6(iii) of A.O. 2.02, a transaction does not necessarily require an “agreement” between ADB and the prospective employer. It can be merely “the act of transacting or conducting any business” (Black’s Law Dictionary quoted by ADB) and includes negotiation among its meanings. —Ahmad v. ADB, par. 23, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 43-44.

j. Purchasing a TEV through Fraudulent Practices

84. x x x Even though the Applicant had not signed or endorsed the fraudulent invoice, she cannot claim innocence. A misrepresentation “that knowingly or recklessly misleads” is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2012, specifies that “misconduct does not need to be intentional,” and that it extends to reckless acts or omissions (para. 2.1).
85. In conclusion, the Tribunal finds that, on a preponderance of evidence, the Applicant fell within the standard of acting “knowingly or recklessly” that constitutes misconduct and the Respondent was thereby authorized to impose penalties under AO 2.02 and AO 2.04 para. 2.1. —Ms. J v. ADB, pars. 84 - 85, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 268.

100. 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 he had an opportunity to present his position, that he had possessed fraudulent documents enabling him to benefit from the TEV privilege for his vehicle purchase. 

101. 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. —Mr. K v. ADB, pars. 100 - 101, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 300.

107. On the evidence established, the Tribunal concludes that the misrepresentations, knowingly or recklessly made by the Applicant, and by the AAA agent to her benefit, were designed to induce ADB to process and endorse her TEV application. The Applicant compounded this when seeking permission to sell the TEV she had purchased. A misrepresentation “that knowingly or recklessly misleads” is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2012, specifies that “misconduct does not need to be intentional,” and that it extends to reckless acts or omissions (para. 2.1). 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 vehicles and that she was a party to the fraudulent scheme. The Tribunal is of the view that the finding of the Applicant’s misconduct, on a more probable than not basis, was justified in this case. —Ms. L v. ADB, par. 107, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 335.

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. - *Ms. M v. ADB*, par. 82, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 368. (See also Misconduct, In General)

**k. Receiving Improper Payment from Suppliers**

27. It is scarcely open to disputation that an ADB official’s act of receiving money from a supplier to the ADB in connection with an ADB transaction, would constitute serious misconduct within the meaning of A.O. 2.04. The amount of the money received may be comparatively modest but receipt thereof may nevertheless constitute misconduct or unsatisfactory conduct. The Applicant also argues that no causal connection between accepting (assuming arguendo that he had accepted) reimbursement from Kjaer of the amount of the provisional receipt, and an ADB transaction, has been shown by the Respondent. The purchase of the Nissan Patrol 4x4 in March-April 2003 took place before any putative reimbursement of the 3 July 2003 provisional receipt. Moreover, the Applicant contends that in 2004, Kjaer was a losing bidder in the procurement of an armored car for the use of the AFRM. The Tribunal considers that receipt of money which directly leads to favoring of the donor-supplier in a specific transaction with the ADB, is not essential for such receipt to constitute misconduct. Causal connection in the context of alleged corruption is rarely identifiable with certainty or precision. But with or without proof of such causality, receipt of financial benefits in whatever form from a supplier by a senior ADB official is bound to impair the reputation of the ADB. Reputational damage is necessarily a serious matter for a multilateral financial institution mandated to serve the needs of poor and developing countries. —*Gnanathurai v. ADB*, par. 27, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, page 27.

30. The standard of conduct here at stake was very substantially breached by the act with which the Applicant was charged: receiving an improper payment from a supplier of the ADB. The consequences for the Bank and its reputation in the international community, especially the international financial and development community, were regarded by the ADB President as grave indeed. This appraisal on the part of the President cannot be regarded as merely arbitrary or unwarranted. The Applicant’s position as Country Director AFRM was a senior one and carried with it weighty responsibilities. That the alleged receipt of money by the Applicant was a deliberate act, and not somehow an unintended accident, is not open to question. The fifteen (15) years service by the Applicant to ADB led the President to believe that the Applicant should have known better. The Tribunal is unable to say that that was a clearly arbitrary appraisal. —*Gnanathurai v. ADB*, par. 30, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, page 29.

**l. Theft**

31. So far as the length of service of the Applicant is concerned, it is admittedly 21 years. However, the Bank asserts that this does not prevent it from assessing theft as serious misconduct. Theft is prohibited regardless of an Applicant’s longevity. Indeed, as the Tribunal
notes in *Nagarajah Gnanathurai*, Decision No. 79 (17 August 2007), para. 30: “The fifteen (15) years of service by the Applicant to ADB led the President to believe that the Applicant should have known better.” The Tribunal notes the Bank’s increasing efforts to combat corruption, including fraud committed by ADB staff members, and that the Applicant should have known that any theft would warrant the “strongest action possible”. With regard to the Applicant’s alleged commendable performance, his receipt of a commendation does not override the fact that he admitted to committing the theft. —*Cahutay v. ADB*, par. 31, Decision No. 90, 23 January 2009. ADBAT Reports, Volume 8, page 211.

32. The Applicant’s actions constitute serious misconduct within the meaning of A.O. 2.04. The Applicant’s theft from a fellow staff member was a deliberate act and not an accident. The Applicant also deliberately lied to OAGI investigators until shown that there was a record of his misconduct. A.O. 2.04, para. 6.3 provides that “[d]ismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member’s services is not in the interest of ADB.” —*Cahutay v. ADB*, par. 32, Decision No. 90, 23 January 2009. ADBAT Reports, Volume 8, page 211.

m. Use of Office Resources

38. While he was clearly aware of the position of the Bank, what the Applicant did was not a single misstep but a series of prohibited actions: systematically working during the ADB’s working hours for AUWSF; directing a member of the ADB’s staff to work on AUWSF business; making numerous personal long distance calls for personal purposes; and, misusing the diplomatic pouch. Moreover, the Tribunal emphasizes the fact that the Applicant did not tell the truth. On 30 August 2005, he told the General Counsel that “he was neither abusing ADB’s resources nor working on AUWSF matters during his office hours in any substantial way”, while, on the eve, he had sent or received 57 related AUWSF emails. It is another breach of the required standard of conduct. The Applicant cannot argue that his supervisors and colleagues allowed him to believe that what he was doing was proper. They only knew that the Applicant was involved in the AUWSF project as *pro bono*; they were not aware of the extent of his involvement, an extent he concealed.

39. Through his systematic work on AUWSF matters during office hours well beyond the expectation of any casual or occasional use, the Applicant misappropriated the salary paid by his employer. He also misappropriated ADB funds by misusing its telephone lines for personal matters and by utilizing hours of work by ADB staff members for the benefit of his personal interests. He placed ADB’s reputation at risk by using the diplomatic pouch in contravention of ADB’s agreement with member country governments. —*Ahmad v. ADB*, pars. 38-39, Decision No. 80, 17 August 2007. ADBAT Reports, Volume 8, page 51.

14. Permanent Ineligibility to work in ADB or ADB-Financed Activity as a Penalty

103. 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 in 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.

—Mr. K v. ADB, par. 103, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 301.

118. 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 in 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.


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.


15. Preliminary Investigation

a. In General

42. As noted earlier we find no violation of due process in the Bank’s handling of the preliminary investigation. Statements made by the Applicant in that proceeding, even if damaging to her case and later regretted, we find, were made of her own free will. A.O. No. 2.04, sections 8 to 10 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,
including the right to be informed in writing of the charges, the opportunity to provide explanations in response to those charges, and so forth. The Bank may, in the exercise of an employer’s administrative control and supervision over its employees, conduct a preliminary investigation about a staff member’s misconduct and meet with him or her to seek information. In this case, the Tribunal does not find it violative of due process that in the preliminary investigation the staff member was not accompanied by another staff member or counsel. The Bank may properly use the information the staff member provided of his or her own will during the preliminary investigation, subsequently in formal disciplinary proceedings against the member. The Applicant did not request counsel either at the time of the preliminary investigation or at the formal disciplinary proceedings and has not demonstrated that her rights to due process were violated at either stage. Thus, the Applicant’s claim for deprivation of due process has no merit. — Abat v. ADB, par. 42, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 11.

b. Role of the BPMSD

18. It is true that A.O. No. 2.07 made no express provision for the issuance by BPMSD of a Show Cause Notice. Yet it is the conclusion of the Tribunal that even though the Show Cause Notice was not required or even provided for in that administrative order, it was within the implied authority of BPMSD to issue such a Notice. A.O. No. 2.07 gave to BPMSD a central role in the implementation of disciplinary measures for unsatisfactory performance, including providing written charges and conducting a hearing. It would be undesirable for charges and an investigation to follow immediately upon allegations or suspicions of wrongdoing; rather, it is reasonable to assume that A.O. No. 2.07 contemplated that BPMSD would first assure itself that charges were warranted. To do this, it was within its authority to hold a preliminary investigation, including the affording of an opportunity to the suspected staff member to proffer evidence or explanation. That was the purpose of the Show Cause Notice. Surely no staff member can reasonably question this procedure, which is intended to assure due process.

19. What has just been stated refutes as well the Applicant’s assertion that the Head of his Department was the only “competent authority” authorized by A.O. No. 2.07 to initiate proceedings and to impose disciplinary measures upon him. That administrative order does provide, in Section 6.1, that “Heads of Departments/Offices are responsible for maintaining discipline of all staff members under their general supervision.” But it must also be noted that Section 4.1 of A.O. No. 2.07 expressly empowers BPMSD to assure that “[t]he staff member will be acquainted in writing with the nature of the charges against him.” It therefore cannot reasonably be maintained that BPMSD was not the competent authority to issue the Notice of Charge and Inquiry. Whatever might be said for treating the Department Head as the “competent authority” under Section 4.1(e) to “determine whether the misconduct alleged has been proven to his satisfaction, and if so, what penalty should be imposed,” that does not negate the authority of BPMSD to initiate charge and inquiry proceedings that are antecedent to the actual imposition of discipline. Moreover, A.O. No. 2.07 provided that it was only for verbal or written reprimands that the Head of Department was empowered to take effective action without the President’s authorization, and even then Section 3.1(c) required that there be consultation with the Director, BPMSD. More severe discipline, such as deferment of salary or demotion in rank, did not
contemplate unilateral decision-making by a staff member’s Head of Department. —Chaudhry v. ADB, pars. 18-19, Decision No. 23, 13 August 1996. ADBAT Reports, Volume 2, pages 177-178

16. President’s Power to Administer Discipline

20. In any event, A.O. No. 2.07 reiterates that it is the President who has the power to administer discipline -- a power earlier granted under the higher authority of Article 34 of the Charter of the Bank and Section 24 of the Staff Regulations -- and the administrative order purports simply to declare the manner in which the President delegates that power regarding stipulated disciplinary measures. The administrative order does not purport to declare that the President cannot in particular cases choose to exercise, in effect to re-claim, that power himself. —Chaudhry v. ADB, par. 20, Decision No. 23, 13 August 1996. ADBAT Reports, Volume 2, page 178.

56. The Tribunal has no doubt that, as a general matter, the President has the institutional authority to create committees of inquiry to assist in investigating and making recommendations concerning disciplinary matters, even when those might not be specifically mentioned in an administrative order. Apart from anything in A.O. No. 2.07, there are more authoritative Bank instruments which furnish such a source of Presidential authority. Article 34, Section 5 of the Agreement Establishing the Asian Development Bank (the Charter) expressly provides that “The President shall be chief of the staff of the Bank . . . [and] shall be responsible for the organization, appointment and dismissal of the officers and staff in accordance with regulations adopted by the Board of Directors.” Section 24 of the Staff Regulations also provides that “The President may impose disciplinary measures on staff members whose conduct is unsatisfactory.” The power to impose discipline must include the power to determine the facts upon which disciplinary action is to rest, and the creation of a committee of inquiry -- accompanied by assurances of due process -- is a reasonable method for the exercise of this power. The Tribunal therefore concludes that, simply because the COI that was created to investigate the Applicant’s alleged wrongdoing was not expressly contemplated by A.O. No. 2.07, that alone did not render the appointment of such a committee beyond the powers of the President. Even if a COI was not required under that administrative order, neither was it prohibited. —Zaidi v. ADB, par. 56, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, page 107: cf. also Chaudhry v. ADB, par. 29, Decision No. 23, 13 August 1996. ADBAT Reports, Volume 2, page 181.

90. Having considered the arguments put forward by the parties about the sanction imposed, the Tribunal reiterates its basic mandate that it cannot substitute its assessment for that of the head of the organization “unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty” (Abat, supra, citing Khelifati, ILOAT Judgment No. 207 [14 May 1973]; see also Bristol, Decision No. 75 (2006) Volume VII, para. 45, citing Zaidi, ADBAT Decision No. 17, (13 August 1996)). In Zaidi, para. 22, the Tribunal adopted the test for the question of proportionality as developed in Planthara, WBAT Decision No. 143 (1995), para. 37:
“... to determine whether a sanction imposed by the Bank upon a staff member is significantly disproportionate to the staff member’s offense, for if the Bank were so to act, its action would properly be deemed arbitrary or discriminatory.” —Ms. J v. ADB, par. 90, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, pages 269-270.

17. Proportionality of Sanctions

10. As was recently stated by the World Bank Administrative Tribunal, in Carew, WBAT Reports 1995, Decision No. 142, para. 32:

   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.

   In the instant case, there are three principal issues before the Tribunal: whether there is sufficient proof of the Applicant’s misconduct, whether the sanction imposed was within the Bank’s discretion and proportionate, and whether the procedures utilized by the Bank were proper and in accordance with due process. —Zaidi v. ADB, par. 10, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, page 92.

22. The Applicant’s principal contention as relates to the discipline imposed by the Bank is that the deferment of his 1994 salary increase, even if listed in A.O. No. 2.07, must be set aside as disproportionate to the severity of his offense. As the World Bank Administrative Tribunal has recently stated:

   The Tribunal has dealt with aspects of proportionality in prior cases in order to determine whether there is “some reasonable relationship between the staff member’s delinquency and the severity of the discipline imposed by the Bank” and “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.” Planthara, WBAT Reports 1995, Decision No. 143, para. 37.

   The Tribunal in that case took into account, inter alia, as provided by the written staff rules, the seriousness of the matter, the situation of the staff member, extenuating circumstances, and the frequency of conduct for which the disciplinary measures were imposed; in quashing the Bank’s decision to terminate the services of a 24-year staff member for filing excessive overtime claims, the Tribunal gave weight to his long service, positive performance evaluations, diligent performance of duties, the modest amount of money involved, and the fact that the applicant’s employment was not one involving higher management responsibilities. This Tribunal agrees. —Zaidi v. ADB, par. 22, Decision No. 17, 13 August 1996. ADBAT Reports, Volume 2, page 96.
44. The Applicant argued that the penalty of dismissal was too harsh on the grounds that the Applicant in the *de Alwis* case (*supra*) had not been dismissed.

45. The issue before this Tribunal is to determine the appropriateness of the President’s action in this case, and the Tribunal assesses the President’s action in the light of the governing law. In disciplinary cases “whether the sanction is not significantly disproportionate to the offence” and “whether the requirements of due process were observed” are among the factors to be considered. (*Zaidi*, ADBAT Decision No. 17, (13 August 1996), para. 10 quoting from *Carew*, WBAT Decision No. 142, (19 May 1995), para. 32). And, one of the requirements of due process is fair and equal treatment.

46. On the issue of proportionality, the Tribunal notes that the Respondent refers to the following facts to substantiate dismissal in this case: 1) the Applicant failed to disclose his ownership in Richland for two consecutive years in 2000 and 2001 in violation of A.O. 3.07; 2) once his ineligibility became known to him in 2002, he failed to advise the ADB of the overpayments previously made to him; 3) for six years the Applicant submitted receipts which falsely represented his rental payments. In the light of A.O. 2.04 (6.3), which provides that “[t]he disciplinary measure of dismissal for misconduct is particularly appropriate when the staff member has ... deliberately misled the Bank through false statement, misrepresentation or fraud,” the Tribunal finds that the President’s sanction was not significantly disproportionate to the Applicant’s misconduct.

47. On the issue of fair and equal treatment, the Tribunal finds that disciplinary action has been taken in this case for different reasons and in different circumstances than in the *de Alwis* case. While in the *de Alwis* case the rental subsidy payments in question related entirely to the pre-2000 version of A.O. 3.07, in this case the Applicant violated A.O. 3.07 after the 2000 amendment. Moreover, the Applicant in this case intentionally omitted to advise the ADB of the overpayments to which he knew he was not entitled. “[O]fficials enjoy the protection ... of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances.” (*Khelifati*, ILOAT Judgment No. 207 (14 May 1973)). —*Bristol v. ADB*, pars. 44-47, Decision No. 75, 11 January 2006. ADBAT Reports, Volume 7, pages 122-123.

19. The second argument of the Applicant is that:

The decision on the charge and the penalty imposed constitute abuse of discretion, arbitrariness, discriminatory practice, violation of fair and reasonable procedure and may even involve improper motivation.

20. We find it sufficient to reproduce, verbatim, the relevant part of the order of the Bank’s President as a complete answer to the allegations contained in the Applicant’s arguments viz:

(a) abuse of discretion, (b) arbitrariness, (c) discriminatory practice and (d) improper motivation.
It is as follows:

In view of the foregoing, I conclude that Mr. Lim committed unsatisfactory conduct under AO 2.04. In determining the appropriate penalty for Mr. Lim’s unsatisfactory conduct, I have taken note of all circumstances listed in paragraph 6 of AO No. 2.04. I note that Mr. Lim had no prior disciplinary record of misconduct and that his action did not cause actual adverse consequence to ADB. I also note that Mr. Lim sufficiently established that he did not gain any financial or other benefit from his action, and that he told his supervisor that he had taken the paintings to his home. However, it bears emphasis that Mr. Lim’s official position involves responsibility for valuable ADB assets and he was directly responsible for matters to which his unsatisfactory conduct related. In this regard, I note that he acted without any apparent concern for the issues raised by his removal of the paintings and taking them to his home without any documented accounting of his actions. Although there was no damage caused to ADB by his unsatisfactory conduct and the creditors who knew of his action did not object to it, he certainly placed ADB’s reputation at risk because there could have been adverse consequences if it became publicly known that the foreclosure process had been irregular. Taking into account all these factors, I have decided to impose the penalty of three week’s suspension without pay, which will immediately take effect upon notice to him. (emphasis added)

This clearly shows that there was no abuse of discretion, arbitrariness, discriminatory practice or improper motivation.

21. Further the review indicates that there has been no violation of fair and reasonable procedure either. Again the precedents cited in this behalf from the ILO tribunal and our own have no relevance to the facts and circumstances of this case.

22. The Applicant has also invoked the rule of contra preferentem to assert that the alleged ambiguity in A.O. No. 2.04 should have been resolved in his favor. In this behalf, he relied on one of our own judgments, Galang, Decision No. 55 (8 August 2002) and an ILOAT judgment, European Patent Organisation, ILOAT Judgment No. 2290 (4 February 2004); but there is no ambiguity in A.O. No. 2.04. The question whether “simple negligence” is punishable under the rules has already been dealt with earlier in this judgment and the conclusion in effect is that the kind of “negligence” the Applicant committed did amount to unsatisfactory conduct.

23. In short, A.O. No. 2.04 has been properly invoked and applied in this case. The disciplinary proceedings were initiated rightly by the Director, BPMSD, under paras. 12 and 4.2 against the Applicant as he was found to have performed the duties assigned to him in an improper and reckless manner which amounted to an abuse of trust to the detriment of the Bank’s name within the meaning of para. 2.1 (b) and (d). The penalty awarded to him is provided in para. 4.2(d). Under para. 6.1, however, the disciplinary measure needs to be proportionate to the seriousness of the unsatisfactory conduct. In assessing the seriousness, the criteria given in para. 6.2 have been kept in view. In the matter of procedure, the provisions of para. 9 have been meticulously followed. The Applicant, therefore, has no reason to complain.
24. After taking into consideration the fact that the President exercised his discretion judiciously, we find no reason to alter it. —*Lim v. ADB*, pars. 19-24, Decision No. 76, 02 August 2006. *ADBAT Reports*, Volume 7, pages 132-133.

28. Under the circumstances, the Tribunal agrees that the disciplinary penalties imposed more than ten years ago, even if proven to have occurred in circumstances similar to those of the Applicant, are not controlling in the case of the Applicant. Accordingly, the Tribunal rejects the Applicant’s request that it subpoena the records pertaining to disciplinary proceedings against four other staff members occurring prior to the adoption of the Anticorruption Policy in 1998.

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55. Even if as alleged, there was leniency in the four previous instances, that policy has been replaced by the Bank’s adoption of the more stringent Anticorruption Policy in 1998. The Applicant also refers to previous cases of this Tribunal, namely: *Powell*, Decision No. 50 (2000) V *ADBAT Reports*, 59; *de Alwis*, Decision No. 57 (8 August 2003); *Chaudry*, Decision No. 23 (1996), II *ADBAT Reports*, 171; and *Zaidi* Decision No. 17, (1996), II *ADBAT Reports* 89, as cases where the conduct of those Applicants fell short of the integrity and judgment expected of ADB staff members and yet no summary dismissal was involved. —*Abat v. ADB*, par. 28 and 55, Decision No. 78, 7 March 2007. *ADBAT Reports*, Volume 8, page 7 and 14.

43. A.O. No. 2.04, para. 6.1 provides that “[t]he disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct.” As the President has discretion to determine a sanction in disciplinary proceedings, the test to be adopted by this Tribunal before it can interfere with the President’s discretion is whether that sanction is disproportionate to the staff member’s offense. (see *Zaidi*, Decision No. 17 (1996) II *ADBAT Reports* 89). The International Labour Organisation Administrative Tribunal similarly ruled that “the Tribunal cannot substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty.” (see *Khelifati*, ILOAT Judgment No. 207 (14 May 1973)).

44. A.O. No. 2.04, para. 6.2 sets out the standards for assessing the seriousness of the unsatisfactory conduct as follows:

6.2 In assessing the seriousness of the unsatisfactory conduct, the following criteria should 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 caused to the Bank, its staff or any third party;
(c) the recurrence of unsatisfactory conduct by the staff member, particularly when there is a repetition of unsatisfactory conduct 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 unsatisfactory conduct relates;

(e) collusion with other staff members in the act of unsatisfactory conduct;

(f) whether the unsatisfactory conduct was a deliberate act;

(g) the situation of the staff member and the staff member’s length of satisfactory service; and

(h) the staff member’s admission of the unsatisfactory conduct prior to the date the unsatisfactory conduct is discovered and any action taken by the staff member to mitigate any adverse consequences resulting from his/her unsatisfactory conduct. —*Abat v. ADB*, pars. 43-44, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 11-12.

57. The Tribunal reiterates its conclusion that the penalty imposed in this case is consistent with the ADB’s stricter stance toward corruption, and that it is not unfair for the President to impose a more severe penalty for fraud than was the case prior to the pronouncement and publication of the Anticorruption Policy in 1998. The Applicant’s reliance on *Powell, de Alwis, Chaudry*, and *Zaidi* is misplaced. *Chaudry* and *Zaidi* involved sanctions imposed prior to 1998. *Powell* and *de Alwis* involved sanctions less than dismissal imposed after 1998, but in the present case receipts were altered on repeated occasions and the Applicant’s actions may be qualified as blatant misconduct. —*Abat v. ADB*, par. 57, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 14.

34. With regards to the proportionality of the measure, examine whether the sanction is not significantly disproportionate to the offence (*See Zaidi* Decision No. 17 [1996] II ADBAT Reports, para.10). In its judgment Mr. J.G.B No. 2495 (2006) the ILOAT decided:

*The tribunal cannot substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty*” (emphasis supplied).

Taking into consideration the gathering of the evidence, the repeated character and the seriousness of the misconduct in the face of opportunity to correct his misbehaviour and protect his position, the Tribunal is of the opinion that there was certainly no “clear disproportion” between the offence and the penalty: so, it has no justification to substitute its assessment for that of the President. —*de Alwis v. ADB (No. 4)*, par. 34, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, page 110.
27. The Applicant having finally admitted his misconduct, the only question for consideration is the proportionality of the penalty. There is sufficient case law on the subject of proportionality. As the Tribunal noted in Abat, Decision No. 78 (7 March 2007), para. 43: “As the President has the discretion to determine a sanction in disciplinary proceedings, the test to be adopted by this Tribunal before it can interfere with the President’s discretion [to determine a sanction in disciplinary proceedings] is whether that sanction is disproportionate to the staff member’s offense. See Zaidi, Decision No. 17 [1996], II ADBAT Reports 89. Lack of proportionality of penalty has been considered as an error of law in Ferrecchia, ILOAT Judgment No. 203 (14 May 1973). It has been observed as follows:

The Tribunal quashes a decision if it is founded inter alia upon an error of law. Cases in which a disciplinary sanction imposed on a staff member appears out of all proportion to the objective and subjective circumstances in which the misbehaviour was committed should be assimilated to cases [of] error of law. —Cahutay v. ADB, par. 27, Decision No. 90, 23 January 2009. ADBAT Reports, Volume 8, page 209-210.

54. The role of this Tribunal in assessing the appropriateness of the discipline imposed by the President of the ADB is governed by the language of A.O. No. 2.04 para 6.1. As this Tribunal held in Abat, Decision No. 78 (7 March 2007), para. 43:

“A. O. No 2.04 para 6.1 provides that [t]he disciplinary measure should be proportionate to the seriousness of the unsatisfactory conduct. As the President has the discretion to determine the sanction in disciplinary proceedings, the test to be adopted by this Tribunal before it can interfere with the President’s discretion is whether that sanction is disproportionate to the staff member’s offense. (see Zaidi, Decision No. 17 (1996) II ADBAT Reports 89). The International Labor Organization Administrative Tribunal similarly ruled that the Tribunal can not substitute its assessment for that of the Director General, unless it notes a clear disproportion between the gravity of the offence committed and the severity of resulting penalty. (see I6helifati, ILOAT Judgment No 207 (14 May 1973)).”

55. A.O. 2.04 para 6.3 further provides that “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 the Bank.”

56. In this case the Tribunal finds that the disciplinary penalty imposed by the President of the ADB was not disproportionate to the staff member’s offence. The determination by the President that the Applicant’s claims of innocence were unsupported, and that she was a collaborator in the Kumar emails, are amply supported by the evidence. The evidence also supports the determination that the widely circulated emails, with their allegations of impropriety and irresponsibility, were detrimental to the ADB and had the potential for damaging its reputation. The Applicant’s lack of full cooperation, her tampering with evidence, and her false statements during the disciplinary process raised serious questions as to whether the Bank could trust her in the future. The evidence demonstrated that she failed to meet the standards of integrity expected of a senior official and that her continued service was not in the interest of the
Bank. Accordingly, the Tribunal finds that the sanction was not disproportionate to the offence of misconduct. —**Hua Du v. ADB, pars. 54 - 56, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 103.**

87. The Tribunal may not substitute its assessment for that of the President, unless there is a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty. (**Hua Du**, Decision No 101 [2013] IX ADBAT Reports 82, para. 54).

88. The gravity of the Applicant’s misconduct justifies a disciplinary measure, and in a most severe form, dismissal. AO 2.04 para. 6.2 provides different criteria to assess the seriousness of the misconduct, including: “(a) the degree to which the standard of conduct has been breached by the staff members”; “(b) the gravity of the adverse consequences and damage or potential damage to ADB, its staff, or any third party”; “(f) whether the misconduct was a deliberate act”; and “(g) the personal circumstances of the staff member and the member’s length of satisfactory service.” Moreover, AO 2.04 para. 6.3 further provides: “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 the Bank.” The filing of the criminal complaint was a clear breach, with serious adverse consequences for the Bank and colleagues, it was deliberate, and the personal circumstances and length of service were taken into account. Moreover, each of these elements justify a finding under para. 6.3 that the breach of trust was so serious that continuation of the Applicant’s service was not in the interest of the Bank. Therefore, the Tribunal concludes that the summary dismissal was proportionate to the misconduct. —**Mr. H vs. ADB, pars. 87 - 88, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 130.**

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

94. The Tribunal finds that the Bank legitimately took into account the relevant factors of the nature of the misconduct and the multiplicity of the offence in deciding upon the disciplinary measures to be applied. AO No. 2.04, para. 4.1 states that “disciplinary measures imposed by the bank on a staff member shall be determined on a case-by-case basis....” This was done in the present case, and the Tribunal finds that the severity of the penalties imposed on the Applicant were “not significantly disproportionate” to the gravity of the offence (see Abat, supra). —**Ms. J v. ADB, pars. 93 - 94, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 271.**

108. 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, is:

“... 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.” —Mr. K v. ADB, par. 108, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 302.

123. 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.” —Ms. L v. ADB, par. 123, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 339.

128. With regard to the possible mitigating factor of cooperation, the Tribunal observes that it has not been applied in relation to the Applicant. In contrast to some other staff members who were investigated, the Applicant was not forthcoming with information requested. She mentioned that other staff had engaged in similar practices but declined to provide their names to the investigators. On this basis, the Bank had a basis on which to consider that the Applicant had not cooperated.

129. In considering the question of proportionality, the Tribunal notes that one of the important factors considered by the Bank was the official position the Applicant held in the Treasury Department. The importance of trust is specified in AO 2.04 para. 6.3, which stipulates that “when the breach of trust is so serious that continuation of the staff member’s service is not in the interest of ADB” then dismissal will be “particularly appropriate.” These elements were, in the Tribunal’s judgment, legitimate factors for the Bank to weigh in deciding upon sanctions for the misconduct, with dismissal being “not significantly disproportionate.” —Ms. L v. ADB, pars. 128 - 129, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 341.

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. — Ms. M v. ADB, par. 109 - 111, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 376.

18. Standard of Proof

39. This Tribunal is governed by the standard for disciplinary proceedings set out in A.O. 2.04. A.O. 2.04, para. 8.1 stipulates that “allegations of misconduct shall be investigated...in accordance with Appendix 2 of this AO.” Appendix 2, paragraph 6 provides “[t]he standard of proof for the investigation is a Preponderance of Evidence”. A.O. 2.04, para. 9.2 authorizes the initiation of disciplinary proceedings where there is “a preponderance of evidence” that a staff member has engaged in misconduct. Appendix 1 of A.O. 2.04 defines “a preponderance of evidence” as

“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 the misconduct.” — Hua Du v. ADB, par. 39, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 97.
Thirdly, Appendix 1 of the revised AO 2.04 describes a preponderance of evidence as “evidence which is more credible and convincing than that presented by the other party ....” In Gnanathurai, ADBAT Decision No. 79 [2007], VIII ADBAT Reports 29, para. 31, this Tribunal noted

“... In disciplinary proceedings, the respondent organization must of course bear the burden of showing that the official or employee charged did commit the acts constituting the misconduct or unsatisfactory conduct imputed to him. It is a widely recognized rule that where the respondent established a prima facie case that the staff member did commit the misconduct or unsatisfactory conduct, the staff member must thereupon provide a reasonable and countervailing demonstration that the misconduct is not fairly or properly attributed to him.” —Ms. J v. ADB, par. 77, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 266.

19. Suspension as an Interim Measure

34. The order of suspension expressly stated that the suspension was only an interim measure pending investigation, and not a disciplinary one. The circumstances in which it was issued confirm that it was never intended to be a disciplinary measure. The Tribunal holds that the Applicant’s suspension was no more than an interim measure. His challenge on that count fails.

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46. Although suspension was an interim measure, its impact on the reputation of the Applicant should not have been ignored. Irrespective of whether a decision is valid, just as it is implicit in every contract of service that the staff member shall be loyal, shall treat his superiors with due respect, and shall guard the reputation of the employer, so it is implicit that the employer in its treatment of staff members shall have a care for their dignity and reputation and shall not cause them unnecessary personal distress. Often distress and disappointment cannot be avoided, but, where it can be, it should be (In re Schofield, ILOAT Judgment No. 361, 9). The Tribunal holds that order of suspension was made with undue haste. —Galang, Jr. v. ADB, pars. 34 & 46, Decision No. 55, 8 August 2002. ADBAT Reports, Volume 6, pages 34 & 37.

20. Task of Tribunal in Disciplinary Cases

25. In Carew, WBAT Decision No. 142, [19 May 1995], para. 12, the World Bank Administrative Tribunal provided the following summary of the essential tasks of the Tribunal in disciplinary cases, that is, in determining whether the disciplinary proceedings had been attended by arbitrariness, discrimination or improper motivation:
“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.”

Items (i) and (v) of the Carew listing may be consolidated into one: whether the procedures followed for the determination of the operative facts were consistent with the requirements of due process. —*Gnanathurai v. ADB*, par. 25, Decision No. 79, 17 August 2007. *ADB Reports, Volume 8, page 25-26.*

35. The issue before the Tribunal is to determine the appropriateness of the President’s decision to summarily dismiss the Applicant. In *Zaidi*, Decision No.17 [1996] II ADBAT Reports 92, para 10, the ADB Tribunal decided:

“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”. (*Zaidi*, para.10 quoting from *Carew*, WBAT Decision No. 142 (19 May 1995), para. 32)

37. Paragraph 6.2 of A.O. 2.04 entitled “Disciplinary measures and procedures” provides:

“6.2 In assessing the seriousness of the unsatisfactory conduct, the following criteria should be taken into consideration:

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

... (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 unsatisfactory conduct relates;

... (f) whether the unsatisfactory conduct was a deliberate act;

(g) the situation of the staff member and the staff member’s length of satisfactory service; and

(h) the staff member’s admission of the unsatisfactory conduct prior to the date the unsatisfactory conduct is discovered and any action taken to mitigate any adverse consequences resulting from his/her unsatisfactory conduct.” —*Ahmad v. ADB*, pars. 35 & 37, Decision No. 80, 17 August 2007. *ADBAT Reports, Volume 8, page 50-51.*

47. The Tribunal has set out its scope of review with respect to disciplinary measures in the following terms:
“In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.” (*Hua Du*, Decision No. 101 [2013] IX ADBAT Reports 82, para. 31). —*Mr. H vs. ADB*, par. 47, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 121.

21. **Time Limit**

38. According to A.O. 2.04 para. 4.2, disciplinary proceedings must be initiated within one year from the date of the discovery of the misconduct. The excessive character of the rental request was discovered, at the earliest, on 11 December 2003, the date of the receipt of the first appraisal report. The preliminary inquiry began in February 2004; the Bank did not exceed the time period under which it could initiate the disciplinary action. —*de Alwis v. ADB (No. 4)*, par. 38, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, page 111.

**Performance Evaluation**

1. **In General**

3. Decisions with respect to the evaluation of staff members’ performance are within the discretion of the Bank (*see Tay Sin Yan*, ADBAT Decision No. 3 [1994], para. 30). Such discretion, however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated, or adopted without due process (*see Lindsey*, ADBAT Decision No. 1 [1992], para. 12). —*Behuria v. ADB*, par. 3, Decision No. 11, 8 January 1994. ADBAT Reports, Volume 2, page 28.

32. According to established jurisprudence, the evaluation of the performance of employees is a matter of managerial discretion; the Tribunal may not substitute its discretion in such matters for that of the Bank. Thus, we cannot decide whether the Applicant deserved or not:

a) the overall rating “Satisfactory” in the final 2007 PDP;

b) the number of assessments as “Always demonstrated” within the interim as contrasted to final PDP.

33. But, according to the same jurisprudence, “Such discretion … is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary … or adopted without due process.” (See *Behuria* Decision No. 11 [1996], II ADBAT Reports, para. 3). —*R. Keith Leonard v. ADB*, pars. 32 – 33, Decision No. 92, 19 August 2009. ADBAT Reports, Volume 8, page 230.
34. The Tribunal notes that a general review of the evaluation of Bank employees by their superiors is beyond its jurisdiction. As this Tribunal decided in Claus, ADBAT Decision No. 105, (13 February 2015), para. 75:

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

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

35. Evaluating the performance of the Applicant is a matter for her supervisor(s). The Tribunal may interfere in such evaluation only under the strict conditions set out under the Lindsey formula, namely if it appears that the evaluation has not been reached by the proper processes, is arbitrary, discriminatory or improperly motivated or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.

36. The Tribunal also notes that “the burden of proof rests on the person who makes allegations, namely, the Applicant in the present case” (see Mr. E, Decision No. 103 (12 February 2014)). —Ms. G v. ADB, pars. 34 - 36, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, page 82. (See also Performance Evaluation, Burden of Proof).

48. The Tribunal finds consistently with its earlier findings at para. 36, that the Applicant has the burden of demonstrating that there was an abuse of discretion. The observations of the Tribunal in Behuria (No. 2) stated as follows:

“The Applicant has, basically, asserted [her] disagreement with several of the Respondent’s assessment of his performance; but this cannot take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record.” (Behuria (No. 2), Decision No. 11 [1996], II ADBAT Reports, para. 11).

Accordingly, the Tribunal finds that disagreement with the assessment does not of itself demonstrate an abuse of discretion and there is no other evidence to indicate that there has been an abuse of discretion. —Ms. G v. ADB, par. 48, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, page 85.

2. Bias and Partiality

15. Nevertheless the Tribunal holds that there were extraordinary circumstances in this case; a supervising staff member who had been arrested because of the Applicant’s complaint was among the raters, and so too was the Manager, PW2, who had expressed his wish
to see the Applicant out of his division. As to such expression of wishes by the Manager, the explanation of the Respondent in its Answer was evasive. It stated:

The Respondent submits that the then Manager, PW2 . . . has denied having uttered the remarks attributed to him. Assuming, *arguendo*, the alleged remarks of the then Manager, PW2, were made, such remarks, though unfortunate, reflected the department’s and division’s dissatisfaction with the Applicant’s performance as she had failed to improve her performance . . . . As the Applicant stated . . . the alleged remarks were made “in exasperation” (emphasis added). The Manager’s exasperation is understandable given the Applicant’s history of performance . . . .

This explanation was amended later as follows:

The Respondent, after further investigation into this matter, admits that [the] Manager, PW2, said to the Applicant “I want you out of my division” and notes that the reason for this statement was that Manager, PW2, was disappointed that the Applicant did not earnestly attempt to settle her dispute with Mr. Liang amicably and had initiated action to have him arrested . . . .

The Applicant thus contends:

The act of the Manager, PW2, in filling out Part. 3.2 of Applicant’s PER and in rating performance as marginal was highly irregular, tainted as it was with vengefulness and reprisal . . . . The supervisors, who were all subordinates of the Manager, PW2, and who were naturally fearful of contradicting his judgment, could not but concur.

The participation of Mr. Liang and the Manager, PW2, in such an extraordinary case as this was likely to create an appearance of bias and partiality on the part of the raters, giving rise to an apparent absence of objectivity in the rating process. The relevant PERs should not be relied upon. — *Cabal v. ADB*, par. 15, Decision No. 22, 13 August 1996. *ADBAT Reports, Volume 2*, pages 167-168.

65. While the Tribunal will be critical of some aspects of the supervisors’ interaction with the Applicant (see below), it is clear that a negative performance report, as such, does not constitute harassment, provided that it is not Improperly motivated. The Tribunal expounded this point in *Haider*, Decision No. 43 [1999], V *ADBAT Reports* 5 para. 18:

“In previous decisions, the Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (Lindsey, Decision No. 1 [1992] I *ADBAT Reports* 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or Improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed. It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of
probation.” —Mr. E v. ADB, par. 65, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 23.

67. In his letter of 9 May the Applicant complained about Mr. X’s alleged regular shouting, impatience, and lack of politeness, which hindered his ability to carry out his work. The question is whether this allegation fell within the definition of harassment. This is defined by paragraph 4.1 of AO 2.11.

“Harassment is unwarranted or unwelcome behavior, verbal or physical, that interferes with work or creates an intimidating, hostile or offensive work environment. If a specific action by one person is seen as offensive or intimidating by another, that action might be viewed as harassment, whether intended or not. Harassment can take many different forms including intimidation, abuse of authority and sexual harassment.”

68. In the Tribunal’s view the letter of 9 May contained an allegation by the Applicant falling within the notion of unwarranted and unwelcome behavior interfering with work or creating an intimidating, hostile or offensive work environment. Moreover, given that Mr. X was the Applicant’s immediate supervisor, his behavior if it occurred could, depending on the circumstances, have amounted to an “abuse of authority,” which again is referred to within the definition of harassment. Thus, the Applicant’s letter to the Country Director contained a complaint of harassment. It was not a formal complaint made in accordance with the procedure specified in paragraph 6.2 of AO 2.11, but it was an “informal complaint,” as envisaged by paragraph 6.1. —Mr. E v. ADB, pars. 67 - 68, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 24.

69. The Tribunal notes that the great majority of the Applicant’s allegations relate to his disagreement with the management’s assessment, which is not evidence that the rating was invalid. The Tribunal recalls its decision in Drilon, supra, para. 64, in which it stated: “the [a]pplicant’s opinion of her performance capabilities as more than satisfactory cannot be taken as a substitute for the assessment made by her supervisor and other reviewers who have arrived at a different conclusion as per the relevant rules.”

70. The Tribunal has found no element of discrimination or abuse of discretionary power by the Respondent in handling the matters during the course of the Applicant’s PIP period. The assessment of the Applicant’s performance as unsatisfactory has been reached on a reasonable and observable basis. —Abrigo v. ADB, pars. 69 – 70, Decision No. 123, 21 October 2020.

3. **Confidentiality of Performance Ratings**

5. The Bank’s decision to keep confidential the overall performance ratings of individual staff members in the Applicant’s work group is warranted, and is not an abuse of discretion. It is a general principle of staff management that personal data in the personnel files of individual employees are confidential, in light of the employees weighty interest in privacy.
The Bank has reasonably balanced that interest with the requirement of transparency in granting access by staff members to their own personal career files under Administrative Order No. 2.08, while refusing access to the personal career files of other staff members. This conforms to the established practice in other international organizations (see In re Ali Khan (No. 2), ILOAT Judgment No. 557 (1983)). —Cumaranatugne v. ADB (No. 2), par. 5, Decision No. 32, 6 January 1997. ADBAT Reports, Volume 3, page 60.

4. Distribution of Ratings / Fixed Quota System

   a. In General

      20. Having regard in particular to the above four items submitted by the Applicant to prove the factual basis of his claim, and to the detailed statements made by him in his Application and Reply, the Tribunal believes that the Applicant has made out a prima facie showing of the existence of the unofficial practice of sharing available employee awards as broadly as possible, suggesting that the Bank is in some relevant way at fault (see the quotation below from de Raet). This prima facie case serves to shift to the Bank the burden of proving that the claimed unofficial practice did not in fact exist and that the “B” performance ratings actually given by the Department Head in the Applicant’s PERs for the years 1987, 1988 and 1989 must be given exclusive and literal effect. As explained by the World Bank Administrative Tribunal in de Raet:

      “(3) The third point is that, despite the assertion of the Applicant to the contrary, it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power - not, that is, until an Applicant has made out a prima facie case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.” (WBAT Reports 1989, Decision No. 85, para. 57).

      x x x

21. The Tribunal is compelled to note, however, that the Bank has not submitted any proof to the contrary and indeed has not expressly denied the existence of the unofficial practice the Applicant has referred to, at any rate not its existence in the EID of which the Applicant was and remains part. Instead, the Bank has chosen to rely simply upon the actual ratings given by the Department Head in the PERs of the Applicant for the years 1987, 1988 and 1989. Those performance ratings actually set out in the relevant PERs are insufficient successfully to discharge the burden of disproving the unofficial practice of sharing as prima facie demonstrated by the Applicant. The Tribunal believes that if the Bank had had evidence other than the PERs themselves that no unofficial practice of rationing and sharing awards had existed, it would have placed such evidence before the Tribunal. x x x —Tay Sin Yan v. ADB, pars. 20-21, Decision No. 3, 8 January 1994. ADBAT Reports, Volume 1, pages 42-43.
27. Administrative Order No. 2.04, as it existed during the years here relevant, as well as the annual guidelines issued by BPMSD for performance evaluation, required an objective examination of the work involvement, contributions and achievements of each professional staff member. If a staff member satisfied the criteria laid down for a “Distinguished” (“A”) performance rating, he was entitled to receive that rating. The Tribunal observes that neither Administrative Order No. 2.04 (in its successive versions) nor Administrative Order No. 2.11 (issued in April 1991) authorized the withholding of that rating on the basis of a fixed quota, whether applicable to the Bank as a whole or to each of the individual Divisions and Departments. The Applicant has not challenged the imposition by the BPMSD guidelines of the 15% quota for the Bank as a whole and the Tribunal sees no need to rule on that matter). —Tay Sin Yan v. ADB, par. 27, Decision No. 3, 8 January 1994. ADBAT Reports, Volume 1, pages 45-46.

38. In Tay Sin Yan, the Tribunal held that the applicable regulations and guidelines for performance evaluation required an objective examination of the work involvement, contributions and achievements of each staff member; that if he/she satisfied the criteria laid down for a “Distinguished” performance rating, he/she was entitled to receive it; and that the relevant Administrative Order did not authorize the withholding of such rating on the basis of a fixed quota, whether applicable to the Bank as a whole or to each of its individual Divisions and Departments. —Isip v. ADB, par. 38, Decision No. 9, 8 January 1996. ADBAT Reports, Volume 2, pages 11-12.

42. While the Tribunal finds that an individual assessment rating should not be altered or adjusted to fit into existing rigid percentages of a quota system, it agrees with the Bank that it is a function of good management operations to use the performance rating system to reward the outstanding performers and to inform the underperformers of the need for improved performance to bring them up to the expected and recognized norms of work performance. The analogy of a bell-shaped curve is commonly used to identify the hoped for distribution. Ideally, such distribution is a reflection of diligent and conscientious supervision informing subordinates of areas requiring improved performance. However, the history of performance review in the Bank shows that the ideal of self-regulation and administration has not been fully realised. Perhaps for a variety of reasons such as inadequate guidance from higher levels, or fear of antagonizing or upsetting subordinates with whom harmonious working relationships need be preserved, honest and constructive criticism has been too often withheld.

x x x

45. Thus, it is not arbitrary to foresee a reasonable distribution depicted as a bell-shaped curve among the four categories with a relatively small number in each extreme box and the majority of employees being divided relatively equally between the two interior boxes.

46. On the other hand and in order to avoid too many discrepancies between the different departments of the Bank, it was reasonable to suggest distribution throughout the Bank as a whole. However, that kind of distribution cannot be rigid or composed of fixed percentages.
Each supervisor or head of service has a “guideline” but cannot be required to alter an objective assessment under the *Tay Sin Yan* Judgment merely to meet a prescribed percentage quota.

47. The record of this case does not show that there were such mandatory fixed percentage quotas. On the contrary, the Bank’s advices we find were intended to be only advisory guidelines, or as noted:

a) “expected” (memoranda or e-mails of 5 December 2005, 3 November 2006 and 4 December 2006)

b) desirable: “Box … should be around …” (e-mail of 19 January 2006) or “would be”


35. The Tribunal follows its decision in *M. Zeki Kiy*, ADBAT Decision No. 89 (23 January 2009), in which it found that there were no mandatory fixed percentage quotas in the 2006 PDP and that it was not arbitrary to foresee a reasonable distribution depicted as a bell-shaped curve among the four categories with a relatively small number in each extreme box and the majority of employees being relatively equally divided between the two interior boxes. Accordingly, the Tribunal rejects the request of the Applicant to set aside his 2006 PDP in relation to the decision not to extend his position as DG, OED. —*Murray v. ADB*, par. 35, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, page 220.

b. Burden of Proof

39. The Applicant argues that it was not within the Bank’s discretion to impose in 2006 a system which required a distribution of ratings. It is essential to differentiate between an individual’s specific performance rating as challenged in this case and the more generic issue of how the totality of those ratings should be utilized to recognize and reward good performance while bringing to the attention of the few underperformers the need for improvement in various aspects of their performance.

40. With regard to this issue, the Tribunal concurs with *Tay Sin Yan*, Decision No. 3 [1994], I ADBAT Reports. If a staff member satisfies the criteria laid down for a specific performance rating, he is entitled to receive it and the relevant Administrative Orders do not authorize the withholding of such rating on the basis of a fixed quota whether applicable to the Bank as a whole or to each of its divisions or departments. This jurisprudence has to be combined with accepted standards of burden of proof.

41. Thus the Applicant has the burden to prove (i) the existence of fixed or imposed quotas; (ii) the relationship between those quotas and the alleged downgrading; and (iii) had such quotas not existed, he would have been ranked “FS” instead of “GS”. —*Zeki Kiy v. ADB*, pars. 39-41, Decision No. 89, 23 January 2009. ADBAT Reports, Volume 8, page 196.
52. In Lindsey, Decision No. 1 [1992], I ADBAT Reports, para. 12, this Tribunal decided:

… The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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 ….

53. Accordingly, the Tribunal has to monitor just the boundaries of the designated categories. The Applicant has the burden of proving that in its evaluation rating for 2006, the Bank acted arbitrarily, in a discriminatory manner, or with improper motivation (See Alexander, Decision No. 40 [1998], IV ADBAT Reports 41).

54. With regard to the limited monitoring cited above, the Tribunal makes the following observations:

a) The Applicant did not have a right to a particular form of evaluation. It resulted from the presentation of the facts that during his period of service, he knew without protest (except for the 2006 PDP) and had been subjected to no less than six performance evaluation systems including the system implemented from 2007.

b) The assessment of a performance is inevitably subjective but being subjective is not necessarily synonymous with being arbitrary. The former is a personal assessment that might differ among supervisors depending on the evidence of performance while the latter is a determination which has no rational basis whatsoever and is not reasonably related to the evidence of performance.

c) The only reason why the Applicant was ranked as “GS” was his relative weakness in “Learning and Knowledge Sharing”. In his final 2006 PDP, he was rated “FS” in all items but that one. That was not a surprise; the Applicant has always rated as needing improvement in “Learning and Knowledge Sharing”.

d) To be ranked “GS” instead of “FS” because of a “GS” rating among other “FS” is not arbitrary; it is the reasonable application of the definition of the “FS” ratings: “performance in all respects meets the expectations of the work unit”.

e) The chart provided by the Bank shows that no staff who received an overall “FS” rating had any individual “GS” rating. —Zeki Kiy v. ADB, pars. 52-54, Decision No. 89, 23 January 2009. ADBAT Reports, Volume 8, page 198-199.
c. Entitlement to Damages

59. Even if the Applicant had been able to prove either he was the victim of a system of fixed quotas or his “GS” performance evaluation was arbitrary, it does not necessarily follow that he would be entitled to any financial damage. As stated above, the “GS” rating is not a bar to promotion and the Applicant does not offer proof that the Bank had plans to create any reward that would have prejudiced staff who received a “GS” rating. —Zeki Kiy v. ADB, par. 59, Decision No. 89, 23 January 2009. ADBAT Reports, Volume 8, page 200.

5. Due Process

a. In General

10. Any enquiry into the performance or conduct of a staff member must be carried out in accordance with the requirements of due process of law, in such a way that the establishment of the truth or falsehood of allegations is not itself a subject of discretion but is the consequence of an objectively verifiable and rationally explicable examination of the facts. Where the continuance or not of a staff member’s livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections. —Lindsey v. ADB, par. 10, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 4.

40. By failing to carry out the review of the Applicant’s performance in a valid manner, the Bank must be treated as having in effect denied the Applicant the possibility of obtaining the extension or conversion which he might otherwise have received. The possibility that, even if everything had been done correctly, the Applicant might still have been found not to have met the Bank’s performance requirements is not relevant. To put the point another way, the Bank cannot now say that, if it had acted properly in accordance with due process, it could legitimately have exercised a managerial discretion not to regard the Applicant’s performance as satisfactory. —Lindsey v. ADB, par. 40, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 16.

15. In passing, however, the Tribunal wishes to interject the following observation. As discussed above, in claiming absence of due process, the Applicant stated that the Manager during the assessment year did not call the attention of the Applicant to what were believed to be shortcomings in the way the Applicant associated with his colleagues. It was brought up for the first time when the PER was being prepared. The Respondent argues that “there is no requirement that a supervisor must call to the attention of a staff member each deficiency in job performance at precisely the time such deficiency is manifested . . . While it is true that the performance assessment is an ongoing process, failure to provide explicit performance assessments on a continuous basis does not result in the formal evaluation at year’s end being rendered procedurally deficient.” Certainly a supervisor need not inform each prospective ratee of disagreeable remarks made within or without the department each time such remarks arouse the supervisor’s attention. Even though it does not make the evaluation process legally deficient, to call the prospective ratee’s attention to such remarks, or to any incidents reflecting adversely on performance, for the first time at the discussion of the PER, is not a thoughtful approach,
particularly if the shortcoming was of such nature that it might affect the PER at the end of the year. In any community, including the work place, something more than what is legally correct is desirable. Under some circumstances, lack of thoughtful consideration can be viewed as verging on abuse of discretion or denial of due process. —*Behuria v. ADB* (No. 2), par. 15, Decision No. 11, 8 January 1996. ADBAT Reports, Volume 2, page 32.

39. The Applicant claims that the evaluation process was distorted and did not truly capture her value to the Bank. Hostile or inconsiderate behavior by a superior might amount to a denial of due process to the extent that it has a direct and material effect on the performance evaluation of a staff member. As the Tribunal has had occasion to point out:

In any community, including the work place, something more than what is legally correct is desirable. Under some circumstances, lack of thoughtful consideration can be viewed as verging on abuse of discretion or denial of due process. (*Behuria (No. 2)*, Decision No. 11 [1996], II ADBAT Reports 32, para. 15)

40. It appears from the records that the management style of the Manager was regarded by the staff in general to be demanding. He emphasized timeliness and required high performance standards of his staff. An exacting managerial style does not, however, amount to abuse of discretion. It was undoubtedly the case that the relations between the Applicant and the Manager were particularly strained. The tension between the Manager and the Applicant is clearly present in the tone of their statements and their behavior as reflected in the records of the several performance evaluation meetings that took place in 1995 and early 1996 as well as in the written messages the Manager sent to the Applicant and that are part of the record in this case. The mere fact that these relations were strained, however, is not sufficient proof of a procedural irregularity particularly as it can be reasonably said that both the staff member and the supervisor bear some responsibility for the strain. It is therefore necessary to look in more detail at the specific accusations that the Applicant makes regarding the behavior of the Manager (and management generally) so as to determine whether it might reflect an illegitimate prejudice or the kind of ill will and malice against her that would amount to a procedural irregularity in her performance evaluation. —*Alexander v. ADB*, pars. 39-40, Decision No. 40, 5 August 1998. ADBAT Reports, Volume 4, pages 52-53.

39. The President had discretion in deciding whether or not to agree with the Chair DEC to recommend the reappointment of the Applicant. The discretion was particularly broad because of the high level and importance of the Applicant’s position. The WBAT stated that “[s]ubjective decisions which may seem unacceptably nebulous with respect to lower-level employees may be unavoidable with respect to persons near the summit of a corporate hierarchy.” See *Conthe*, WBAT Judgment No. 271, [30 September 2002], para. 97. While the President had broad discretion, his decision was still subject to the requirements of due process, in particular that it must not be arbitrary. There is no evidence to suggest that the decision of the President not to recommend the reappointment of the Applicant was arbitrary. —*Murray v. ADB*, par. 39, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, page 221.

54. The Tribunal concludes that the Respondent has followed the elements of the procedural rules (A.O. 2.05 Section 10) and relevant guidelines in respect of the performance
evaluation of the Applicant. The records show that she was given the necessary feedback dated 11 August 2015. Despite repeated attempts on the part of the supervisor to schedule a meeting to discuss the progress during the second month of the PIP work plan, it did not occur then because of the Applicant’s own non-cooperation with the suggested schedule before the supervisor went on leave (see Azimi, Decision No.88 [2009] VIII ADBAT reports, 175, para.38). The Tribunal concludes that the Applicant herself has contributed to the extension of the process and that while the extension was for the convenience of the supervisor, it did not leave the Applicant disadvantaged.

55. The Tribunal finds that while using two different expressions, “satisfactory” and “at least generally satisfactory”, as the standard of performance required is somewhat confusing, the issue itself is not determinative in this case because the Respondent has found that the Applicant failed to meet either standard.

56. For these reasons, the Tribunal concludes that there is no evidence that the Bank has not satisfied due process. —Ms. Maria Lourdes Drilon vs. ADB, pars. 54 - 56, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, page 156.

35. A critical feature of due process is impartiality of any decision-making body, particularly in view of the provisions of AO 2.02, para. 2.14. The Appeals Committee had the opportunity to consider the impartiality of the Review Panel, but failed to do so. Although the Appeals Committee hinted at a broader structural (member composition) problem of the review by recommending that “future ESP exercises be strengthened by including more independent members to the ESP Review Panel”, its conclusions did not cure the earlier composition defect in proceedings. Although the Tribunal does not require an altogether different composition, the membership of the Review Panel for its second meeting should not have included all of the same members and in particular, should not have included the officer who made the initial recommendation to include the Applicant in the ESP.

36. Therefore, after reviewing the record, the Tribunal concludes that the second review by the same members of the Review Panel did not meet the Bank’s own requirements of “confidence in the integrity of the process” and in particular, the broad requirements of due process; the Application accordingly succeeds. —Ma. Editha T. Cruz v. ADB, pars. 35 - 36, Decision No. 115, 21 July 2018. ADBAT Reports, Volume 10, page 245.

60. 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 Bank’s investigation of its own staff members began. The Tribunal, having seen evidence in camera, considers that the Bank made reasonable efforts to locate her; even in her absence, it took the measure of posting her name in connection with the fraudulent scheme and enabling other development banks to cross-bar her. —Mr. K v. ADB, par. 60, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 290.

62. 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. —Mr. K v. ADB, par. 62, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 229.

64. The Tribunal sees no obligation on the part of the Bank to follow the opinion of an outside law firm, particularly on issues relating to its privileges and immunities as agreed with the host country. The Tribunal agrees that it was reasonable for the Bank to consider the opinion irrelevant to the issue of misconduct, especially since it did not take into account the various provisions of the Staff Regulations or Administrative Orders governing staff obligations and disciplinary procedures. In conclusion, the Tribunal finds that there was no denial of due process in relation to the Bank’s decision to disregard the legal opinion that it had considered before imposing the sanctions. By considering the information provided by the Applicant, the Bank met its due process obligation. —Mr. K v. ADB, par. 64, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 291.

b. Burden of Proof

20. Having regard in particular to the above four items submitted by the Applicant to prove the factual basis of his claim, and to the detailed statements made by him in his Application and Reply, the Tribunal believes that the Applicant has made out a prima facie showing of the existence of the unofficial practice of sharing available employee awards as broadly as possible, suggesting that the Bank is in some relevant way at fault (see the quotation below from de Raet). This prima facie case serves to shift to the Bank the burden of proving that the claimed unofficial practice did not in fact exist and that the “B” performance ratings actually given by the Department Head in the Applicant’s PERs for the years 1987, 1988 and 1989 must be given exclusive and literal effect. As explained by the World Bank Administrative Tribunal in de Raet:

“(3) The third point is that, despite the assertion of the Applicant to the contrary, it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power - not, that is, until an Applicant has made out a prima facie case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner.” (WBAT Reports 1989, Decision No. 85, para. 57). —Tay Sin Yan v. ADB, par. 20, Decision No. 3, 8 January 1994, ADBAT Reports, Volume 1, pages 42-43.

31. In the application of these standards and norms, determination of whether or not arbitrariness or abuse of discretion has been shown and determination of whether due process in the course of evaluation of performance was observed, are perforce closely related. Arbitrariness is frequently manifested by lack of regard for observance of proper procedure in the investigation of alleged nonfeasance or malfeasance. At the same time, the substantial fairness, or unfairness, of the managerial decisions and acts complained of is commonly of telling effect in evaluation of allegations of lack of due process. The rule that the Applicant must carry the burden of showing prima facie that the managerial act or decision being challenged was vitiated by arbitrariness or disregard of due process, is the common rule that is recognized in all judicial or quasi-judicial

35. Evaluating the performance of the Applicant is a matter for her supervisor(s). The Tribunal may interfere in such evaluation only under the strict conditions set out under the Lindsey formula, namely if it appears that the evaluation has not been reached by the proper processes, is arbitrary, discriminatory or improperly motivated or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.

36. The Tribunal also notes that “the burden of proof rests on the person who makes allegations, namely, the Applicant in the present case” (see Mr. E, Decision No. 103 (12 February 2014)). —Ms. G v. ADB, pars. 35 - 36, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, page 82. (See also Performance Evaluation, In General)

89. The Tribunal recalls that the Applicant has the burden of showing that the Bank’s finding of misconduct “could not reasonably have been taken on the basis of facts accurately gathered and properly weighed” (Lindsey, supra). Before imposing disciplinary measures, the Bank had a duty to show by a “preponderance of the evidence” that the Applicant had 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). —Mr. K v. ADB, par. 89, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 297.

91. A misrepresentation “that knowingly or recklessly misleads” is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2012, specifies that “misconduct does not need to be intentional,” and that it extends to reckless acts or omissions (para. 2.1). 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 his vehicle and that he was a party to the fraudulent scheme. He has not met his burden of proof to show that the misconduct was not fairly or properly attributed to him. 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 the ADB to process and endorse his TEV application. —Mr. K v. ADB, par. 91, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 298.

105. Having considered the arguments made 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 had a duty to show that a “preponderance of the evidence” indicated that the Applicant had 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).

106. 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. …” - Ms. L v. ADB, pars. 105 - 106, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 335.

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. …

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. —Ms. M v. ADB, pars. 80 – 81 and 96, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 372.

c. Procedure

9. It is also inherent in this system that those who exercise a discretion in respect of staff employment should have reliable first-hand evidence of any deficiencies alleged; that when evidence is gathered it should be related to the whole of the period and range of activity under consideration and that hearsay and indirect evidence should be carefully weighed for reliability and cogency. Individual complaints or adverse comments by one staff member of the conduct of
another should not be taken into account unless first brought to the attention of the latter, to whom an opportunity of replying should have been given including, where appropriate, the opportunity of meeting and questioning the complainant or witness. —Lindsey v. ADB, par. 9, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 4.

36. It is sufficient for the Tribunal to limit its conclusions to the procedures followed in relation to the Applicant. The Tribunal is, in particular, struck by the seeming absence during the relevant period of any system of regular staff evaluation applicable to an officer of the Bank at the Applicant’s level. The record reveals not one contemporaneous document communicated by the Bank to the Applicant complying with the basic requirements of due process in the field of staff evaluation. Neither during his probationary period during his first year of employment in the Bank, nor in the remaining period of his initial three-year term, nor especially in the subsequent period of extension, also described by the Bank as “probationary”, were the criticisms of the Applicant’s personal behaviour spelled out in specific detail. Nor was any specific indication given of the change of conduct that was required of the Applicant if he was to meet the standard of personal performance called for by the Bank. If such documents exist, it was, of course, the duty of the Bank to produce them to the Tribunal. No order of the Tribunal to this effect is required. Such documents would have been an essential ingredient of the proof of the Bank’s contention that there was no irregularity in the process leading to its eventual conclusion not to extend the Applicant’s employment. The fact that the Bank has not produced such documents can only be taken to reflect the fact that they do not exist. —Lindsey v. ADB, par. 36, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, pages 14-15.

25. A.O. 2.03, paras. 2.3 and 2.4, requires the Bank when conducting a staff performance review to give a staff member an opportunity to formally discuss the review with her supervisor. Such performance reviews pertain, inter alia, to decisions on extension or regularization of fixed-term appointments. —Pal v. ADB, par. 25, Decision No. 52, 10 August 2001. ADBAT Reports, Volume 6, page 6.

65. Section III 2 of the then governing Performance Management Implementing Guidelines provides that:

Supervisors should prepare a Note-to-File to document discussions of significant or ongoing and persistent performance concerns. The Note-to-File should be signed by both the supervisor and the staff member. The Note-to-File should be normally referred to during the interim or year-end assessment exercises.

66. Despite the Bank’s contention that the Applicant should have realized from supervisory editing and revising of her submissions that her work did not meet minimum standards, or that it was a poor quality of work, the Bank failed to conform to the recommended Guidelines to advise the employee of her shortcomings or to provide the written documentation in timely fashion. Such timely notification, even though not then a mandated requirement, must be viewed as a reasonable prerequisite to any improvement in employee performance if an employee is to benefit from such criticism, particularly to avoid negative evaluations. The September and October 2006 criticisms occurred only a month or two after her interim review which lacked any evidence of criticism, and more than four or five months before her annual
review. A timely discussion and written Note-to-File would have alerted the Applicant to any alleged shortcoming in adequate time for her to improve her performance. Yet nothing was done to record in timely fashion these alleged failings, and the record is bereft of any written criticism, let alone signed acknowledgment of such discussion. The concept of a discussion and Note-to-File with signed acknowledgment is aimed specifically to avoid the uncertainty of adequate notice presented in this case.

67. There is no written record to establish that any of the alleged failures of which her supervisor’s were supposedly aware of after 31 July 2006 were ever communicated to the Applicant prior to her review. The introduction of critical comments in tardy fashion as here, when the 2006 assessment period had closed, does not guide the employee to improved performance. Rather than as a constructive vehicle for encouraging performance improvement, it appears instead to be a self serving device for management to attempt to erase years of PDPs which supervisors had written up and endorsed as evidence of superior workplace performance in order to support an unexplained and apparently random decision by the DG, CWRD, to rate her as unsatisfactory. Furthermore, from the absence of any “Comment” on the form, there is no evidence that the DG, CWRD was aware of those alleged failings at the time he rendered the “U” rating. On its face the conflict between the written record including her favorable ratings on the Results and Behavior Assessments in the 2006 Review and the “U” rating in the same document without comment compels a conclusion that the latter was arbitrary and unfounded. That doubt is underscored by the manner in which the Bank apparently undertook to create and bolster the record after 26 February 2007 when the Applicant registered her surprise and sought review of the “U” rating. The actions of the Bank which followed the “U” rating, raises questions of the mala fides and indeed the motivation of its action.

68. On 4 March 2007, the Bank solicited a number of the Applicant’s prior supervisors noting that “A weakness in our case is that [the Applicant] received fully satisfactory ratings from 2000 to 2005” and requesting reply emails commenting on her performance beyond and presumably at odds with those introduced in her annual evaluation forms. Nearly a dozen of the Annexes attached to the Bank’s Answer are devoted to some 40 single spaced pages of such after-the-fact statements. The Bank developed and promulgated a set of Guidelines to provide timely discussion of employee performance with provision for written Notes-to-File countersigned by the affected employees precisely to avoid what the Bank has done in this case: attempting to provide adverse evidence from as far back as her 1999 application for employment to which the Applicant has had no opportunity for response or rebuttal. Such a course of action deprived itself of an opportunity to create and develop a record system which both the Bank and staff can rely on to accurately assess performance during the period covered by the PDP. The whole purpose of the Note-to-File procedure is to assure that the determining officers have all pertinent information vetted by the employee when making their assessments of performance. Having promulgated such procedures, the Bank is obliged to use them and such ex post facto entries have been excluded from our consideration. If the Bank believes the annual assessments fail to provide an accurate assessment of an employee’s weaknesses or shortcomings, the appropriate remedy is to require its supervisors to be more transparent and critically honest in evaluating employees in their charge in a timely fashion.
69. In addition, in soliciting the comments of the supervisor who conducted the 31 July 2006 review, the Bank inserted into the record its proposed recitation of that interview totally ignoring the supervisor’s efforts to correct the accuracy thereof.

70. Given that record of after-the-fact efforts to alter or modify the record that was before the rating officials, and the total absence of any explanation for the “U” rating by DG, CWRD and Director, CWOC, it is difficult to find any justification for the disparity in view represented by the imposition of the “U” rating in the light of the then available record. Accordingly, the Tribunal finds the “U” rating in the light of the entire written record at the time to have been arbitrary and without any justification or explanation. —*Ibrahim v. ADB*, pars. 65-70, Decision No. 86, 15 August 2008. *ADBAT Reports, Volume 8*, pages 135-136.

29. The legal standards and norms which pertain to the dispute between the Applicant and the Bank in the present case, are well known, having been repeatedly invoked and applied in previous cases. In the very first Decision rendered by the Tribunal *Lindsey*, Decision No. 1 [1992], *I ADBAT Reports* 5, the Tribunal ruled:

12. … The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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 ….

…

7. *The application of such due process must involve a fair and balanced scrutiny of the staff member’s qualifications, as well as of his performance during the period he has already served.* … (See, for example, the decisions of the World Bank Administrative Tribunal in *Saberi*, *WBAT Reports* 1981, Decision No., 5, para. 23; *Buranavanichkit*, *WBAT Reports* 1982, Decision No. 7, para. 28; and *Thompson*, *WBAT Reports* 1986, Decision No. 30, para. 28).”

…

9. … *[W]hen evidence is gathered it should be related to the whole of the period and range of activity under consideration and that hearsay and indirect evidence should be carefully weighed for reliability and cogency.*

…

10. *Any enquiry into the performance or conduct of a staff member must be carried out in accordance with the requirements of due process of law, in such a way that the establishment of the truth or falsehood of allegations is not*
itself a subject of discretion but is the consequence of an objectively verifiable and rationally explicable examination of the facts. Where the continuance or not of a staff member’s livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections.

...

38. … [I]f the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. It is this absence of record which makes it so difficult to understand how the quality of the Applicant’s performance in his first year of service could be deemed to have so seriously declined thereafter.” (Emphases added)

30. The twin requirements of proper evaluation of staff members’ performance: a) no arbitrariness; and b) objective evaluation of performance through recourse to fair and reasonable procedure, have been repeatedly elaborated and applied. Thus, in Dalla (Nos. 1 and 2), Decision No. 73 [2005], VII ADBAT Reports 63:

59. As noted in Haider, Decision No. 43 [1999], V ADBAT Reports 6, para. 18: In previous decisions, this Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (Lindsey, Decision No.1 [1992], I ADBAT Reports 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated, or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.

… The onus is on the Applicant to establish through the presentation of evidence that the imposition of the six-month evaluation constituted an abuse of discretion. (see Alexander, Decision No. 40 [1998], IV ADBAT Reports 52, para. 38). It was the responsibility of the Applicant and not of this Tribunal to garner such testimonials or corroborative documentation in timely fashion to prove his case. The record shows numerous allegations, but we find no credible evidence to support those allegations. Accordingly we must deny the claims of procedural irregularity in the imposition of the six-month evaluation.

...

68. … We find appropriate to our reasoning in this case the decision of the ADBAT in Behuria, ADBAT Decision No. 11 (No. 2) [1996], paras. 3 and 11:

3. Decisions with respect to the evaluation of staff members’ performance are within the discretion of the Bank. Such discretion
however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated or adopted without due process.

11. It is true, as the Applicant says that prejudice is usually concealed and its existence has to be established by inference. Yet, in the view of the Tribunal, the allegations of the Applicant are not sufficient to establish bias or lack of responsibility on the part of his Manager or the Director with respect to the three items of the PER. The applicant, has, basically, asserted his disagreement with several of the Respondent’s assessments of his performance, but this can not take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record. [Emphases added] —Azimi v. ADB, pars. 29-30, Decision No. 88, 23 January 2009. ADBAT Reports, Volume 8, pages 181-184.

74. In the light of the above, the Tribunal concludes that the Respondent did not adhere to proper procedures in relation to the Applicant’s communication of 9 May 2011 to the Country Director complaining about Mr. X in view of the following.

(1) The Country Director failed to discharge his duties under paragraphs 5.1 and 6.1.3 of AO 2.11 in respect of the Applicant’s informal complaint of harassment.

(2) If the supervisors’ account of their meeting with the Applicant on 11 May 2011 is true, their failure to produce a note of the meeting and to provide it to the Applicant amounts to a breach of the Respondent’s obligations of fairness and transparency under paragraph 2.1 of AO 2.02. —Mr. E v. ADB, par. 74, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 26.

40. Accordingly, the Tribunal suggests that the Bank do more to abide by both the spirit and the letter of its own Guidelines. The Tribunal also observes that the automatic operation of the online PR system might not be sufficiently flexible and transparent, for example, to accommodate instances where a staff member has brought issues of process to the Bank’s attention. —Ms. G v. ADB, par. 40, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, page 83.

46. Finally, with regard to the question whether this was an unjust process, the Tribunal considers that this was not unjust as reasonable standards of due process were met through the opportunities for discussions with the Bank. While the 2013 PR Tips and Reminders included for the online supervisor to indicate on the electronic form “up to three input supervisors who the online supervisor will contact for feedback about the staff’s performance”, the Tribunal notes that Guidelines or Tips are not mandatory and therefore their simple breach cannot be breach of due process. (Cf. Ibrahim, Decision No. 86 [2008] VIII ADBAT Reports, para. 51). However, the failure to provide the Applicant with the names of all her input supervisors on the Applicant’s PR form and the fact that she did not become aware of the two further input supervisors until the end of the process were to her disadvantage, lacked
transparency and not in the full spirit of the PR. —*Ms. G v. ADB*, par. 46, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, page 85.

53. The Applicant challenges the procedures which led to the final recommendation to terminate the Applicant’s employment. In summary the steps taken were as follows:

(1) The Director BPHP notified the Applicant that he would be placed on a PIP for a three-month period which, if unsatisfactory, could lead to termination of employment (AO 2.05, para. 10). A work-plan was agreed by the Applicant.

(2) Monthly meetings to review progress on the PIP work-plan were held, resulting in improvements each month in timeliness but issues remained with the quality and standard of his output, communication skills and work ethic. The Applicant submitted comments to the NTF following the final meeting in August 2018.

(3) On 9 November 2018, the Director SDCD informed the Director, BPHP that the Applicant’s performance through the PIP was unsatisfactory (AO 2.05 para. 10.4).

(4) On 3 December 2018, the Director, BPHP advised the Applicant of the recommendation to terminate his employment for unsatisfactory performance (AO 2.05 para. 10.4), and that a panel would be constituted to review the recommendation.

(5) The Applicant provided a 22-page response for the panel’s consideration, in which he submitted that his 2017 and PIP unsatisfactory performance ratings should be replaced with satisfactory ratings.

(6) This response was discussed with him by the Director, BPHP and the HR Business Partner on 15 January 2019, and the following day the Applicant submitted additional comments.

(7) On 8 February 2019 the panel convened (AO 2.05 para. 10.4), considered relevant documents including all comments provided by the Applicant, agreed that termination of the Applicant’s employment was warranted, and on 18 March 2019, submitted its written recommendation through the Director, BPHP, to the DG, BPMSD for his approval.

(8) The DG, BPMSD approved the recommendation to terminate the Applicant’s employment effective upon receipt of the notice (AO 2.05, para. 10.6), with payment in lieu of 30 days’ notice.

(9) The Director, BPHP informed the Applicant on 19 March 2019 that his appointment was being terminated for unsatisfactory performance with immediate effect (AO 2.05, para. 10.6).

54. The Tribunal finds that the procedures during the PIP process assessing the Applicant’s performance, the panel recommendation to terminate employment, and the termination of the Applicant’s employment were correctly followed pursuant to AO 2.05.

55. The Tribunal finds that the Applicant’s allegations that he was not provided an opportunity to discuss his comments in breach of AO 2.05, para. 10.4 are untenable. The Applicant provided extensive written comments to Director, BPHP on 18 December 2018. On 15 January 2019, in compliance with AO 2.05, para. 10.4, a meeting was held between the
Applicant, Director BPHP and the HR Business Partner for the purpose of discussing the Applicant’s comments before they were transmitted to the Panel. As a result of this meeting, the Applicant was provided with an additional opportunity to supplement his written comments and he did so on 16 January 2019. The Minutes of the Panel meeting reflect that Panel members were provided with “all documents relevant to the case” and confirmed the recommendation to terminate the Applicant’s appointment “taking into account [the Applicant’s] comments.”


6. Evaluation Reports

7. The application of such due process must involve a fair and balanced scrutiny of the staff member’s qualifications, as well as of his performance during the period he has already served. It is now a very common feature of the employment practices of international organizations that periodic written assessments or evaluation reports are prepared on the performance of staff members. These reports detail both the satisfactory and the unsatisfactory features of the employee’s performance and, if criticisms of performance are made, they are required to be accompanied by a clear indication of the steps which the staff member should take to improve the situation. Experience has shown that this practice is an important element in the avoidance of administrative arbitrariness or discrimination. (See, for example, the decisions of the World Bank Administrative Tribunal in Saberi, WBAT Reports 1981, Decision No. 5, para. 23; Buranavanichkit, WBAT Reports 1982, Decision No. 7, para. 28; and Thompson, WBAT Reports 1986, Decision No. 30, para. 28.) —Lindsey v. ADB, par. 7, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 3.

38. In short, the Tribunal finds that the decision of the Bank not to extend the Applicant’s period of employment was invalidated by failure to apply due process. The fault lay in the insufficiency of the system of establishing reports on senior personnel. What was lacking was a procedure that would ensure that senior staff whose performance within the Bank might still be called into question would enjoy proper protection. Even at high levels, if the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. It is this absence of record which makes it so difficult to understand how the quality of the Applicant’s performance in his first year of service could be deemed to have so seriously declined thereafter.

—Lindsey v. ADB, par. 38, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 15.

22. In Lindsey, Decision No. 1 [1992], I ADBAT Reports 1, the Tribunal stated certain principles which it would follow in regard to the review of the exercise of discretion by the Bank:

[T]he fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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. (id., at 5, para. 12)

Where the continuation or not of a staff member’s livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections. (id., at 4, para. 10)

[I]f the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. (id., at 15, para. 38) —Toivanen v. ADB, par. 22, Decision No. 51, 21 September 2000. ADBAT Reports, Volume 5, pages 78-79. (See also Tribunal, Jurisdiction, Limits to Jurisdiction, Performance Evaluation)

44. The Tribunal notes that according to AO 2.08, para. 4 the Applicant has no right to receive “working papers” that are defined as preparatory materials generated for the exercise of managerial responsibilities, or those that deal with general staff matters. As such, the documents claimed by the Applicant are not subject to the obligations under AO 2.08 para. 2.2 because they are working papers. It is also for that reason that these documents are not in the staff’s personnel files kept by BPMSD.

45. Noting the Bank’s refusal to comply with the Applicant’s request on the grounds of confidentiality, the Tribunal recognizes the delicate balance between requirements of due process on the one hand and the confidentiality designed to safeguard reliable appraisals on the other. (cf. ILOAT Judgment No. 2700, (104th Session, 2008), Considerations 5 to 7.) As a general principle, it would be open and fair for a staff member to know the names of all those persons acting as input supervisors, and, in appropriate circumstances, have access to either the written assessments provided, or a process where discussion of the assessment can take place. In this case, the Bank has set up such a process of discussion, and yet the facts indicate that the Applicant chose not to engage in that process. Thereby, from the Applicant’s own actions, she has foregone the opportunity to discuss the basis of her assessment. The Applicant has explained this failure to engage on the basis of an alleged statement that her assessment was “non-negotiable”. However, as discussed before, the Applicant has not substantiated this allegation and failed to discharge her burden of proof. —Ms. G v. ADB, pars. 44 - 45, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, page 84.

43. In addition, it is well established that the “burden of proof rests on the person who makes allegations.” (Ms. G, ADBAT Decision No. 106 [23 September 2015], para. 36). —Mr. I v. ADB, par. 43, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, page 230.

7. Failure to Follow Standards and Procedure

50. The performance evaluation system was intended to assess not only a staff member’s performance level, but to place him in the correct performance zone. Parts 3, 4, 6 and 8 of the PER form set out requirements integral to the evaluation process. Non-compliance with those requirements, in relation to the evaluation of the Applicant’s performance, was not minimal or technical, but substantial. Parts 3 and 4 were not completed; the Division Manager failed to record in Part 6 adverse comments which he later made without the Applicant’s knowledge giving him no opportunity of rebuttal; there was no discussion as required by Parts 4 and 8, despite the Applicant’s note in Part 5; the Applicant was not given the direction and guidance contemplated by Part 4; and it was not the Director, BPMSD, who completed Part 8. Moreover, if, as stated by the Division Manager on 7 January 1994, the supporting staff who were rated as “Satisfactory” were not ranked, it is difficult to see how the Bank assessed the Applicant in relation to the four staff members given S2 ratings at the meeting on 29 July 1993 and the subsequent meeting. If they were in fact ranked, there are serious doubts as to fairness of the methodology used (including the panel meetings). Two of those staff members had fewer “ticks” on the boxes intended for the highest rating; and the Applicant did not have the benefit of his Division Manager’s participation at the third meeting at which two of the staff members were awarded S2 ratings in preference to the Applicant. These were administrative errors and irregularities, which were both significant and prejudicial.

51. The Tribunal holds that the failure to follow a fair and reasonable procedure, and these administrative errors and irregularities, vitiates the process by which the Applicant’s performance was assessed in order to rank him in relation to his colleagues. —Isip v. ADB, par. 50-51, Decision No. 9, 8 January 1996. ADBAT Reports, Volume 2, pages 14-15.

38. The Tribunal notes that the observance by the Bank of all of the elements of the implementing guidelines in respect of the performance evaluation found in A.O. 2.03, relating to providing the Applicant with feedback concerning his performance, may have been less than perfect. The Tribunal must, however, also note that the Applicant materially contributed to the difficulties encountered by the Bank in ascertaining the level of quality of his performance and in giving the Applicant “feedback” on such performance, by refusing to report to his supervising officer—the CD, AFRM, and to meet with the latter for the second day of his 2006 performance review and generally to comply with ADB requirements and processes. —Azimi v. ADB, par. 38, Decision No. 88, 23 January 2009. ADBAT Reports, Volume 8, page 186.

39. x x x Mr. Lahiri may have known the Applicant as he knew a lot of other staff members but before October 2007, he was not the supervisor of the Applicant and, therefore, he did not have the responsibilities of a supervisor, which are described in detail in the “Competency Evaluation Guide” (Annex 5 to the Answer).

40. In other words, it could not be expected from Mr. Lahiri that for the period January to October 2007 he had the detailed knowledge of the Applicant’s performance as would be required of a supervisor.
41. Other reasons given by Mr. Lahiri for his actions are likewise not convincing: “I felt that Mr. Murray was perhaps … overly generous”, nor his reference to the practice “in Indian civil service …”.

42. In summary, we find that, the Bank acted improperly in the final assessment of the Applicant and that the Applicant is entitled to a measure of recompense. —R. Keith Leonard v. ADB, pars. 39 – 42, Decision No. 92, 19 August 2009. ADBAT Reports, Volume 8, pages 232 – 233.

8. Feedback or Performance Problems

42. The Applicant argues that the President did not bring performance problems of the Applicant to his attention in a timely manner so that he could correct them, thereby failing to follow the procedures for performance management as set out in A.O. 2.03 and the Implementing Guidelines.

43. An important purpose of the 2003 policy paper was to strengthen the effectiveness of OED by making it independent and remove undue influence, if any, of the President. The Tribunal finds it reasonable that the President did not give feedback directly to the Applicant on his performance during his three-year appointment out of respect for the independence of the Applicant’s position. However, the President still retained broad discretion in deciding whether or not to recommend the reappointment of the Applicant at the end of his initial term of three years, and his decision not to recommend was not arbitrary. —Murray v. ADB, pars. 42-43, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, page 222.

51. From that date until the end of 2006, the Applicant was involved in four projects including an August Aide Memoire concerning a visit of an Afghanistan team to ADB headquarters, a September Regional Management Mission to Pakistan, a November briefing paper and a December Board paper on Afghanistan. Although management wrote up Notes-to-File on these incidents, it failed to do so until after the issuance of the end-of-year Appraisal containing the “U” rating and it was not a part of her file at the time of the performance review. The “U” rating itself is more than a warning that the performance level of a staff member may be declining. It partakes of the nature of a penalty for a performance level that has already crashed. There is no evidence of any discussion or complaint as to her performance at the time of, or immediately after, those four projects took place. The Bank has established a useful procedure for providing timely discussion of “matters affecting or flowing from events and accomplishments throughout the performance cycle” before the formal assessment exercise. In this case the Bank ignored the goals of the Guidelines by delaying the issuance of the Note-to-File until the 2006 assessment exercise had been completed and the “U” rating imposed. It is difficult to characterize such after-the-fact discussion and imposition of a “U” rating as being helpful feedback to help the Applicant in her performance when the Note-to-File is not provided until that performance period had already closed. Rather, it appears to be an effort to buttress the Bank’s position at a time when the employee was past opportunity for benefiting therefrom. Although it is obviously beneficial for an employee to be alerted to performance problems in a timely fashion, the Tribunal finds nothing in the governing law or then applicable Guidelines
which mandates such discussion of performance or issuance of a Note-to-File at the time a performance concern arises. They are clearly merely “guidelines”. Although encouraged, Notes-to-File were not required. Judged by the then governing Guidelines, there was no managerial impropriety in the manner in which the Applicant’s case was processed prior to the 2006 end-of-year PDP. —Ibrahim v. ADB, par. 51, Decision No. 86, 15 August 2008. ADBAT Reports, Volume 8, pages 131-132.

9. Marginal or Unsatisfactory Rating

24. It is noteworthy that in that system of evaluation, marginal is a distinctive, separate and specific rating. A Department/Office can propose a closely supervised work plan for the staff member only if a staff member is given a marginal or unsatisfactory rating. The Applicant did not have a marginal or unsatisfactory rating and his work performance could not have been said to have been ‘judged’ marginal. The Meeting proceeded on a false assumption and in so doing the Meeting was violative of due process and norms of fairness.

25. Assuming, for the sake of argument, that the Meeting was held as part of an ongoing process of performance review which was within the Bank’s discretion, and that the decision to impose the work program was based on the need for improvement in the Applicant’s work performance in order to realize his full potential, the Meeting was still in manifest error. Under the Guidelines, performance review meetings can be held from time to time in preparation for the annual PER and to avoid surprises. The performance review in the Meeting was, however, held under threat of dismissal.

26. In the light of the foregoing discussion, the Tribunal holds that the Meeting was irregular and that the 6-month provisional work plan imposed on the Applicant was inoperative and of no effect. The Tribunal directs the expunction of any remarks in the Bank’s records to the effect that the Applicant’s work performance was rated or judged marginal. The Tribunal does not, however, consider it appropriate to direct the Bank or its officers to offer apologies to the Applicant for the error or invalidity of the Meeting and rejects the request of the Applicant in that respect.

27. The Tribunal also denies the request of the Applicant for promotion to Level 6 as it would constitute an affirmative exercise by the Tribunal of a managerial power which belongs to the Bank and not to the Tribunal. As pointed out in Lindsay WBAT Reports 1990, Decision No. 92, para.29, ‘The Tribunal will review such matters only for the purpose of ensuring that the Administration has behaved in a procedurally correct way and that it has not reached a substantive conclusion that is not reasonably sustainable. It is not the task of the Tribunal to substitute its own assessment for that of the Bank.’

28. The Applicant’s right to due process has been infringed, and for that he is entitled to equitable compensation as assessed by the Tribunal. —Chan v. ADB (No. 2), pars. 24-28, Decision No. 36, 7 August 1997. ADBAT Reports, Volume 3, pages 117-118.
10. **Past Performance as Criterion**

48. *x x x* The Tribunal agrees with the Bank’s submission that the use of past performance as a criterion for a program which operates prospectively does not offend the principle of non-retroactivity. A PER is the result of a contemporaneous and participatory process of evaluation, and must accurately reflect the staff member’s level of contribution and achievement. If a staff member does not accept its accuracy - whether “high”, “average” or “low” - he must contest it promptly. If he does not, he cannot but know that whenever for some legitimate purpose the quality of his past performance needs to be ascertained, the Bank would be entitled - and, indeed, obliged - to refer to his PERs as being the proper and the best evidence of such performance. To a staff member’s service, or to the PER awarded in respect of such service, there attaches no accrued right of participation in a future, as yet unannounced, separation program. —*Breckner v. ADB*, par. 48, Decision No. 25, 6 January 1997. ADBAT Reports, Volume 3, pages 31-32.

11. **Performing Extra Duties**

6. It is the conclusion of the Tribunal, however, that performing some extra duties is usually expected of the Bank’s staff. Whether or not some extra work was of one’s “own seeking” is immaterial. Although the Appellant argues that the rating given to him is unjust because he performed some extra work and that he would have been given a higher rating had there not been bias, the Tribunal is not persuaded by that argument. —*Behuria v. ADB (No. 2)*, par. 6, Decision No. 11, 8 January 1996. ADBAT Reports, Volume 2, page 29.

12. **Performance Improvement Plan**

32. According to the staff handbook, “Improving Performance: a Guide for Staff”, a Performance Improvement Plan is recommended for those probationary staff whose performance is “clearly deficient.” On 24 March 2004, the date Mr. Shimabuku requested to be placed on a PIP, the Bank had approved the extension of his probationary period until 15 July 2004. Thus, Mr. Shimabuku, who was still on probation, could request to be placed on a PIP in order to improve his performance. However, in reality, the extension of the probationary period was the way chosen by the Bank to allow Mr. Shimabuku to remain until 15 July 2004, his effective date of resignation: besides, his workload had been adapted in consideration of the next and final end to his employment. It was, therefore, useless to give to Mr. Shimabuku a new chance to improve his performance. In any case, his appointment would have ceased on 15 July 2004. The decision of the Bank not to agree with the request of Mr. Shimabuku to be placed on PIP was justified and not arbitrary. —*Shimabuku v. ADB*, par. 32, Decision No. 72, 19 August 2005. ADBAT Reports, Volume 7, page 60.

62. In compliance with its authority to remedy performance that is found to be deficient in the PER, the Bank prepared a Performance Improvement Plan (PIP) to assist in the improvement of his performance, as “a formal process that is geared towards enhancing performance of staff and helping realize full potential” as contemplated by the publication
“Improving Performance - A Guide for Staff” issued by the Director, BPMSD, in August 1998. Although the Applicant protested the development of the PIP as being based on a flawed PER, our ruling that the PER was properly conducted leads us to endorse the right the Bank to develop the PIP for the Applicant. —Dalla v. ADB, par. 62, Decision No. 73, 19 August 2005. ADBAT Reports, Volume 7, page 85.

13. Quashal of Rating: Effect

12. The resulting position is that the Tribunal’s decision requires that the Applicant must not be prejudiced, in respect of his salary increase, by the absence of a PER for 1995, and that that increase cannot be determined by reference to the C3 rating which the Tribunal quashed. His performance in 1994 was rated as C2, and in the absence of a valid PER for 1995, due to no fault whatever of his, it must be assumed - in the absence of a proper appraisal to the contrary - that his performance continued at the same level. Following therefrom, the Bank is directed to adjust the Applicant’s 1996 salary increase as if he had a C2 rating for 1995. —Chan v. ADB (No. 4), par. 23, Decision No. 42, 8 August 1998. ADBAT Reports, Volume 4, page 79.

14. Renewal/Extension

31. The Tribunal finds the debate conducted between the parties over “renewal” versus “extension” not to be dispositive. The crux of the matter is whether the procedures set out for the initial appointment of DG, OED - appointment by the Board of Directors upon the joint recommendation by the DEC and the President - are required for his “reappointment” for a further two years. Acceptability of DG, OED to both the DEC and the President is clearly a prerequisite of his appointment for the initial term of three years. Although the 2003 policy paper did not expressly require the recommendation of the DEC and the President for the reappointment, it is reasonable to conclude that the same requirement applies. The Tribunal considers that because of the importance of the position of DG, OED, the implicit assumption of the policy paper was that if the performance of DG, OED during the initial term meets the approval of the DEC, the President, and the Board, he may be “reappointed” for the position for a further two years. Because it is a repeated appointment, the same procedures as used for the initial appointment are called for. DG, OED is to be reappointed by the Board of Directors upon the joint recommendation by the DEC and the President. The term of DG, OED cannot be renewed for a further two years in the absence of a positive recommendation by the President. The initial appointment required the confidence and support of both the DEC and the President and those same circumstances are appropriately regarded as preconditions for reappointment. As the Applicant did not have the confidence and support of the President at the end of three years, he did not meet the requisite preconditions for the reappointment. —Murray v. ADB, par. 31, Decision No. 91, 23 January 2009. ADBAT Reports, Volume 8, page 219.
15. Reprisal

18. The letter of 26 March 1996 may reasonably have been understood to mean that the Applicant would receive a rating which would be “fair and truly reflective” of his performance “without comments which could negatively affect [the Applicant’s] future promotion opportunities” only if he withdrew his Appeal No. 17 of 1995 and his request for apology. That was not only a breach of due process but also a threat of reprisal in contravention of Section 6.6(a) (Freedom from Reprisals) of Administrative Order No. 2.06 (Grievance and Appeal Procedures). —Chan v. ADB (No. 3), par. 18, Decision No. 38, 6 January 1998. ADBAT Reports, Volume 4, page 6.

75. The Applicant’s complaint concerning the 2013 performance appraisal is summarized at paragraph 38. It is settled law that the assessment of staff members’ Annual Performance is essentially made by the Bank and it is not for the Tribunal to substitute its assessment. As part of this reviewing process, the Tribunal has examined with care AO 2.03 (“Performance management, assignments, lateral transfers, promotion, and position classification and staff level complement system”) together with the applicable Performance Management — Implementing Guidelines. It is the Tribunal’s task to consider the facts of the present case in the light of these principles and specific provisions in the administrative order and the guidelines.

76. The Tribunal’s conclusions are as follows.

1. We do not accept that the Applicant’s poor performance assessment was a result of retaliation because she had initiated formal proceedings within the Bank’s administrative process.

2. The Bank was fully entitled as part of the 2013 performance appraisal to have the CE and the DCE as input supervisors, which is permitted by virtue of paragraph 6 of part B of the Implementing Guidelines.

3. However, the Bank itself recognized that it could have better informed the Applicant in 2013 of the unsatisfactory aspects of her performance, but did not do so as these deficiencies were known to the Applicant as they were raised with her in 2012. The Bank also recognized that it had not reported the Applicant’s major performance issues to BPHR in accordance with Section IV, A of the Implementing Guidelines, but did not do it because BPHR were in any event aware of these deficiencies.

4. In any event, the Tribunal finds that the Applicant’s 2013 Performance appraisal was substantially in accordance with the rules and procedures and it has not been motivated by extraneous, irrelevant or retaliatory considerations.
5. Finally, such minor criticisms as could be made had no effect whatsoever on
the outcome of the Applicant’s performance review. —Claus vs. ADB, pars.
75 – 76, Decision No. 105, 13 February 2015. ADBAT Reports, Volume
10, page 70.

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

   1. According to the Applicant (paragraph 18 of her Addendum Application), BPMSD
“undertook its own assessment of the claim [of misconduct through retaliation]
which ultimately ended in an exoneration of [the CE]”. It is to be noted that BPHR
is the HR section of BPMSD called up to investigate whether or not there has been
misconduct with view to a possible referral to OAI under paragraph 4.6 of AO 2.10.
The Tribunal accepts the Applicant’s analysis insofar as it described BPMSD,
which means for this purpose BPHR, undertaking an assessment that exonerated the
CE.

   2. It follows from this implicitly that, following its assessment, BPHR concluded that
there was no misconduct to refer to OAI.

   3. Accordingly, the Tribunal concludes that the Applicant’s claim that the Bank was at
fault in not referring the matter to OAI is without merit. —Claus vs. ADB, par. 79,

72. The Tribunal notes that the Applicant did not raise the above allegations of
harassment until 25 February 2016 when she requested for Administrative Review against
the decision of termination. The Tribunal observes that the Bank has processes in place under AO
2.11 to address allegations of harassment. The Applicant has not filed a formal complaint at any
time against the alleged harassment by her supervisor and her supervisor has provided a
statement denying the allegations. The Applicant has thus failed to discharge her burden of
proving that the alleged incidents of harassment had occurred so as to vitiate the decision taken
on her performance evaluation by her supervisor (See, Ms. D, Decision No. 95 [2011], IX
ADBAT Reports, 36, para. 35).

73. The Tribunal concludes that the Applicant’s claims of harassment, discrimination
and improper motive remain unsubstantiated. —Ms. Maria Lourdes Drilon vs. ADB, pars. 72 -
73, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, page 165.

16. Twelve-Month Performance Evaluation Review

66. The Applicant has failed to meet his burden of proving that the twelve-month
PER “lacked objectivity, was improperly motivated and [was] a sham.” The record shows that
the Applicant was given an explicit and measurable program for improving his performance
following the issuance of the six-month evaluation, and that he was provided full opportunity to
express his position, provide evidence to support his allegations and repeated opportunity to
discuss his complaints with members of management prior to the decision to not confirm his
continued employment.

67. Yet the evidence shows that he continued to protest his allegedly unfair treatment
and showed a distinct unwillingness to take advantage of the opportunity provided to improve his
performance prior to the twelve-month PER. Indeed he even continued to protest the authority
and legitimacy of the members of supervision charged with the authority for conducting his
twelve-month review. That second review demonstrated that there had been no material
improvement in any of the three areas identified as deficient in the six-month PER and requiring
improvement as a condition for his continued employment. As demonstrated by his continued
protests, and by his failure to meet the extended deadline of 15 July 2004 for completion of his
portion of the PER form, he provided clear evidence that he failed to appreciate the importance
of conformity to ADB procedures, culture and work environment.

68. The evaluation done by his supervisor was consistent with ADB rules and
procedures, and appropriate considering her continued and on going responsibility for
supervising the Applicant both prior to the six-month review and during the period between the
six- and twelve-month PERs. She was most familiar with the requirements and performance of
his job; she was best suited to determine whether he had conformed to the recommendations for
improvement in the six-month PER and in the PIP. We find appropriate to our reasoning in this
case the decision of the ADBAT in Behuria, ADBAT Decision No. 11 (No.2) [1996]. paras. 3
and 11:

3. Decisions with respect to the evaluation of staff members’ performance
are within the discretion of the Bank. Such discretion however, is not unlimited and the
Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary,
discriminatory, unreasonable, improperly motivated or adopted without due process.

11. It is true, as the Applicant says that prejudice is usually concealed and its
existence has to be established by inference. Yet, in the view of the Tribunal, the
allegations of the Applicant are not sufficient to establish bias or lack of responsibility on
the part of his Manager or the Director with respect to the three items of the PER. The
applicant, has, basically, asserted his disagreement with several of the Respondent’s
assessments of his performance, but this can not take the place of proof of discrimination
or bias, which the Tribunal finds to be absent from the record. —Dalla v. ADB, pars. 66-
68, Decision No. 73, 19 August 2005. ADBAT Reports, Volume 7, pages 87-88.

17. Arbitrariness and Mala Fides

61. In the present case there is a significant and unexplained discrepancy between the
Applicant’s record with the endorsement thereof in ratings of Fully and Generally Satisfactory
provided by her supervisors and the “U” rating which is the subject of this Appeal. For a system
such as the PDP to function effectively it should, in timely fashion, inform those involved, and
those reviewing such actions as to the reasoning for actions taken. That was done in all stages up
to the issuance of the final “U” rating by the DG, CWRD who apparently had had only four months’ supervision of the Applicant. That short exposure made it even more important that he provide some explanatory comments to support a decision at such odds with the rest of the then available record.

67. There is no written record to establish that any of the alleged failures of which her supervisor’s were supposedly aware of after 31 July 2006 were ever communicated to the Applicant prior to her review. The introduction of critical comments in tardy fashion as here, when the 2006 assessment period had closed, does not guide the employee to improved performance. Rather than as a constructive vehicle for encouraging performance improvement, it appears instead to be a self serving device for management to attempt to erase years of PDPS which supervisors had written up and endorsed as evidence of superior workplace performance in order to support an unexplained and apparently random decision by the DG, CWRD, to rate her as unsatisfactory. Furthermore, from the absence of any “Comment” on the form, there is no evidence that the DG, CWRD was aware of those alleged failings at the time he rendered the “U” rating. On its face the conflict between the written record including her favorable ratings on the Results and Behavior Assessments in the 2006 Review and the “U” rating in the same document without comment compels a conclusion that the latter was arbitrary and unfounded. That doubt is underscored by the manner in which the Bank apparently undertook to create and bolster the record after 26 February 2007 when the Applicant registered her surprise and sought review of the “U” rating. The actions of the Bank which followed the “U” rating, raises questions of the mala fides and indeed the motivation of its action. —Ibrahim v. ADB, pars. 61 and 67, Decision No. 86, 15 August 2008. ADBAT Reports, Volume 8, pages 134-135, 136.

64. Arbitrariness may manifest itself by the lack of regard for observance of proper procedure in assessing the alleged performance of an employee. In the Tribunal’s view the Applicant’s opinion of her performance capabilities as more than satisfactory cannot be taken as a substitute for the assessment made by her supervisor and other reviewers who have arrived at a different conclusion as per the relevant rules. In the Tribunal’s view the allegations of the Applicant are not sufficiently supported to establish bias or arbitrariness on the part of the management. There is nothing on record with regard to the performance evaluation or PIP exercises that were carried out to show that the rules were not properly adhered to.

65. The Tribunal concludes that the decision was not arbitrary for reasons given in her supervisor’s detailed 24 August 2015 Note-to-File following the closing PIP meeting, namely:

(i) even though some issues may have been due to external factors, those to do with “schedules, submissions, and communications” were within the Applicant’s control and were not progressed as planned;
(ii) the competency framework for level 5 requires the Applicant to demonstrate supervision skills, resolve client situations, foster team work, provide high quality communications, and innovate; and
(iii) improvements in all of these areas were not evident.
66. The Tribunal therefore, concludes that the Applicant has failed to discharge her burden of proof that the challenged decision was vitiates by arbitrariness or an abuse of discretion. - *Ms. Maria Lourdes Drilon vs. ADB*, pars. 64 - 66, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, page 164.

18. Change of Supervisor

35. The facts asserted by the Applicant show that the Bank did not conduct his PDP for 2007 either in accordance with the PDP implementing guidelines, or in a fair manner.

(A) The Bank did not follow its own rules. As stated above, the hypothesis where, in the course of a review period change is foreseen in the supervisor of a staff member the matter is addressed in Section 5 of the 2007 Performance Management – Implementing Guidelines (27 March 2007):

… [T]he previous supervisor must complete Parts 1.C and 1.D and Part 2 of the PDP form for the period of his/her supervision of the staff member’s performance. The previous supervisor will discuss Parts 1 and 2 with the staff member during a formal transfer interview. The previous supervisor will forward a copy of the PDP form to BPHR and to the staff member and the original form will be retained in the department … as input into the next assessment exercise.

The overall assessment will be completed by the new supervisor, after consultation with the previous supervisor whenever possible.

Changes occurring after 15 November should be referred to BPMSD. [Underline added]

The “previous supervisor”, Mr. Murray, abided by this regulation before his departure on 24 October 2007. He completed the parts 1.C, 1.D and 2 of the PDP form, forwarded a copy of this to BPHR and the Applicant, and conducted the formal transfer interview.

Mr. Lahiri, who had agreed to become the “new” supervisor, knew, or should have known of and was bound by the Performance Management – Implementing Guidelines which required consultation with the prior supervisor “whenever possible” before completing the overall assessment. This he failed to do despite the fact that:

(i) He was aware of the issue: on 10 January 2008, the Applicant wrote to him: “I hope you have been provided the assessment done by Bruce up to 24 October”;

(ii) It was possible for him to mail or phone and consult with Mr. Murray who, at that time, was still in Manila;
(iii) He had the opportunity to correct his omission. Notwithstanding this fact, after having requested the copy of the interim assessment from BPHR, he maintained his appraisal (see statement of 11 December 2008).

(B) The Applicant was not treated equitably. Even if there was actually no other solution but to appoint the same person, Mr. Lahiri, as supervisor and rater, the unusual situation should have led the Bank to give the Applicant greater guarantees of objectivity given that his review occurred almost at the end of the month of October and inasmuch as the last paragraph of Section 5 of the Performance Management – Implementing Guidelines quoted above, provides that “changes [of supervisors] occurring after 15 November should be referred to BPMSD”. —Leonard v. ADB, par. 35, Decision No. 92, 19 August 2009. ADBAT Reports, Volume 8, pages 231-232.

PROBATIONARY APPOINTMENT

1. Nature and Purpose

17. The main objective of probation is to enable the organization to find out whether the probationer is suitable for the employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment. As was stated in the case of Salle, WBAT Reports 1982, Decision No. 10, para. 27:

   It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff members performance during the probationary period, he does or does not qualify for permanent Bank employment. These determinations necessarily lie within the responsibility and discretion of the Respondent ....

Conversely, however, the probationer’s interest in being definitively employed should not be ignored nor deprived arbitrarily, if he has satisfied the obligations and standards required of him. Thus, for example, his duties must be well-defined, and he should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment. —Haider v. ADB, par. 17, Decision No. 43, 7 January 1999. ADBAT Reports, Volume 5, page 5.

44. It was also appropriate for her supervisors to give weight, in evaluating her performance, to her evasion and obstinacy in connection with the monthly PIP meetings in the early half of 2002, as to which she was either absent or altogether uncooperative. As has been stated by the World Bank Administrative Tribunal, Buranavanichkit, Decision No. 7 [1982], WBAT Reports, para. 26: “Probation has as its purpose the determination whether the employee concerned satisfies the conditions required for confirmation. These conditions may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with
supervisors and other staff members.” —Yamagishi v. ADB, par. 44, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, page 120.

32. It should be understood that a staff member on probation is under close scrutiny, on the basis of which his or her supervisors are to decide whether he or she should be retained in service for the remainder of the contract. Normally a staff member on probation has no inherent right to be confirmed under all circumstances. The probationary period does involve a risk. It is, however, true that the Bank has provided safeguards in the form of A.O.s to protect a probationer from victimization by the supervisory staff. The Bank has further provided safeguards in the form of intra-Bank procedures like appeals and reviews and has also established an Administrative Tribunal which consists of members from outside the Bank to bring an unbiased scrutiny to bear upon the Bank employees’ grievances. All this, however, does not mean that a probationer stands on a par with the confirmed employees of the Bank. The confirmation of an employee does in the ultimate analysis depend upon the assessment of his or her performance, the quality of which is to be judged by the supervisors alone and not by the members of the Tribunal. At any rate the Tribunal has examined the Applicant’s case in the light of the A.O.s applicable to her at the relevant time and the case law on the basis of which the Tribunal has found that there was no trace of any wrong doing involved in her case. —Ms. L.C. v. ADB, par. 32, Decision No. 67, 20 January 2005. ADBAT Reports, Volume 7, pages 11-12.

58. Administrative Order No. 2.01, para. 11.3 provides: “The performance of a staff member is first reviewed after six months of service.” As noted in the case of Salle, WBAT Reports 1982, Decision No. 19, para. 26

It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests and to decide whether, judging by the staff member’s performance during the probationary period he does or does not qualify for permanent Bank employment. These determinations necessarily lie within the responsibility and discretion of the Respondent…

Here, the record shows that the Applicant filled out the Performance Evaluation Review process on 19 January 2004 by submitting Part 1 listing his accomplishments. Instead of merely completing Part 2 of the evaluation with assessment and recommendations for improvement and providing it to the applicant for comment as anticipated in the wording of the form, the Director, RSFI, met with him twice to discuss his performance before providing a draft Part 2 on 29 January 2004. There is no requirement for offering such a draft Part 2, nor for providing an employee an opportunity to discuss the draft before the PER is signed by the supervisor and submitted to the Officer-In-Charge, BPHR. Administrative Order No. 2.02, para. 2.3 allows the staff member” the opportunity to formally discuss” the content of the evaluation. It does not require negotiations and certainly there is no requirement for the staff member’s agreement to the content provided by the supervisor in Part 2, and there is no right granted to the staff member to veto the proper exercise of the authority of the supervisor to complete the PER. Here, after the discussion, the Director did amend her entry at Part 2 and again discussed it with the Applicant for an hour on 2 February 2004, before signing it and soliciting the Applicant’s signature at Part 3. The Applicant apparently failed to fully read the revised Part 2 provided him at that meeting, but the Director was under no obligation to secure his agreement to the changes from the earlier
draft, and was fully within her responsibility in signing it and in providing it to the Applicant for completion of Part 3. From that date until 31 March 2004 when he finally completed Part 3, the Applicant repeatedly challenged the due process, fairness and transparency of the process, met twice with the Director General, RSDD, and despite being given the option of accepting the Part 2 of 29 January 2004, or that of 5 February 2004 or indeed restarting the PER review, the Applicant missed the deadline, even extended, for exercising that option, and the signed 5 February 2004 evaluation was properly processed. —*Dalla v. ADB*, par. 58, Decision No. 73, 19 August 2005. *ADBAT Reports*, Volume 7, pages 83-84.

2. **Due Process**

30. The Tribunal has repeatedly emphasized the importance of the respect for due process in cases in which the Bank exercises its discretion in terminating a staff members employment. This is also true in reaching a decision not to confirm an appointment at the end of a probationary period. The right to due process of staff members is expressly guaranteed by the Bank in the Personnel Policy Statement for Professional Staff adopted by the Board of Directors in April 1991:

(xiii) The Bank will observe due process in all areas of personnel administration, in particular, in initiating and deciding on the involuntary or premature separation of staff from service.

This provision is incorporated as part of Administrative Order No. 2.02, Section 2.14, entitled “Personnel Policy Statement and Duties, Obligations and Rights of Staff Members” (issued 1 April 1991 and revised on 1 November 1993 and 28 May 1998). —*Haider v. ADB*, par. 30, Decision No. 43, 7 January 1999. *ADBAT Reports*, Volume 5, page 10.

39. A.O. 2.01, para. 11, provides *inter alia* that the supervisor should meet with the probationary staff member “as soon as possible” after the entry on duty to establish the work program, a copy of which is to be provided and discussed with the staff member. Performance is to be reviewed after six months of service, and again at the end of the 13th month. “The staff member’s appointment will be confirmed if the staff member’s performance is fully satisfactory in all respects and the staff member is considered suitable for further employment.” A.O. 2.03, para. 2, provides that the six-month performance review “allows the staff member the opportunity to formally discuss with the supervisor” matters such as work accomplishments, performance goals and areas of performance requiring further development. —*Yamagishi v. ADB*, par. 39, Decision No. 65, 28 July 2004. *ADBAT Reports*, Volume 6, page 119.

34. A.O. 2.03, para. 2.2, provides that “[t]he performance of a new staff member will be reviewed in accordance with Section 11 of A.O. No. 2.01 (Recruitment and Appointment of External Candidates). Thereafter, the procedures applicable to staff members with confirmed appointments will apply.” The PDP Implementing Guidelines apply only to the performance evaluation of staff members with confirmed appointments, and not to staff members on probation such as the Applicant. —*Schmidt-Soltau v. ADB*, par. 34, Decision No. 93, 5 February 2010, pages 11-12.
38. The Tribunal finds that the Applicant received adequate notice about concerns regarding his performance and the opportunity to address these concerns and defend himself against them throughout his probationary period. We find that the Bank properly followed the procedures for evaluation of a probationer’s performance set out in Section 11 of A.O. No. 2.01 and complied with the requirements of due process in reaching its decision not to confirm the appointment of the Applicant.

39. The Tribunal accordingly concludes that the Applicant has failed to prove that there was an abuse of discretion, or that the decision was arbitrary, discriminatory or improperly motivated, or that it could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed. We conclude also that the Bank complied with the relevant requirements of due process in reaching its decision not to confirm the Applicant’s appointment. —*Schmidt-Soltau v. ADB*, pars. 38 – 39, Decision No. 93, 5 February 2010. ADBAT Reports, Volume 9, page 12.

52. The Applicant was early informed of the prospects of his non-renewal, and by the time the Bank exercised its option of providing compensation in lieu of notice, he was well alerted to the end of his time with the ADB. Nonetheless, the Bank provided him, at his request, another month of rental subsidy to clear his affairs. The provision in A.O. 2.05 para. 2.5 for payment of compensation in lieu of notice did not restrict his time for closing his affairs, it merely freed him of any work responsibility to do so after the termination had come into effect. The Tribunal finds that proper procedures were followed in giving the Applicant adequate notice of his non-confirmation. —*Mr. Y v. ADB*, par. 52, Decision No. 94, 2 March 2011. ADBAT Reports, Volume 9, page 34.

30. The Tribunal finds no flaw in the procedure used by the Bank in holding two PDP meetings. As provided in the aforesaid A.O. 2.01, review of the staff member’s performance is required by the PDP procedures to discuss the recommendation and the Applicant’s comments on the same. We are not persuaded by the Applicant’s claim that the Bank is limited to one PDP review at the end of 12 months. Although the bottom of the PDP form provides for “a” Note-to-File, the provision of a second meeting and a second Note-to-File in this case did not violate the rules and in fact provided the Applicant a further opportunity to present her case. It is also clear from the records, including the Notes-to-File of the meetings held on 16 November and 2 December, 2009, that both the Supervisor and CD, PRCM discussed and explained in detail to the Applicant the basis for the assessment and the latter’s recommendation. The Applicant, having specifically requested the CD, PRCM to reconsider the recommendation of non-confirmation, cannot now be heard to challenge the result of that recommendation as being contrary to ADB law.

31. With regard to the PDP Implementing Guidelines on which the Applicant relies, the Tribunal reaffirms that these “apply only to the performance evaluation of staff members with confirmed appointments and not to staff members on probation…” (see *Schmidt-Soltau*, Decision No. 93 (5 February 2010), para. 34).
32. Therefore, the Tribunal finds that there is no merit in the Applicant’s claim that proper procedures leading to the decision had not been followed by the Bank. —*Ms. D v. ADB*, pars. 30 - 32, Decision No. 95, 8 September 2011. ADBAT Reports, Volume 9, page 49.

3. Managerial Discretion

18. In previous decisions, the Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (*Lindsey*, Decision No. 1 [1992] I ADBAT Reports 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed. It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation. Thus, for instance, the Administrative Tribunal of the International Labor Organization stated that:

[i]n the case of the probationer the organization must indeed be granted the broadest possible measure of discretion ... and its decision will be upheld unless some particularly serious or glaring flaw can be shown. (*In re Verlaeken-Engels*, ILOAT Judgment No. 1127 [1991], para. 30) —*Haider v. ADB*, par. 18, Decision No. 43, 7 January 1999. ADBAT Reports, Volume 5, pages 5-6. (See also Tribunal, Jurisdiction, Review of Management Decisions, Performance Evaluation)

34. More central to her Application is the Applicant’s contention that the decision not to confirm her appointment after her probationary year was a violation of her employment contract. The Tribunal has held, in *Haider*, Decision No. 43 [1999], V ADBAT Reports 5, that “[t]he main objective of probation is to enable the organization to find out whether the probationer is suitable for employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment” and that, as with any evaluation of employee performance, “the Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.” Indeed, in probationary situations most particularly, the Tribunal’s authority is limited. “It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation. . . . [I]n the case of the probationer the organization must indeed be granted the broadest possible measure of discretion . . . and its decision will be upheld unless some particularly serious or glaring flaw can be shown.” The burden lies with the Applicant to prove these elements of her case.

35. At the same time, as the Tribunal also stated in *Haider*, “the probationer’s interest in being definitively employed should not be ignored nor deprived arbitrarily, if he has satisfied the obligations and standards required of him. Thus, for example, his duties must be well-defined, and he should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment.” The question for the Tribunal is
therefore whether the Respondent treated the Applicant fairly, as just defined, and whether its non-confirmation decision was or was not an abuse of its discretion. —Yamagishi v. ADB, pars. 34-35, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, pages 117-118. (See also Tribunal, Jurisdiction, Review of Management Decisions, Performance Evaluation)

59. As noted in Haider, Decision No. 43 [1999], V ADBAT Reports 6, para. 18:

   In previous decisions, this Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (Lindsey, Decision No.1 [1992], I ADBAT Reports 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated, or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.

   In the case before us, it is evident that the Bank went far beyond the requirements of the law in providing the Applicant an opportunity to discuss his performance and the Bank's proposals for enhancing his effectiveness. It met with him repeatedly, it responded to his memoranda, it offered him a choice of avenues to pursue for the conduct of the evaluation, it provided a facilitator to help in the discussions, and it explicitly advised him of the areas where he needed improvement. The onus is on the Applicant to establish through the presentation of evidence that the imposition of the six-month evaluation constituted an abuse of discretion. (see Alexander, Decision No. 40 [1998], IV ADBAT Reports 52, para. 38). It was the responsibility of the Applicant and not of this Tribunal to garner such testimonials or corroborative documentation in timely fashion to prove his case. The record shows numerous allegations, but we find no credible evidence to support those allegations. Accordingly we must deny the claims of procedural irregularity in the imposition of the six-month evaluation. —Dalla v. ADB, par. 59, Decision No. 73, 19 August 2005. ADBAT Reports, Volume 7, page 84.

   20. The Bank has the authority to establish rules for hiring and retention of personnel and the discretion to decide whether or not to confirm a probationary appointment. The Tribunal stated in Haider, Decision No. 43 [1999] V ADBAT Reports, para. 17:

      The main objective of probation is to enable the organization to find out whether the probationer is suitable for the employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment. As was stated in the case of Salle, WBAT Reports 1982, Decision No. 10, para. 27: “It is of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff member’s performance during the probationary period, he does or does not qualify for permanent Bank employment . . . .”

   21. The discretionary authority of the Bank should be exercised with due regard to the guarantees of due process to which probationers are entitled. “The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that
the procedural guarantees ensuring the staff member of fair treatment be respected.” (Salle, WBAT, supra, para. 50). Thus, the probationer should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment and should receive guidance and be made aware of concerns regarding his performance as well as the opportunity to defend himself against these concerns.

22. The evaluation of the performance of employees is a matter of managerial discretion, where the Tribunal may not substitute its discretion for that of the management (see Lindsey, Decision No. 1 [1992] I ADBAT Reports, para. 12). This Tribunal has held in Haider, Decision No. 43 [1999] V ADBAT Reports, para. 18, that the Tribunal may only intervene in the Bank’s decision not to confirm a probationary appointment “when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.” This Tribunal has also stressed that “the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation.” (ibid.) —Schmidt-Soltau v. ADB, pars. 20-22, Decision No. 93, 5 February 2010, Volume 9, pages 7-8.

21. The discretionary authority of the Bank should be exercised with due regard to the guarantees of due process to which probationers are entitled. “The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.” (Salle, WBAT, supra, para. 50). Thus, the probationer should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment and should receive guidance and be made aware of concerns regarding his performance as well as the opportunity to defend himself against these concerns.

22. The evaluation of the performance of employees is a matter of managerial discretion, where the Tribunal may not substitute its discretion for that of the management (see Lindsey, Decision No. 1 [1992] I ADBAT Reports, para. 12). This Tribunal has held in Haider, Decision No. 43 [1999] V ADBAT Reports, para. 18, that the Tribunal may only intervene in the Bank’s decision not to confirm a probationary appointment “when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.” This Tribunal has also stressed that “the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation.” (ibid.) —Kai Schmidt-Soltau v. ADB, pars. 21 – 22, Decision No. 93, 5 February 2010. ADBAT Reports, Volume 9, page 7.

29. Under A.O. 2.01 the Bank has the authority to provide for a probationary period “to determine whether the probationer is suitable for service in ADB.” Further, the Bank has prescribed among the matters to be taken into account in making such determination, the following:

“(a) the technical competence of the probationer;

(b) whether the probationer can adapt to the work culture within ADB;
(c) the ability of the probationer to work harmoniously and well with supervisors and other colleagues; and

(d) whether the probationer has the appropriate intellectual and moral qualities personality, character and demeanor for employment by ADB as an organization.”

30. The Tribunal has recognized the Bank’s authority in such matters in *Haider*, Decision No. 43 [1999], para. 17 noting that:

   The main objective of probation is to enable the organization to find out whether the probationer is suitable for employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment….

31. The Tribunal has also endorsed and enforced requirements of due process in the implementation of that process. It made clear the scope of its authority in *Lindsey*, Decision No. 1 [1992], para. 12:

   The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could nor could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. —*Mr. Y v. ADB*, pars. 29-31, Decision No. 94, 2 March 2011. ADBAT Reports, Volume 9, page 25.

25. While determining whether a probationary staff is suitable for service, it is a well-established principle that the Respondent has a wide discretion in the matter.

   “the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation.” (*Haider*, Decision No. 43 [1999], V ADBAT Reports, para. 18)

26. A staff member on probation is under close scrutiny on the basis of which his or her supervisors are to decide whether he or she should be retained in service. A probationer has no inherent right to be confirmed. However, the Bank must follow the A.O.s and safeguards provided to the probationer so that he or she is not unfairly denied confirmation. In *SchmidtSoltau*, ADBAT Decision No. 93, (5 February 2010), paragraph 21, it was held that

   “[t]he discretionary authority of the Bank should be exercised with due regard to the guarantees of due process to which probationers are entitled. „The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.”* (Salle, WBAT, Decision No. 10 [1982], Reports, para. 50). Thus, the probationer should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment and should receive guidance and be made aware of concerns regarding his performance as well as
the opportunity to defend himself against these concerns.” —Ms. D v. ADB, pars. 25 - 26, Decision No. 95, 8 September 2011. ADBAT Reports, Volume 9, page 45-46.

33. The Tribunal notes that the Applicant in her comments provided on 20 May 2009 acknowledged that “Meanwhile, I, as a new staff, recognize the need to further strengthen my knowledge of ADB’s operations and analytical skills. My thanks go to the Supervisor who has helped develop my work plan and provided guidance on undertaking each work assignment”. This acknowledgement of her shortcomings shows that the Applicant’s subsequent allegations of improper motive, pre-determination, arbitrariness and abuse of discretion on the part of her Supervisor and others are baseless and without merit. —Ms. D v. ADB, par. 33, Decision No. 95, 8 September 2011. ADBAT Reports, Volume 9, page 49.

4. Tribunal Decisions on Probationary Appointments

11. It needs to be noted that we are barred from substituting our judgment for that of the Applicant’s supervisors in the matter of assessment of her performance (Lindsey, Decision No. 1 [1992]. I ADBAT Reports). However, no breach of the contract of employment as such has been alleged. At this juncture, it will be appropriate to look at the relevant Administrative Orders (A.O.) and the case law on the subject.

(a) A.O. No. 2.02 (2.14):

ADB will observe due process in all areas of personnel administration, in particular, in initiating and deciding on the involuntary or premature separation of staff from service. It will provide appropriate termination payments having regard to the reasons for separation, length of service and other relevant factors.

(b) A.O. No. 2.02 (2.1):

ADB requires for its operations highly qualified, dedicated and motivated complement staff with various skills. To meet its needs, ADB recruits such staff from amongst its member countries. In order to attract, recruit and motivate and retain such staff, ADB seeks to provide competitive terms and conditions of employment and is guided by fair, impartial and transparent personnel policies and practices in the management of all its staff.

The Administrative Order relating particularly to probationary period is in paragraph of A.O. No. 2.01 which is as follows:

11.1. The purpose of the probationary period is to determine whether the probationer is suitable for service in ADB. Such determination is generally made by ADB on the basis of the staff...01ember’s first 12 months of service.
Paragraphs 11.2 to 11.5 also deal with probationers. This Tribunal has, in the past, dealt with several cases pertaining to service matters. Some of them, which are relevant to the issues in question, have been referred to below:

(a) *Haider*, Decision No. 43 [1999], V ADBAT Reports 1, 5, para. 17:

The main objective of probation is to enable the organization to find out whether the probationer is suitable for employment. It is clear in this context that the Respondent has discretion to decide whether or not to confirm a probationary appointment. As was stated in the case of *Salle*, WBAT Report 1982, Decision No. 10, para. 27:

It is of the essence of the probation that the organization be vested with the power both to define its own needs, requirements and interests, and to decide whether, judging by the staff member’s performance during the probationary period, he does or does not qualify for permanent Bank employment. This determination necessarily lies within the responsibility and discretion of the Respondent [the Bank]…

Conversely, however, the probationer’s interest in being definitively employed should not be ignored nor deprived arbitrarily, if he has satisfied the obligations and standards required of him. Thus, for example, his duties must be well defined and he should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment.

(b) *Lindsey*, Decision No. 1 [1992], I ADBAT Reports 1, 5, para. 12:

The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that it cannot have been reasonably taken on the basis of facts accurately gathered and fairly weighed. It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation.

(c) *Salle*, WBAT Reports 1982, Decision No. 10, para. 50:

The Tribunal deems it necessary to emphasize the importance of the requirements, some times subsumed under the phrase “due process of law” the very discretion granted to the Respondent [the Bank] in reaching its decision at the end of probation makes all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected.
Behuria (No. 2), Decision No. 11 [1996], II, ADBAT Reports 27, 28, 30, paras. 3 and 11:

Decisions with respect to the evaluation of staff member’s performance are within the discretion of the Bank. (see Tay Sin Yan, ADBAT Decision No. 3 [1994], para. 30). Such discretion, however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated or adopted without due process. (See Lindsey, ADBAT Decision No. 1 [1992], para. 12).

It is true, as the Applicant says, that the prejudice is usually concealed and its existence has to be established by inference, yet in the view of the Tribunal the allegations of the applicant are not sufficient to establish bias or lack of responsibility on the part of his manager or the director with respect to the three items of PER. The applicant has basically asserted his disagreement with several of Respondent’s assessments of his performance; but this cannot take the place of proof of discrimination or bias, which the Tribunal finds to be absent from the record.

In the Lindsey case it has been clearly stated that the matter of evaluating the performance of the Applicant is a matter for the supervisors. The Tribunal may interfere in such evaluation only under the strict conditions set out under the Lindsey formula, namely, if it appears that the evaluation ‘has not been reached by the proper processes’, ‘is arbitrary, discriminatory or improperly motivated’, or ‘could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed’. Similarly in the Alexander case the Tribunal held that the onus of proving abuse of discretion is on the Applicant. See Alexander, Decision No. 40 [1998], IV ADBAT Reports, para. 38. —Ms. L.C. v. ADB, pars. 11-12, Decision No. 67, 20 January 2005. ADBAT Reports, Volume 7, pages 3-5.

The memo sent to the VPKM was noted in each of the PDPs of those who had signed it. While it is true that the other three colleagues were not terminated as was the Applicant, and that a probationary staff member who signed the memo successfully completed his probationary period and was eventually confirmed, the performance problems the Applicant confronted were peculiar to him and not experienced by the others. Under such circumstances, this Tribunal finds no evidence to support the Applicant’s claim that the Bank’s decision to terminate the Applicant’s appointment was discriminatory. —Schmidt-Soltau v. ADB, par. 31, Decision No. 93, 5 February 2010. ADBAT Reports, Volume 9, page 10.

There is nothing on the record to support the Applicant’s claim that the Director, RSES and the ADG, RSDD in any way abused their discretion in recommending non-confirmation of his appointment. This is particularly the case given the broader discretion vested in the Bank in the confirmation of probationers. The emails providing the feedback from the operations departments show that they voiced concerns as to the Applicant’s performance in Client Orientation and Working Together. Neither does anything on the record support the Applicant’s claim that the Bank’s decision not to confirm his appointment after the one-year
probationary period was arbitrary. —*Kai Schmidt-Soltau v. ADB*, par. 26, Decision No. 93, 5 February 2010. ADBAT Reports, Volume 9, page 8.

30. This Tribunal finds that the decision of the Bank to regard the Applicant’s signing the memo as not constituting misconduct is in order.

31. The memo sent to the VPKM was noted in each of the PDPs of those who had signed it. While it is true that the other three colleagues were not terminated as was the Applicant, and that a probationary staff member who signed the memo successfully completed his probationary period and was eventually confirmed, the performance problems the Applicant confronted were peculiar to him and not experienced by the others. Under such circumstances, this Tribunal finds no evidence to support the Applicant’s claim that the Bank’s decision to terminate the Applicant’s appointment was discriminatory. —*Kai Schmidt-Soltau v. ADB*, pars. 30 – 31, Decision No. 93, 5 February 2010. ADBAT Reports, Volume 9, page 9.

46. *x x x* The Tribunal finds it was appropriate for the Bank to include the results of that investigation in its evaluation of the Applicant’s potential for continued employment within the organization. The fact that his supervisor had not earlier subjected him to criticism for his performance or imposed any discipline for his behavior does not detract from the record as it developed and was presented in the PDP. His acceptance in his PDP of the basic facts underlying the charges, his request for forgiveness and his having “apologized profusely” therein constitute ample acknowledgement of his “errors” (see para. 23 above). We find that due process and the requirements of the applicable Administrative Orders were complied with in evaluating the Applicant’s suitability for continued employment within the ADB. —*Mr. Y v. ADB*, par. 46, Decision No. 94, 2 March 2011. ADBAT Reports, Volume 9, page 31.

49. The record is clear that the Respondent adhered to the appropriate procedure in providing the Applicant an initial six month performance review, and a second performance review before the end of the 13th month, and in having the Head of Department/Office prepare a draft recommendation with the Applicant being provided the opportunity to comment thereon and discuss the draft with his superior. Thereafter, the recommendation with those comments was forwarded to DG, BPMSD and thence to the President. The Tribunal has examined the proceedings and finds no evidence of an orchestrated effort to remove the Applicant. Indeed, had the Applicant not engaged in repeated misbehavior following his initial incident, this matter would not be before us. It was the Applicant’s continued inappropriate behavior, rather than any orchestrated undertaking by the Bank that was the triggering event that led to his non-confirmation. There is nothing in the A.O.s which requires the Respondent to impose progressive discipline as a precondition to non-confirmation. —*Mr. Y v. ADB*, par. 49, Decision No. 94, 2 March 2011. ADBAT Reports, Volume 9, page 32.

36. With regard to the Applicant’s request for an independent assessment of her performance, there is no provision for independent assessment under the relevant Administrative Order (A.O. 2.01), which already provides for a multi-layered review of the work of the probationer by a number of officers before a final decision on non-confirmation is taken at a senior level. As already mentioned above, the CD, PRCM took into account the various e-mails and written communications from the Task Managers and other agencies she had submitted,
while assessing her work. Further, the comments of the Task Managers regarding her work related to those areas which portrayed her strengths, which are not in question here. It is the Bank, in exercise of its broad discretion under the relevant provisions given in A.O. 2.01, section 11, which is to take a decision at the end of the probationary period as to whether or not a staff member is suitable for further employment. That decision is based on the assessment by the Bank of a probationer’s technical competence, ability to adapt to the work culture of ADB, ability to work well with superiors and other colleagues, and appropriate intellectual and moral qualities, personality, character and demeanor for employment.

37. The Tribunal finds no evidence that the non-confirmation decision was arbitrary, pre-motivated, unjustified or distorted, or that the Respondent’s administrative orders with respect to performance evaluation and non-confirmation were violated. The Applicant has failed to discharge the burden of proof of her allegations against the Respondent (see Azimi, Decision No. 88 [2009] VIII ADBAT Reports, para. 31). —Ms. D v. ADB, pars. 36 - 37, Decision No. 95, 8 September 2011. ADBAT Reports, Volume 9, page 50.

PROMOTIONS

1. In General

15. In making its recommendation as regards the best candidate for the position of Senior Records Assistant, level 5, the Panel was guided by the relevant provisions, including Administrative Order No. 2.03, para. 4.1 which provides:

Subject to the paramount importance of securing the highest standards of efficiency and technical competence, promotion will be based on merit and capacity to assume increased responsibilities. Length of service in the Bank will be taken into account but by itself will not automatically entitle a staff member to a promotion.

To the allegation of the Applicant that she had longer work experience in the Bank than the selected candidate, the Tribunal notes that this factor “will be taken into account but by itself will not automatically entitle a staff member to a promotion.” —Guioguio v. ADB, par. 15, Decision No. 59, 8 August 2003. ADBAT Reports, Volume 6, page 82.

16. At the outset, the Tribunal endorses some of the arguments or assertions of the Bank:

“The paramount importance of securing the highest standards of efficiency and technical competence” (para 4.1 of A.O. 2.03) is the overarching principle in appointment and promotion (para. 47, Answer).

“Appointment and promotion decisions are matters that are within the Bank’s discretion” (Guioguio, ADBAT Decision No. 59 (8 August 2003)) for which the Tribunal cannot substitute its own (para. 32, Answer). —Mr. A v. ADB, par. 16, Decision No. 77, 02 August 2006. ADBAT Reports, Volume 7, page 137.
30. Turning to the merits of the Applicant’s claim, it is well established that appointment and promotion decisions are matters within the discretion of the Bank pursuant to A.O. 2.03, paragraph 1.5, and that the Tribunal may not substitute its discretion for that of the Bank (Guioguio, Decision No. 59 [2003], VI ADBAT Reports, para. 11) or undertake its own examination of the record or assessment of the qualifications of the staff member. If the employer fails to choose the most suitable candidate, it is the loss of the employer as well as of the employee or candidate. As noted in D’Aoust (No. 2), IMFAT Judgment 2007-3 (22 May 2007), p. 28, in quoting the Statutory Commentary:

… determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility. —Ms. A v. ADB, par. 30, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 165.

49. As noted, selection for promotion is a right and discretion of the Bank, but that discretion is not without limitation. However, careful review of the relative standing of the Applicant and the Appointee fails to support her claim that because of bias, prejudice, or improper motivation she was improperly denied the opening. Even if she had made a prima facie case of gender discrimination, the evidence shows that the Appointee had at least equal qualifications. The evidence shows that while she had performed adequately, she lacked the requisite capabilities in higher level more analytical work that the Appointee possessed from his prior private sector work and which he demonstrated in the missions to which he had been appointed during his relatively brief time at the Bank. His very strong communication skills and suitability for undertaking the various responsibilities of the new position do not support the views of the Applicant that his choice was based on improper motivation rather than on merit and qualifications. The record is not bereft of basis for the conclusion reached by the Selection Panel that the Appointee was the more qualified candidate.

50. Here, as in Alexander, Decision No. 40, [1998], IV ADBAT Reports 41, para. 88, “although the Tribunal has been unable to find evidence of prejudice against the Applicant that would have amounted to a failure of due process, the Tribunal notes nevertheless that the manager’s attitude did contribute to the strained relationship she had with him.” See also Malekpour v. IBRO, WBAT Decision No. 322 (2004). Accordingly, the Tribunal decides to award a sum of US$5,000 to the Applicant. —Ms. A v. ADB, pars. 49-50, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 170.

2. Gender Discrimination

30. Turning to the merits of the Applicant’s claim, it is well established that appointment and promotion decisions are matters within the discretion of the Bank .... pursuant to A.G. 2.03, paragraph 1.5, and that the Tribunal may not substitute its discretion for that of the Bank(Guioguio, Decision No. 59 [2003], VI ADBAT Reports, para. 11) or undertake its own examination of the record or assessment of the qualifications of the staff member. If the employer fails to choose the most suitable candidate, it is the loss of the employer as well as of the employee or candidate. As noted in D’Aoust (No. 2), IMFAT Judgment 2007-3 (22 May 2007), p. 28, in quoting the Statutory Commentary:
... determination of the adequacy of professional qualifications is a managerial, and not a judicial, responsibility.

31. The judicial role is properly confined to determining whether the Bank’s determination was made in compliance with the applicable rules, regulations and procedures it established for handling such matters. In this case, the Bank has also committed itself in A.G. 2.02, para. 2.1, to be “guided by fair, impartial and transparent personnel policies and practices “, and in para. 2.4, to make “the employment, promotion and assignment of staff without discrimination on the basis of sex, race or gender.” In para. 2.5, the Bank further commits itself as follows:

ADB will take affirmative action to increase the representation of women on the professional staff at all levels.

It is therefore appropriate that the Bank’s action in denying the Applicant’s promotion be judged in the light of those commitments. —Ms. A v. ADB, pars. 30-31, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 165.

32. This Tribunal has need the difficulty of proving discrimination which often requires “circumstantial proof, most obviously by a demonstration that the woman staff member has been treated less favorably with respect to such matters as performance evaluation rating, salary increase or reappointment than are men of essentially equivalent abilities.” (Alexander, Decision No. 40 [1998], IV ADBAT Reports 41, para. 74). Normally the Applicant has the burden of proving gender discrimination. Despite the efforts of the Bank to overcome its acknowledged problems of gender discrimination, the Tribunal finds that the Applicant had a reasonable perception that she was the victim of gender discrimination within CTL. That perception was based in part on her seniority and the fact that despite performance ratings of “Fully satisfactory” she had not been promoted although she had applied for such 35 times. Taking into consideration this convergence of events, the Tribunal finds it reasonable that the Bank should show that the Applicant had not been denied the promotion on the basis of gender. —Ms. A v. ADB, par. 32, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 165.

34. Despite the Applicant’s claim that the Bank has been lax in undertaking measures to reduce gender discrimination, the evidence shows that the Bank has made substantial progress in its effort to reduce gender inequity in its professional staff particularly in senior positions. The Bank’s efforts in placement of women in higher positions, while still open to further improvement, has shown significant success.

35. The evidence shows that in the period since the Alexander Decision, the Bank has intensified its efforts to combat the problems of gender discrimination. In that year, 1998, it initiated its first GAP which by its termination in 2002 had increased total representation of women to 26.1%, the highest number to date in both absolute and percentage terms. In the GAP II from 2003 to 2005, women’s representation increased from 27.5 % at the beginning of 2003 to 29.6 % by 30 June 30 2006, while women in the pipeline levels (levels 5 to 6) increased from
19.6% in 2002 to 29% by mid 2006, and in the senior levels (levels 7 to 10) more than doubled from 6.2% in 2002 to 12.6% by mid 2006. Women professional staff, Bank-wide, were promoted at a higher rate than men for four of the five years from 2003 to 2006.

36. Since the Applicant has joined the ADB, the representation of women has increased from 12% to 29%, an increase of 144%, the number of women occupying level 5 positions has gone up from 12.7% to 32%, and the number of women occupying level 6 positions has risen from 1% in 1998 to 25% in 2007.

37. Likewise, in coping with problems of gender equity within the CTL, the Bank has demonstrated that it has undertaken to provide equal opportunity for qualified female employees to move into senior professional positions in that Department. Women in CTL in three of the past five years have been promoted at a higher rate per capita than men in the department. It notes that several women instead of remaining within the Department to compete for the higher level professional openings, transferred, took promotions to other departments, or left the Department for personal reasons not related to gender discrimination. We are not persuaded that the Applicant has demonstrated that her failure to fill the disputed vacant position was a consequence of systematic gender discrimination either within the Bank or the CTL. There is no question that the Bank has recognized the adverse statistical reflection of its earlier Bank wide gender equity problem and that it has sought to rectify it. Nor is there any question that the Bank has faced particular problems in seeking qualified staff for its most senior positions in CTL. We are sensitive to the perception of the Applicant that her failure to advance after 35 denied bids for promotion was due to systemic gender discrimination within the Bank, and that her failed bid in this case was due to gender discrimination within CTL. In this case the Bank has been able to show that the Applicant did not possess the required qualifications pertaining to knowledge in accounting and that the Applicant was not a victim of gender discrimination. —Ms. A v. ADB, pars. 34-37, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, pages 166-167.

3. Present-Incumbent Only (PIO) Promotion

29. Although the Applicants appear to claim that their positions as staff members are equivalent in every pertinent respect to that of Mr. A, the Tribunal cannot so conclude. The PIO promotion is expressly meant to be tailored to the individual accomplishments of a particular staff member, whose promotion is otherwise constrained by the more general rules regarding job classifications, grade levels and promotion to vacancies. As already noted, Administrative Order No. 2.03, para. 6.4, provides in pertinent part: “The President may decide to grant a staff member a PIO promotion to recognize an individual’s outstanding service.”

30. The Tribunal thus rejects, as a matter of law, the Applicants’ contention that they are entitled to the same treatment as Mr. A simply because they too are members of the support staff, or because they too are graded at level 7 or 8, or because they too have equivalent duties and accountabilities, or because they too have a positive work record. —Canlas et al. v. ADB, pars. 29-30, Decision No. 56, 8 August 2003. ADBAT Reports, Volume 6, page 51.
4. **Seniority**

47. The Applicant has failed to prove her claims of bias and prejudice on the part of Mr. Z in allegedly pushing through his pre-selected candidate in a very short meeting without mentioning her PhD and 12 years of seniority. The evidence shows that the Bank adhered to the requisite proper procedures in processing the applications for the disputed opening. The Selection Panel consisted not only of those whom the Applicant believes were biased, but also an independent staff person selected by the President and one selected by the Staff Association. This underscores the transparency and equitable composition of the Panel in making their unanimous recommendation to deny the position to the Applicant.

48. There is no evidence that the members of the Selection Panel violated their obligation to provide a fair and independent assessment of the candidates. They all had the internal applications (which included the Applicant’s curriculum vitae noting her PhD), and relevant documentation well in advance of the session. This Tribunal is persuaded that despite the asserted brevity of the session, the selection process met the requirements of A.O. 2.03 in being competitive, based on specific criteria, and that the relative merits of the candidates were considered by the Selection Panel. The minutes noted the Applicant’s 12 years of service. Any error in omitting reference to her PhD in Commerce from her K20 Staff Profile we find may well have been inadvertent. Mr. Z was clearly aware of it and it was included in her application materials. Furthermore, a doctoral degree was not a requirement of the position which required only “a postgraduate degree in finance, accounting or other related fields with a good knowledge of computerized accounting and financial information system and preferably with professional qualification such as Certified Public Accountant (CPA)/Certified Financial Analyst (CFA) or its equivalent.” Additionally, it is clear that seniority, while a relevant qualification does not by itself necessarily create any entitlement to promotion. —*Ms. A v. ADB*, pars. 47-48, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, pages 169-170.

**PROVISIONAL MEASURES**

1. **Application for Production of Documents**

3. In their Application the Applicants requested the production by the Bank of a number of documents. The Bank objected to their production on the ground that some of them related to the Bank’s security arrangements and were in any event irrelevant, and that others were personnel files which should remain confidential and which were also irrelevant. The Bank noted that the Applicants’ representatives had been given an executive summary of one document, a copy of the most material section of that same document, as well as a copy of another report, and that the same representatives were also given an opportunity to peruse the entire text of the principal document. As the Applicants maintained their request, the Tribunal ordered that the full texts of the various requested documents should be supplied to it so that it might judge their relevance and decide whether they should be produced to the Applicants. The Bank produced the documents to the Tribunal. The Tribunal considered them, ordered one to be produced to the Applicants and, as regards the rest, concluded that they contained nothing that
could advance the Applicants’ case and, therefore, decided that they need not be made available to the Applicants. —Bares, et al., v. ADB, par. 3, Decision No. 5, 31 March 1995. ADBAT Reports, Volume 1, pages 53-54.

25. The Applicant requested production of certain documents, which he contended were ‘germane to full consideration [of the merits]’ of his Application. In its Answer, the Bank objected, contending that the Applicant had failed to make a _prima facie_ case as to the relevance of the documents. To enable the Tribunal to decide the request, the Tribunal, in its Order of 2 May 1996, directed the Applicant to provide the aspects of his arguments to which he considered each of those documents was likely to be relevant.

26. The documents requested included copies of all written comments/statements made by members of the Board of Directors on the SSP and the Management’s response thereto, and the record of the discussions and the minutes of the Board meeting at which the SSP was approved, which he said would show that the Board had not been provided with sufficient information and that the SSP had been implemented with undue haste. The Bank objected, claiming that these documents were confidential. The Tribunal did not require the production of those documents, as the relevant Board paper which the Board considered was available, and so there was no sufficient reason to override the plea of confidentiality.

27. The other documents requested were a detailed list of persons who had been, or would be separated from the Bank under the SSP, and any studies or surveys undertaken by the Bank in relation to the design and criteria for the SSP. By Order of 20 June 1996, the Bank was directed to produce these documents for perusal by the Tribunal.

28. Having considered the documents produced, the Tribunal, by its Order of 22 August 1996, directed the Bank to produce a list of the staff members eligible for the SSP for consideration by the Tribunal only, and to produce a similar list, omitting personal information concerning the staff members, to be furnished to the Applicant. As for studies and surveys undertaken in connection with the SSP, the Bank was ordered to produce its ‘Three-Year, Rolling Work Program and Budget Framework (1995-1997)’ for transmittal to the Applicant. The Tribunal granted the Applicant 21 days within which to file a supplement to his Reply with his comments on those documents.


24. The Applicant also asked for preliminary measures in her Application, namely, the production of documents and information. The Tribunal directed her to describe each item of evidence requested, and to identify the specific issues and contentions to which each item was relevant. After considering the objections in the Respondent’s Answer, the Tribunal granted the request, in the same Order dated 6 April 1998, and required the production of the following: (a) record of interviews conducted by the Deputy Director (Personnel), BPMSD, on the Applicant’s performance and her claims; (b) samples of her work output in specific projects, which formed
the basis of the performance evaluation ratings in question, and other project-related documents and information pertaining to schedules and costs; (c) other documents relied upon by the Bank in evaluating the performance of the Applicant, as well as the tape recording of a performance evaluation meeting; and (d) statistics on hiring and promotion of professional staff within the Applicant’s Department and Division, classified by gender and salary level. —*Alexander v. ADB*, par. 24, Decision No. 40, 5 August 1998. ADBAT Reports, Volume 4, page 47.

13. In his Application, Mr. Powell requests two preliminary measures, to wit:

(i) an oral hearing of certain officials of the Urban Bank, and

(ii) production of a letter from Urban Bank as well as Bank statements reflecting rental payment.

14. It appears from the correspondence with Urban Bank, however, that Urban Bank did not have any record of any business relations with Mr. E. The Applicant has not provided reasons for the Tribunal to believe that interviewing these witnesses would result in the disclosure of any new information or document. The Urban Bank has already indicated that it is not in possession of such material, and an order for production would be futile. As for (ii), if Mr. Powell was in possession of any other relevant letter from Urban Bank, or any bank statement reflecting rental payment, he could have produced it himself.

15. Therefore, the Tribunal refuses the preliminary requests. —*Powell v. ADB*, pars. 13-15, Decision No. 50, 21 September 2000. ADBAT Reports, Volume 5, page 62.

F. The Applicant seeks the production of email communication related to him and his employment, between the Director, RSFI, Senior Counsel, and Head, BPHR-CS, from 14 March to 2 May 2004. Such email communication, if it exists, we find to be covered by Section 2.3 of Administrative Order No. 2.08 which defines privileged documents as:

communications with in the Office of the General Counsel and/or between OGC and other Departments/Offices/Divisions, providing legal advice on disciplinary matters, grievances, appeals, applications to the Administrative Tribunal and other personnel Issues.

Inasmuch as Section 4 of Administrative Order No. 2.08 precludes staff member access to such privileged communication, the request is denied.

G. The Applicant seeks minutes of a meeting which allegedly took place in mid-March, chaired by then Assistant General Counsel to decide on the Applicant’s future employment with ADB. There is no evidence that any such meeting occurred, and in the absence of any proof of the meeting or of minutes thereof, the request must be denied.
H. The Applicant seeks production of statistics organized by nationality of ADB staff members who have not been confirmed at the end of their probationary period during the past five years. In the absence of any demonstration that the action taken by the Respondent was based on nationality, the requested data are irrelevant and the request is denied. — *Dalla v. ADB*, pars. 53, Decision No. 73, 19 August 2005. ADBAT Reports, Volume 7, pages 81-82.

27. Even if the alleged records of the Bank’s lighter discipline against staff members for fraudulent medical claims in the 1990’s were to be subpoenaed, reviewed and found relevant by the Tribunal, and were indeed in support of the Applicant’s claim of penalties less than dismissal being imposed for similar offenses in the 1990s, we do not believe that such documentation would be controlling in the case presently before us. As an international development bank in Asia, ADB attached particular importance to combating corruption including fraud and introduced the Anticorruption Policy in 1998. One of the three pillars of that new Policy was “ensuring that ADB projects and staff adhere to the highest ethical standards,” and the Policy announced that “staff violations of the ADB’s Code of Conduct or other relevant guidelines will be dealt with severely.” Thus, ADB expects staff to behave in an exemplary fashion and, according to the Respondent, has since 1998 steadily increased its efforts to combat corruption and “is making every effort to institute a zero tolerance policy on fraud and corruption, including fraud committed by ADB staff members.” The Tribunal considers such a tightening of the Bank’s stance toward corruption as reasonable and an appropriate exercise of its fiduciary responsibility, as long as the disciplinary measure is proportionate to the misconduct. The Tribunal does not find it unfair for the Bank to impose more severe disciplinary measures for fraud now than prior to the adoption of the Anticorruption Policy in 1998, in as much as the Bank provided due notice to employees of its new stricter norms. “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.” (*Khelifati*, ILOAT Judgment No. 207 (14 May 1973)). — *Abat v. ADB*, par. 27, Decision No. 78, 7 March 2007. ADBAT Reports, Volume 8, page 7.

16. In his Application, the Applicant requested that the Respondent produce a number of documents, including those pertaining to the application, meaning and interpretation of Administrative Order (A.O.) 2.01 (sections 11.1 & 4.1) and A.O. 2.12 (section 5.5).

17. On 10 July 2009, the Tribunal ordered the Applicant to specify the materials he was seeking and to explain their relevancy, to which the Applicant responded on 20 July 2009. On 30 July 2009, the Respondent submitted comments on the Applicant’s written compliance with the Tribunal’s order, providing a Competency Evaluation Guide (Annex 1); an email from BPHR regarding refusal by staff to sign their PDPs (Annex 2); and a PowerPoint presentation on ADB’s performance management system (Annex 3).

18. In his Reply dated 30 July 2009, the Applicant requested a copy of a directive regarding refusal to sign PDPs, which was coincidentally supplied by the Respondent on the same day (supra). The Applicant also requested copies of emails from the Director, RSES to the
Applicant which the Respondent said show the receipt of specific ongoing feedback prior to the six-month PDP, which the Respondent provided on 17 August 2009. The Applicant further requested a copy of the material used in training supervisors on giving performance evaluation feedback, which the Tribunal ordered the Respondent to provide on 19 August 2009. The Bank provided it on 31 August 2009.

19. As the Applicant made no further request for documentation in his 7 August 2009 reply to the Respondent’s comments on the Applicant’s written compliance with the Tribunal’s order, the Tribunal denied any further preliminary measures in its order dated 19 August 2009. —Kai Schmidt-Soltau v. ADB, pars. 16 – 19, Decision No. 93, 5 February 2010. ADBAT Reports, Volume 9, page 6.

28. The Tribunal finds that the documentation requested by the Applicant 1) does not exist, or 2) is irrelevant to these proceedings, or 3) the substance thereof has already been provided in the extensive documentation of this case. With respect to the charges against the Applicant, the Tribunal finds that the requested documentation of the actions taken in the case of Mr. Sharma would be immaterial. Accordingly, the Applicant’s request for further documentation is denied. —Hua Du v. ADB, par. 28, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 92.

45. The Tribunal is empowered, under ADBAT Rules 10 and 112, when it considers it necessary for the proper examination of an application, to require a party to submit documents or evidence that might be pertinent to the issues posed. The Tribunal has employed this power in this case to obtain information from the Bank concerning individuals, other than the Applicant, who were also disciplined in relation to the fraudulent scheme up to February 2017. This was the time when the Appeals Committee obtained the information, as stated in its report concerning the Applicant’s conduct. The Tribunal has also obtained, for its in camera review, information regarding the other individuals sanctioned, a copy of OAI’s Report into AAA and its representative, and the Bank’s institutional learnings and measures taken after the uncovering of the TEV privilege scheme. The Tribunal sought this information in order to examine the Applicant’s claims of discrimination and disproportionality of the sanctions imposed upon her. —Ms. J v. ADB, par. 45, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 259.

51. The Tribunal is empowered, under ADBAT Rules 10 and 11, to require a party to submit documents or evidence that might be pertinent to the issues posed when it considers this necessary for the proper examination of an application. 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, information regarding the other individuals sanctioned, a copy of OAI’s Report into AAA and its representative, and the Bank’s institutional learnings and measures taken after the uncovering of the TEV privilege scheme. The Tribunal sought this information in order to examine the Applicant’s claims of discrimination and disproportionality of the sanctions imposed upon him. —Mr. K v. ADB, par. 51, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 288.
47. The Tribunal is empowered, under ADBAT Rules 10 and 11, if it considers it necessary for the proper examination of an application, to require the Bank to divulge documents or evidence pertinent to issues posed. It has done so in this case with regard to information regarding disciplinary measures imposed upon other individuals, for purposes of examining the Applicant’s claim of discrimination and disproportionality of the sanction imposed upon her. However, the Tribunal does not see how divulgence of the information she has requested could possibly rebut the existence of the fraudulent invoices for the Applicant’s vehicles, or the fact that she had received a copy of them and had benefited from invoking the TEV privilege on two occasions.

48. The Applicant’s request for documents showing measures taken to produce the AAA representative as a material witness implied inadequate efforts by the Bank to do so, whereas it was in the Bank’s own interest to pursue this individual. The Applicant has not made out a convincing case of why such information would be pertinent to the allegation of her own misconduct, since she cannot shift the blame on to others for her own acts. Nor would provision of a detailed report of changes, adjustments or corrections made by the Bank as it applied the TEV privilege, or disclosure of the status of the issues presented vis-à-vis the Government of the Philippines serve to exculpate her or address her claims for relief in this case. These aspects of the request are thus denied. —Ms. L v. ADB, pars. 47 - 48, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 322.

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. —Ms. M v. ADB, pars. 45 - 46, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 359.
2. **Full Panel: \textit{En Banc}**

24. The Applicant and his colleagues requested that their cases be heard by a full panel of the Tribunal in terms of Rule SA, paragraph 2 of the Rules of Procedure. Despite the Bank’s objections, having regard to the novelty and the complexity of the issues involved, the Tribunal determined that the cases warranted consideration by a panel consisting of all its members. —\textit{Breckner v. ADB}, par. 24, Decision No. 25, 6 January 1997. \textit{ADBAT Reports}, Volume 3, page 25.

32. Upon request by the Applicants which were in part granted by the Tribunal, and upon the direction of the Tribunal, the Respondent was required, under Rules 6 and 10 respectively, to produce more specific information about the benefits in question for the year 1995. This information related principally to: the grant of education benefits to non-Filipino professional staff members (average and total amount, relation to average salary, number of staff members and dependents affected); the grant of home leave benefits to non-Filipino professional staff members (average amount, relation to average salary, number of staff members affected); the grant of severance pay to all separated staff members (average amount and relation to average salary); the nationality and “salary-level” of staff members; and the pertinent staff rules and regulations of other international organizations. This information was furnished to the Applicants, and the parties were permitted to comment thereon. The Tribunal, elsewhere in this decision, makes specific reference to this information where pertinent. Because of the time concerned in the production and transmittal of this information, the exchange of comments, and in filling two vacancies in the Tribunal, the Tribunal deferred its decision until its next session in January 1998, and thereafter again until its session in August 1998. On 12 February 1997, the Tribunal decided that this Application should be considered by a panel consisting of all its members. —\textit{De Armas v. ADB}, par. 32, Decision No. 39, 5 August 1998. \textit{ADBAT Reports}, Volume 4, pages 18-19.

24. Article V of the Statute of the Tribunal provides as follows:

\(...\)

4. The Tribunal shall form panels, each consisting of three of its members, for dealing with all cases except for the instances provided in paragraph 5 of this Article. The decisions of such panels shall be deemed to be taken by the Tribunal.

5. The Tribunal shall form a panel consisting of all of its members when dealing with (1) certain cases which, in the determination of the Tribunal, warrant a hearing by such a panel; and (2) any cases where any party to such a case makes a written request and gives reasons for the request that the case be heard by such a panel, and where such request is agreed to by the Tribunal.

25. The Tribunal rejects the Applicant’s request to constitute a full panel in the present case. The burden is on the Applicant to demonstrate the need for an en banc proceeding. As in \textit{Toivanen}, the Tribunal is of the opinion that there are no circumstances of sufficient
novelty, complexity or difficulty to make it necessary or desirable that this case be considered by a panel consisting of all its Members (see Toivanen, Decision No. 51 (2000), V ADBAT Reports 69). —Abat v. ADB, pars. 24-25, Decision No. 78, 7 March 2008. ADBAT Reports, Volume 8, page 6.

24. Article V of the Statute of the Tribunal provides as follows:

... 

4. The Tribunal shall form panels, each consisting of three of its members, for dealing with all cases except for the instances provided in paragraph 5 of this Article. The decisions of such panels shall be deemed to be taken by the Tribunal.

5. The Tribunal shall form a panel consisting of all of its members when dealing with (1) certain cases which, in the determination of the Tribunal, warrant a hearing by such a panel; and (2) any cases where any party to such a case makes a written request and gives reasons for the request that the case be heard by such a panel, and where such request is agreed to by the Tribunal.

22. The Applicant requests that a full panel be constituted to hear this Application. She maintains that “her case [should] be heard and ventilated as widely as possible to preclude any doubt in her mind that her case will be decided with the object of discovering the truth and ensuring that truth and justice shall prevail.”

23. Article V of the Statute of the Tribunal provides as follows:

5. The Tribunal shall form a panel consisting of all of its members when dealing with (1) certain cases which, in the determination of the Tribunal, warrant a hearing by such a panel; and (2) any cases where any party to such a case makes a written request and gives reasons for the request that the case be heard by such a panel, and where such request is agreed to by the Tribunal.

24. The burden is on the Applicant to demonstrate the need for an en banc proceeding. As in Abat and Toivanen, the Tribunal is of the opinion that “there are no circumstances of sufficient novelty, complexity or difficulty to make it necessary or desirable that this case be considered by a panel consisting of all its members.” (See Abat, Decision No. 78 [7 March 2007] and Toivanen, Decision No. 51 [2000], VADBAT Reports 69. See also Ahmad, Decision No. 80 (17 August 2007). Accordingly, the Tribunal denies the Applicant’s request for a full panel. —Agliam v. ADB, pars. 22-24, Decision No. 83, 25 January 2008. ADBAT Reports, Volume 8, page 79.

25. The Applicant requests that the Tribunal subpoena all e-mails, official or otherwise between the Applicant and the US Executive Director and all other emails pertaining to her or copied to her within the Department “to prove beyond shadow of a doubt that there was never any issue with regard to her performance that will support the personnel action that was brought upon against her.” The Respondent requests the Tribunal to reject the Applicant’s
request, maintaining that it has included all relevant documents in its possession including any relevant written communications between the Applicant and the US Executive Director. The Respondent makes the point that it would expect as party to the communications that the Applicant would already have copies of the requested documents.

26. In her Reply, the Applicant produced one e-mail Mr. Speltz had sent and had copied to the Applicant. In his response, Mr. Speltz suggested that there were “confidentiality agreements” between the Applicant and the office of the US Government office of the US ED not to "keep [...] copies- hard or soft -of all [his] communication that [he] copied on-or otherwise" and that the Applicant had breached the agreements. If there were such agreements and the Applicant had abided by them, there would indeed be difficulty in producing e-mails as evidence. However, the above email produced by the Applicant as evidence shows that she was in fact in possession of the relevant emails. The Applicant has the burden of specifying a document to be subpoenaed without merely asking the Tribunal to subpoena all e-mails pertaining to her.

27. Furthermore, as explained below, based on the evidence provided by the Respondent, the Tribunal is satisfied that the Applicant's teamwork problem within the US ED's Office was definitely an issue at the latest by early January 2006, and that it was one of the factors that prompted the transfer of the Applicant to another position in ADB. Under the circumstances, the Tribunal finds it unnecessary to subpoena all emails between the Applicant and the US ED and all other emails pertaining to her or copied to her within the Department "to prove... that there was never any issue with regard to her performance that will support the personnel action. Accordingly, the Tribunal rejects the Applicant’s request that it subpoena e-mails. —Agliam v. ADB, par. 25-27, Decision No. 83, 25 January 2008. ADBAT Reports, Volume 8, page 79-80.

8. The Applicant requests a hearing and that this Application be considered by the Tribunal en banc. We have been provided no persuasive justification to call for a hearing and that request is therefore denied. However, in the circumstances of the case, the Tribunal grants the request for consideration by the Tribunal en banc.

9. Although the Tribunal has determined that this case warrants consideration by the Tribunal en banc, one member has not been able to attend this plenary session of the Tribunal. In the exercise of its powers under Rule 23, and considering that Rule 5, paragraph 4, provides that three members of the Tribunal shall constitute a quorum for plenary sessions, the Tribunal decides that this case shall be determined by the four members present at this session. —Srinivasan Kalyanaraman v. ADB, pars. 8 – 9, Decision No. 96, 8 September 2011. ADBAT Reports, Volume 9, page 56. (See also Oral hearings; Affidavits)

4. In his Reply, the Applicant requests 'that the application be subject to oral hearing before the full bench of the tribunal”.

5. This decision is being rendered en banc pursuant to Decision No. 96, although one member has not been able to attend this plenary session of the 'tribunal. and accordingly the
ease is determined by the four members present. —Srinivasan Kalyanaraman v. ADB [No. 2], pars. 4 – 5, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, page 63.

50. The Applicant has further requested that a full panel be constituted to hear this Application. He maintains that the subject matter is unique and that there has never been a case heard by the Tribunal dealing with the issue of transfers. The Respondent, while taking no formal position, suggests that there is no special need in this case nor a particularly unique or important question to warrant the decision being heard en banc.

51. The burden is on the Applicant to demonstrate the need for en banc proceedings. The Tribunal notes that in Agliam, Decision No. 83 [2008], VIII ADBAT Reports 73, para. 24, contrary to the Applicant’s assertion, the Tribunal dealt with the issue of transfers and, as in that case, the Tribunal is of the opinion that “there are no circumstances of sufficient novelty, complexity or difficulty to make it necessary or desirable that this case be considered by a panel consisting of all its Members.” In the circumstances of the case, having regard to Article V para. 5 of the ADBAT Statute, the Tribunal rejects the Applicant’s request for a full panel. —Mr. F v. ADB, pars. 50 - 51, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 41.

44. In light of the complexity of the legal issues raised, the Tribunal has decided in accordance with Article V(5) of the Tribunal Statute and Rule 5A to hear the decision en banc. —Mr. H vs. ADB, par. 44, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 120.

30. In view of the complexity of the legal issues raised in the case, in accordance with Article V(5) of the Statute read with Rule 5A, the Tribunal deems it appropriate to consider the case en banc. —Ms. Maria Lourdes Drilon vs. ADB, par. 30, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, page 156.

28. In view of the complexity of the legal issues raised in the case, and in accordance with Article V(5) of the Tribunal’s Statute read with Rule 5A of its Rules, the Tribunal deems it appropriate to consider the case en banc. —Perrin, et al vs. ADB [No.3], par. 28, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 200.

41. The case involves the interpretation of the 2016 ESP provisions, which warrants the case being decided en banc under Article V (5) of the Tribunal’s Statute read with Rule 5A of the Tribunal’s Rules of Procedure. —Mr. I v. ADB, par. 41, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, page 230.


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. —Ms.
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. — *Mr. K v. ADB*, par. 47, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 287.

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. — *Ms. L v. ADB*, par. 43, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 321.

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. — *Ms. M v. ADB*, par. 42, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 358.

The case involves a review of a decision that was decided en banc under Article V(5) of the Tribunal’s Statute read together with the Rule 5A of the Tribunal’s Rules of Procedure. This request has thus been dealt with as well en banc. — *Ms. J v. ADB [No. 2]*, par. 16, Decision No. 120, 28 February 2019. ADBAT Reports, Volume 10, page 385.

The case involves a request for clarification of a decision that was decided en banc under Article V(5) of the Tribunal’s Statute read together with the Rule 5A of the Tribunal’s Rules of Procedure. This request has thus been dealt with as well en banc — *Ms. Cruz v. ADB [No. 2]*, par. 15, Decision No. 121, 28 February 2019. ADBAT Reports, Volume 10, page 392.

### Oral Hearing; Affidavits

We consider each of the preliminary requests in turn:

A. The Applicant requests the Tribunal to summon the Senior Advisor, RSDD, whom he asserts had been his supervisor during the study done prior to his employment, and during his first few months of employment. The Applicant was recruited to fill a vacancy in RSFI, where his immediate supervisor was the Director, RSFI, who was responsible for the preparation of the PER. The Senior Advisor did provide a memorandum dated 8 January 2004 regarding the Applicant’s performance, but the content thereof establishes that it focused on his work during the time he was a consultant on the Harmonization project rather than his work in
RSFI which was the focus of the PER. Examination of the PER shows that the Applicant did call attention to the Harmonization study, and that the Director, RSFI, acknowledged that work as substantially having been done prior to his recruitment to RSFI. Applicant did not challenge that assessment in his undertaking to revise Section B. We find that given the timing of the Applicant’s work with the Senior Advisor, RSDD, and the responsibility entrusted to the Director, RSFI, for assessing the Applicant’s performance for the full period of the PER that the testimony sought would have no bearing on the matter before this Tribunal. The request for that testimony is denied.

B. The Applicant requests the Tribunal to summon the Auditor General of ADB to testify on enforcement of ethical standards within the ADB. The record is clear that the WB Code of Ethics is unique to that institution, and that ADB employees are governed by the duties, rights and responsibilities of staff members as set forth in Administrative Order No. 2.02. The Applicant’s request for factual testimony is superfluous, given the documentation provided on the record. As to his request for his view on the complaints of reprisal, that view is set forth in the Auditor General’s memorandum of 20 August 2004, and will be considered by this Tribunal in that format. The request for testimony of the Auditor General is denied.

C. The Applicant requests the Tribunal to secure affidavits from the Director, Finance and Governance, Mekong Department, from the Assistant Chief Economist, ADB on their withdrawal of verbal offers for transfer to their divisions. The issue to be considered on the requested transfer is the propriety of the Respondent’s denial of the request for transfer, and not the availability of positions to which transfer could be approved. Thus, even if the two individuals were to provide evidence that they had offered to accept the Applicant as a transfer, such testimony or affidavits would be irrelevant to the issue of whether or not the denial of the request for transfer was proper. The request for provision of such affidavits is denied.

D. The Applicant requests the Tribunal to request the Director, BPHR, for an affidavit as to his role in handling the Applicant’s case and in particular whether he was acting in good faith. The record is replete with documentation to and from the Director, BPHR, and concerning his involvement and it is the function of this Tribunal to weigh that evidence as well as the charge that he was not acting in good faith and was merely implementing a predetermined decision. We deny the request on the grounds that the record is sufficiently detailed as to the role of the Director and sufficient as well for us to determine the propriety of his actions.

E. The Applicant requests the Tribunal to seek an account from the Executive Director for Thailand as one who is “very familiar” with the Applicant’s case. In the light of the extensive documentation in this case, and in the
absence of any specific indication as to how the testimony of the Executive Director for Thailand is related to the actions of the Respondent or to the allegations raised by the Applicant, this request is denied.

\[x x x\]

I. The Applicant asks the Tribunal to request a statement from the United States’ Executive Director who allegedly wrote a letter on the Applicant’s behalf to the Deputy Director General, BPMSD. Such letter even if introduced in evidence would not impact on the responsibility of the Respondent to make its determinations here under challenge on the basis of the appropriate law of the ADB. The statement thus requested by the Applicant is irrelevant and the request is denied.

54. In addition to the foregoing, it should also be noted that the Applicant had the opportunity to present the foregoing testimony and documentation in his numerous contacts and discussions with representatives of the Respondent in a much more timely fashion both prior to and during the earlier stages of these proceedings rather than through seeking to have this Tribunal solicit those inputs on his behalf. The Applicant bore the onus for their introduction and we find his effort at this stage to be inappropriate and tardy. —*Dalla v. ADB*, pars. 53-54, Decision No. 73, 19 August 2005. ADBAT Reports, Volume 7, pages 80-82.

13. On 6 May 2004, the current Director, AMC, dismissed all of the Applicant’s allegations. On 31 May 2004, she appealed that decision to the Appeals Committee which on 20 September 2004, without finding a hearing was required, recommended the Appeal be rejected as being without merit. The President accepted the Report and Recommendations, the same day and the Applicant on 17 December 2004 appealed to the Administrative Tribunal seeking the following relief:

a. “I request that the Administrative Tribunal conduct full hearings on this matter with the former Dean and the former Senior Administrative Officer, who are thoroughly familiar with the management skill of [Mr. Q].”

b. “I request that the Tribunal commission an assessment on the following three to a reliable private consulting company: (1) the past and present management skills of the Asian Development Sank Institute (ADSI) management, (2) the performances so far up to now conducted by the ADSI management, (3) the appropriateness of the salary so far up to now paid to the ADSI management.

   In addition to this, I request that the results of the aforementioned assessment be used as part of the reference materials for your judging this matter and that the results are made public.”

c. “I request that the Tribunal invalidate ‘Report and Recommendation of the Appeals Committee on Appeal NO.3 of 2004’ (Annex 1) issued by the Appeals Committee on 20 September 2004.”
d. “I request that [Mr. Q] and [the Dean] apologize to me in writing.”

e. “I request that [Mr. Q] return to the ADSI a part of the salary overly paid for his poor performances.”

f. “I request that the ADSI pay me compensation of 45,000,000 Japanese Yen against the moral injury, humiliation, besmirched reputation, wounded feelings, mental stress, anxiety, anguish and physical damage that I suffered and am suffering.”

g. “I request that the ADSI pay my legal costs and any other costs involved.”

h. “I request that the Asian Development Bank (ADB) immediately make provision for assisting employees who suffered or suffer from any kinds of harassment at work and that the provision be stipulated in the Administrative Order.”

i. “I request that the ADB reorganize the current members of the Appeals Committee so that the appeal system should be appropriately conducted and that the ADS set up a system to support the employees who appeal by adopting experts and/or technically educating the personnel of the committee.”

j. “I request that the working environment of the ADBI be promptly improved to a level deemed adequate for an international organization.”

k. “I request that employment contract of the ADBI staff and/or temporary Professionals be appropriately concluded and that a legal advisor professionally serves the duty to ensure an appropriate working environment.”

14. The Administrative Tribunal considered the foregoing claims at its August 2005 session and determined that an evidentiary hearing was required to help resolve conflicting statements as to what transpired during the instances of alleged sexual harassment. Accordingly we issued an order calling for a hearing for testimony on the issue of the alleged sexual harassment. Mr. Q petitioned to be granted status as an Intervenor and that request was granted. —Ms. X v. ADB, pars. 13-14, Decision No. 74, 11 January 2006. ADBAT Reports, Volume 7, pages 94-96.

5. In the absence of any disputed facts we find no justification for hearing oral testimony. Only the motives and intentions of Mr. Lim are in dispute which are not palpable but need to be gathered from the attending circumstances. The request for calling witnesses is, accordingly, turned down. —Lim v. ADB, par. 5, Decision No. 76, 02 August 2006. ADBAT Reports, Volume 7, page 128.

24. The Applicant requests for a hearing in order to present the testimony of three members of staff (Task Managers) in ADB HQ with whom she had worked. The comments of the Task Managers are, however, already on record and had been fully taken into account by the Respondent’s officers when making the non-confirmation decision. Their comments focus on her
areas of strength and not on her technical and analytical skills, which are the core issue in dispute. The Applicant has challenged the assessment of her performance done by her Supervisor and CD, PRCM and yet they have not been called as witnesses. The Tribunal accordingly denies the request for a hearing of witnesses on matters that are at best secondary to the question of the technical skills for which she was not confirmed. —Ms. D v. ADB, par. 24, Decision No. 95, 8 September 2011. ADBAT Reports, Volume 9, pages 44-45.

8. The Applicant requests a hearing and that this Application be considered by the Tribunal en banc. We have been provided no persuasive justification to call for a hearing and that request is therefore denied. However, in the circumstances of the case, the Tribunal grants the request for consideration by the Tribunal en banc.

9. Although the Tribunal has determined that this case warrants consideration by the Tribunal en banc, one member has not been able to attend this plenary session of the Tribunal. In the exercise of its powers under Rule 23, and considering that Rule 5, paragraph 4, provides that three members of the Tribunal shall constitute a quorum for plenary sessions, the Tribunal decides that this case shall be determined by the four members present at this session. —Srinivasan Kalyanaraman v. ADB, pars. 8 – 9, Decision No. 96, 8 September 2011. ADBAT Reports, Volume 9, page 56. (See also Full Panel: En Banc)

6. According to Rule 14, paragraph I of the Rules of Procedure of the Tribunal, “[o]ral proceedings, including the presentation and examination of witnesses or experts may be held only if the Tribunal so decides”.

7. In the present case, the facts are not disputed; the issue is one of interpretation of the rules and the arguments of both parties on the issue are sufficiently explained in their pleadings. The Applicant’s request for an oral hearing is not founded on any claim of evidentiary conflict.

8. Accordingly, we deny the request to hold an oral hearing in accordance with the power granted to us by the rule quoted above.

9. We note that, in his Reply, the Applicant seeks in case of the denial of his request for an oral hearing, permission to “pursue the application under international law ... through alternative processes of adjudication of the application”. It is not the function of the Tribunal to grant or deny such permission. —Srinivasan Kalyanaraman v. ADB [No. 2], pars. 6 – 9, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, page 64.

29. According to Rule 14 paragraph 1 of the Rules of Procedure of the Tribunal, “Oral proceedings ... may be held only if the Tribunal so decides”. The Tribunal held in Harder (No.2) Decision No 48 (2000), paragraph 9:

“The Applicant has requested to hold oral proceedings under Rule 14 of the Rules of the Tribunal. Noting that the decision to accord oral proceedings rests with the discretion of the Tribunal and that it may be held only when it
finds such proceedings are necessary, the Tribunal decides that there is no such necessity in this case, and accordingly, that the request be denied.”

In this case, both parties have submitted extensive, written evidence and the Tribunal finds that this documentation is sufficient to determine the issues before it. Therefore, the Tribunal decides that there is no necessity for an oral hearing in this case, and accordingly the request for an oral hearing must be denied.

30. Given our conclusion that oral testimony is not necessary in this case, we find that the record is closed on the basis of the existing submissions. A document submitted on 17 January 2013 by the Applicant is rejected as being out of time. —Hua Du v. ADB, pars. 29 – 30, Decision No. 101, 31 January 2013. ADBAT Reports, Volume 9, page 93.

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

49. Taking into account the nature of the allegations made by the Applicant and the very extensive and detailed comments with supporting documents given by her and the Bank to substantiate their arguments, the Tribunal after due deliberation has decided that oral proceedings were not warranted in this case, as conveyed to the parties by the Order dated 23 December 2014. —Claus vs. ADB, pars. 48 – 49, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, page 62.

39. Under Article VIII of the Tribunal’s Statute, oral proceedings, including the presentation and examination of witnesses or experts, may be held only if the Tribunal so decides. The Tribunal has been furnished with more than ample documentation satisfactorily illustrating the facts, and both the Applicant and the Respondent have been able to support their positions fully. There does not seem to be any need for further clarification. The facts so presented are not disputed and the issue is one for legal interpretation of the rules and the arguments of both parties. In these circumstances, the Tribunal does not find it necessary to order an oral hearing in this case. —Mr. H vs. ADB, par. 39, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 120.

27. As set out in the facts, the Applicant requested an oral hearing so that, amongst other things, her statement to the Ombudsperson in relation to the allegations of harassment could be made available. Under Article VIII of the Statute of the Tribunal it is for the Tribunal to take a decision in each case whether oral proceedings, including presentation and examination of witnesses, are warranted or not. It is not appropriate to call the Ombudsperson as a witness in light of the confidential function and AO 2.14 para. 3.9 which states that “the Ombudsperson cannot be compelled to provide information or be a witness in hearings … about concerns brought to the Ombudsperson’s attention in his/her capacity as Ombudsperson”. The Tribunal notes as well a similar provision AO 2.11 para. 5.5 on Prevention of Harassment. As the submissions by the parties provide a sufficient basis for consideration of the issues, the Tribunal
considers that oral proceedings are not warranted. (See Claus, Decision No. 105 (13 February 2015), paras. 52 and 53; Mr. H, Decision No. 108, (6 January 2017), para 39). —Ms. Maria Lourdes Drilon vs. ADB, par. 27, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, pages 155-156.

39. Under Article VIII of the Tribunal’s Statute, oral proceedings shall be held only when the Tribunal so decides. In this case, the Applicant and Respondent have supported their positions with sufficient documents and there seems to be no need for further oral clarifications. Besides, the Applicant has not indicated the names of any witnesses whom he would like to examine orally. In the circumstances, after due deliberation, the Tribunal does not find it necessary to order an oral hearing in this case. (See Claus, ADBAT Decision No. 105 (3 February 2015)) —Mr. I v. ADB, par. 39, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, pages 229-230.

4. Request for Recusal of a Member

43. Articles IV para. 4 of the Statute of the Tribunal states: “[a]ny member who has an actual or potential conflict of interest in a case shall recuse himself or herself.” The request for the recusal has been considered and rejected. —Mr. H vs. ADB, par. 43, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 120.

**RETIREMENT**

1. Age of Retirement

32. Thus Chapter II provides for two distinct types of termination, in distinct situations, and with distinct consequences as to financial entitlements. SR 10 provides, upon termination of service, on account of age, for the payment of a “retirement benefit” (whether by way of pension or otherwise), while SR 12 provides, upon termination of appointment, for cause, for a “termination payment.” That these payments were intended to be distinct is confirmed by yet another feature: the former was to be laid down in the staff retirement benefit scheme, and the latter in Administrative Orders.

33. Thus at the time, and in the context in which, the Staff Regulations were adopted, the plain meaning of SR 10 was that:

   (a) if the option was exercised, by either party, the age of retirement was that age (more than sixty, but less than sixty-five) at which the option was exercised;

   (b) if (and only if) the option was not exercised, the age of retirement was sixty-five; and
by way of exception to (b), the age of retirement would be more than sixty-five, if the President extended the employment of a staff member.

The language of Chapter II does not permit a retirement, viz, a termination of service under SR 10(1), to be deemed to be also a termination of appointment under SR 11.

The provision in (c) above was clearly no more than an exception to the provision in (b). But it is plain that the provisions of (a) and (b) contained two distinct rules, and neither was subordinate to the other. There were thus two rules in regard to the age of retirement: optional retirement, at any time between sixty and sixty-five, and compulsory retirement at sixty-five (subject to an exception). The Tribunal observes that SR 10 made no reference, let alone defined, any “normal” retirement age or date. Accordingly, when the Staff Regulations were first adopted the power of the Bank to retire a staff member after the age of sixty did not depend on what the Bank considered to be the “normal retirement age.”—*Samuel v. ADB (No. 2)*, par. 32-34, Decision No. 15, 13 August 1996. ADBAT Reports, Volume 2, pages 61-62.

The Tribunal therefore concludes that SR 10 does not prescribe a “normal” retirement age (whether sixty-five as contended by the Applicant, or any other age); that SR 10 prescribes two distinct rules, one as to optional retirement between sixty and sixty-five, and the other as to compulsory retirement at sixty-five (and, exceptionally, even after sixty-five); that the exercise of the option results in a retirement (i.e., a termination of service) and not a termination (of appointment) under SR 11; and that upon such a retirement, no termination payment is due. —*Id*, par. 42, Decision No. 15, 13 August 1996. ADBAT Reports, Volume 2, page 64.

The tribunal need not further address the issue of exhaustion of internal Bank remedies with respect to the claim of termination pay for involuntary retirement before the age of 65, because even were this issue to be addressed on the merits, the Applicant would be unsuccessful; the Tribunal has this day decided by a majority that the Respondent has the authority under Section 10 of the Staff Regulations to exercise an option to retire staff members at the age of 60, upon paying pension and other normal retirement benefits without making additional termination payments for premature termination under Section 12. See *Samuel (No.2)*, Decision No. 15 [1996]. —*Singh v. ADB*, par. 10, Decision No. 16, 13 August 1996. ADBAT Reports, Volume 2, pages 85-86.

In *Samuel (No. 2)* (ADBAT Decision No. 15 [1996]), the Tribunal held that Section 10 gives the Bank the option to retire a staff member at the age of sixty, and that the Bank was entitled to adopt a coherent policy of exercising that option uniformly, and without discrimination.

Applying those principles, the Tribunal holds that the exercise by the Bank of its option to retire the Applicant was not flawed. —*Amora v. ADB*, pars. 50-51, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 12: cf. also *Cumaranatunge v. ADB*, Decision No. 30, pars. 4-5, 6 January 1997. ADBAT Reports, Volume 3, page 56.
2. Early Retirement (Special Separation Program)

8. It was in that background that the Bank’s management approved the SSP, and sought Board approval. The Board paper of 15 July 1994 stated the objectives of the program:

4. The underlying rationale for the SSP stems from the MTSF, the TFIPQ Report and, more importantly and directly, from the HRD strategy. The Bank’s current strategic agenda necessitates a strategic shift in the management of its human resources. The needed reorientation of the HRD strategy, however, cannot be accomplished under conditions of normal staff turn over and retirement. Its effective implementation requires a special separation program to be put in place with special objectives and procedures for the voluntary separation of staff in order to enable the Bank to operate with increased efficiency and economy to better serve the needs of its DMCs.

5. The SSP would provide staff who feel that their contribution to the Bank has become of limited or diminishing value or who are experiencing career stagnation problems the opportunity to leave the Bank earlier than their normal retirement ages and be suitably compensated with a fair and reasonable separation package. These staff tend to be relatively senior in age and in Bank service. They are not likely to progress further in their respective job streams nor are they likely to make a transition into other job streams. Although still performing satisfactorily, the prospect of continued stagnation in their current jobs would make them lose motivation to continue service in their present jobs. In such cases, the SSP would facilitate their voluntary separation from the service of the Bank.

6. In essence, therefore, the SSP is an exceptional measure to enable the Bank to create new staffing and career growth opportunities in a short-time table in order to meet the HRD strategy objectives without jeopardizing the institutional effectiveness and operational requirements of the organization. Since the SSP is an exceptional measure, it has to be limited in the scope and period of its application. Given the foregoing considerations, it can only be offered to a particular segment of the Bank staff, i.e., those who are experiencing career stagnation despite their long service and age as explained in paragraph 5 above, on a voluntary basis. In order to qualify under the program, such staff would need to meet certain Bank-specified eligibility criteria within the short duration of the program and to wish to be separated from the service of the Bank under the program. Owing to the special nature of the program, it is not covered by any of the existing separation schemes provided in Administrative Order 2.05.

32. From the Bank’s assessment of the situation, three conclusions are inevitable. First, in introducing the SSP, the Bank’s primary objective was not the improvement of benefits to staff, upon voluntary separation. On the contrary, the SSP was principally a policy measure - and just one part of a many-pronged approach - designed to improve the quality and impact of the Bank’s services to its DMCs. And it was also the Bank’s policy, in that process, to improve the balance among its staff in regards to gender and country-representation. It is true that the
implementation of the SSP require payments to staff, and so when it was announced the SSP did affect the terms and conditions of employment of staff members concerned; but that was only indirect and incidental. It is in the perspective of those policies that the Tribunal must consider the SSP.

34. Finally, it follows that the payments made under the SSP were not in any sense rewards or remuneration for service. It was not at all a case of substantial payments being offered to those who were average performers as a reward for their services, while nothing was being offered to ‘high’ performers. The Bank wished to retain ‘high’ performers; it was not necessary to pay them something extra for that, and indeed it would have undermined the rationale of the SSP to have offered them enhanced separation payments. In regard to the other category - those whom it did not wish to retain - the Bank faced a practical difficulty: those who were marginal or unsatisfactory performers might have been separated under the existing staff rules and regulations without additional payments, but that would have been more difficult in the case of those who were satisfactory. For the latter, therefore, a special inducement was necessary, and that was what the SSP provided - an inducement to leave, and not a reward for service.

44. As explained in paragraph 32, the SSP was neither intended to provide, nor provided, “benefits” for work or services. Consequently, the classification which the Bank made - of “high” performers whom it wished to retain, and others whom it did not - was not in order to reward past service but to improve the quality of its staff. In relation to the object which the Bank sought to achieve, that classification was proper and reasonable. As explained in paragraph 34, the provision of “benefits”, which were in essence payments in the nature of inducements to separate to those whom it did not wish to retain was, again, a proper and reasonable way of achieving the Bank’s objectives; and the refusal to offer similar payments to those whom it wished to retain was in no way discriminatory.

45. The Tribunal holds that in this respect the SSP did not infringe the principle of equal treatment. —*Breckner v. ADB*, pars. 32, 34, 44-45, Decision No. 25, 6 January 1997. ADBAT Reports, Volume 3, pages 27, 28, 30.

67. As a result of the defects in formulating criterion (a) and in implementing criterion (b), out of 34 staff members who obtained SSP benefits, 16 who could not reasonably have been considered as suffering career stagnation in terms of the objectives of the SSP were nevertheless allowed its benefits. Likewise, it is clear that of the 73 staff members on the list furnished by the Bank, as many as 36 were not suffering career stagnation. However, that does not justify an order by the Tribunal that the Applicant and his colleagues should also be allowed those benefits, as they too were ineligible.

68. But that does not conclude the matter. The criteria for the SSP were not determined on the basis of some inflexible or immutable principles, but pragmatically to create a sufficient number of vacancies in order to recruit new staff with the desired ‘skill-mix.’ The Board acted upon the representation by the management that about 70 staff would be eligible, of whom 60% to 70% were likely to separate. Had the Board then realized that in fact only about 37
would be eligible, if it wished to proceed with the SSP it would have directed that the criteria be
relaxed to achieve that target of 70 eligible staff members. In that event, there would have been a
likelihood that the Applicant (and his colleagues) would qualify. Because of the defects in
formulating and implementing the criteria, they have been wrongfully deprived of that
opportunity. For that they must be compensated, upon an equitable assessment of their chances
of coming within that class - which, of course, would vary according to the extent of the career
stagnation of each, as revealed by high PERs and promotion. —Breckner v. ADB, pars. 67-68,
Decision No. 25, 6 January 1997. ADBAT Reports, Volume 3, pages 27-28, 30: cf. also
Fajardo v. ADB, 6 January 1997, Decision No. 26, 6 January 1997. ADBAT Reports,
Volume 3, pages 41-43.

3. Notice of Retirement

6. This interpretation of the Staff Regulations is strongly supported by the
practicalities of Bank employment and its termination. There is no reason why a notice should
not be given in advance of the date on which a staff member’s service in the Bank is to be
terminated. On the contrary, fairness requires that such a notice be given, for it enables the staff
member to make advance arrangements about his personal and professional affairs upon leaving
the Bank. To read into Section 10 a condition that notice of retirement may be given no earlier
than a staff member’s 60th birthday would lead to either of two unacceptable conclusions. Either
the Bank would give such notice and make it effective within such a short period of time
thereafter as severely to disadvantage the affected staff member, a result clearly not in the best
interests of the staff, or the Bank would have to allow for a fairly extended post-notification time
period before making the retirement effective, a result that would contradict the clear language of
Section 10 giving the Bank the option to terminate service when a staff member turns 60. In sum,
giving notice of retirement in advance of a staff member’s 60th birthday is a rational
administrative practice, not an arbitrary decision. —Singh v. ADB, par. 6, Decision No. 16,
13 August 1996. ADBAT Reports, Volume 2, page 84.

4. Retirement Benefits

53. Although the exemption clause in the MOAs purported to deny the Applicant any
compensation, allowances, benefits and rights except as expressly provided therein, the Tribunal
holds that the Applicant was in fact in regular employment and that Section 26 of the Staff
Regulations did not authorize exemptions from the Staff Regulations which would have the
effect of denying him benefits under the SRP. —Amora v. ADB, par. 53, Decision No. 24, 6

58. The Tribunal holds that the Bank’s failure to make deductions and contributions
as required by the Rules of the SRP, caused material and moral injury to the Applicant, on
account of the unfair employment practice resorted to by the Bank, and the reduction of his
superannuation benefits. The Tribunal considers it impracticable to order retroactive
contributions, by the Bank and the Applicant, to the Retirement Fund, and instead directs the
Bank to pay the Applicant compensation which it equitably assesses in the sum of Pesos

14. According to Section 8.1 of the SRP, “No person shall have any interest in or right in any part of the Retirement Fund or of the earnings thereof or any rights in, or to, or under the Plan or any part of the assets thereof except as and to the extent expressly provided in the Plan”.

15. There is no provision in the SRP which provides expressly or even by implication, the restoration of the full pension after a certain age or period of time, let alone after the completion of a period of 15 years in retirement and at the age of 70.

16. On the contrary, paragraph 5 of the Thirteenth Schedule specifically warns that [t]he Pension to which the Participant would otherwise be entitled be reduced by the amount of the Pension which he is commuting” The amount remaining after the selection of the commutation is thus a “pension”. The term pension is defined in Section 1.1 (k) of the SRP in force at the time of retirement as "annul payments for life payable under the Plan, except as may be otherwise expressly provided herein.”

17. Therefore, the reduced pension is set for life without any possibility of restoration, except for cost of living increases as foreseen by Section 15.1 of the SRP in force at the time of the Applicant’s retirement. —*Srinivasan Kalyanaraman v. ADB [No. 2]*, pars. 14 – 17, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, page 66.

21. The system of commutation when applicable and invoked, is balanced. The SRP bears the risk that the pensioner will receive a large pay-out even though he or she may pass away shortly after the commutation, while the pensioner bears the risk that he will long outlive the alleged exhaustion of the lump sum. The system is with risks to both and thus not inequitable as asserted by the Applicant.

22. Additionally, we draw the attention of the Applicant to the fact that he voluntarily opted to commute a part of his pension and that he was not compelled to do so. At the time of his retirement, he was Assistant Controller with seniority of 17 years. He presumably would have had the skill to anticipate the consequences of his choice. —*Srinivasan Kalyanaraman v. ADB [No. 2]*, pars. 21 – 22, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, page 67.

5. **Burden of Proof**

10. The Applicant has the burden of proving his right to secure a full restoration of the pension to which he claims he was entitled as of June 2010.

11. Furthermore, it is up to him to establish, not only that the Bank improperly used a commutation period” of 15 years but also but in a case where the retiree has “out lived” (or completed) this period, he had the right to recover the full pension.
12. For the reasons given below, the Applicant fails to discharge his burden of proof; we are unable to find the evidence to support his assertions, either in the provisions of the SRP of 1994 in force at the time of his retirement or in his other arguments. —*Srinivasan Kalyanaraman v. ADB [No. 2]*, pars. 10 – 12, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, page 64.

6. **Noblemaire Principle**

30. There is no need to deal with the question of whether the *Noblemaire* Principle applies in this case. Even if it were applicable, the Applicant fails to provide persuasive evidence of violation of that principle or even evidence that his pension was lower than pensions paid to domestic and/or international civil servants with equivalent duties. After 17 years of seniority and at the age of 55, his annual pension amounted in 1995 to $51,604 and he received that a year lump sum payment of $243,000. —*Srinivasan Kalyanaraman v. ADB [No. 2]*, par. 30, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, page 71.

**SEVERANCE PAY BENEFITS**

1. **Purpose**

18. That contention is based upon a misunderstanding of the Tribunal’s conclusion (in Decision No. 39) that severance pay “is not a reward for service”. The Tribunal had to deal with the Applicants’ submission that the grant of severance pay (and other benefits) to expatriate staff members violated the principle of “equal pay for equal work”, because, they said, the Bank should have ignored the personal circumstances of expatriate staff (namely their expatriate status) which were irrelevant. The Tribunal held that when the Bank had to determine the remuneration of staff members, the principle of “equal remuneration for work of equal value” applied, and the Bank was not required to take into account the personal circumstances of staff members. However, when the Bank had to decide what employment benefits it would grant to its staff, generally their personal circumstances were very relevant. Thus the Tribunal drew a clear distinction between remuneration for service and employment benefits.

19. On that basis, the Tribunal held that “severance pay - although its amount is based on length of service - is not a reward for service” (para. 92) (emphasis supplied), because severance pay is not remuneration commensurate with the value of the service rendered, but only a benefit to offset some of the costs of resettlement. The difference in the amount paid was no discrimination because the Bank assumed, legitimately, that a staff member who resettles outside his last duty station would incur greater expense than another who continues to stay in his duty station. —*De Armas v. ADB (No. 2)*, pars. 18-19, Decision No. 45, 19 December 1999. ADBAT Reports, Volume 5, pages 29-30.
21. The Applicants assume that the Tribunal’s conclusion that severance pay “is not a reward for service” is contradicted by the statement in the discussion paper, that “severance pay was also regarded as a means to reward longer service.” In reality, however, the two phrases - “reward for service” and “reward longer service” - do not mean the same thing. The Tribunal held that severance pay is not a “reward for service”, because it is not remuneration commensurate with the value of the service rendered. Although it is not remuneration based on the value of service, it is an employment benefit; and because the amount of the benefit is based on, and increases in proportion to, the length of service, that benefit, in effect, “rewards” length of service. Thus the discussion paper relates to matters which were known to the Tribunal, and which are entirely consistent with the Tribunal’s conclusion. They could not possibly have influenced the Tribunal to decide Decision No. 39 any differently. —De Armas v. ADB (No. 2), par. 21, Decision No. 45, 19 December 1999. ADBAT Reports, Volume 5, page 30.

2. Retroactivity

19. The Tribunal accepts the contention of the Bank that it is not obliged to make any newly introduced benefit retroactive, in order to cover service rendered by staff members prior to the introduction of such benefit. The Bank is under no duty to take into account periods of service rendered when the scheme was not even in existence. In other words, the Tribunal considers that it is within the discretion of the Bank to choose not to make a new rule retroactive.

20. Moreover, contrary to the Applicant’s assertions, the action of the Bank does not deprive staff members of accrued rights; before the decision to set up a severance pay scheme, no such acquired or even potential right existed. As the new system does not impair any rights, but on the contrary grants new benefits, there is no question of a denial of acquired rights.

21. Therefore, it is the conclusion of the Tribunal that the operation of the new rule did not deprive the Applicant of any acquired right and is not discriminatory. —Viswanathan v. ADB, pars. 19-21, Decision No. 12, 8 January 1996. ADBAT Reports, Volume 2, page 40.

41. The Tribunal concludes that the manner in which the Bank designed and applied the new severance pay system does not lend itself to criticism. First, the Bank is not under an obligation to create a new system on a retroactive basis, which means that a non-retroactive scheme of benefits, as such, is not discriminatory. Secondly, the transitional arrangement is not discriminatory; the application of the scheme to the Applicant resulted in his receiving the guaranteed minimum -- and more. —Viswanathan v. ADB, par. 27, Decision No. 12, 8 January 1996. ADBAT Reports, Volume 2, page 41.

3. Severance Pay for Non-Regular Employees

60. The Tribunal rejects the Bank’s contention on the two counts. First of all, there is no dispute that at the date of separation, the Applicant was a staff member. He had continuous service from August 1979, and for the reasons stated above, he was a regular staff member, entitled to severance pay. In any event, even if he had not been in regular employment, under the
applicable rule the entitlement to severance pay is not restricted to service as a staff member holding a regular appointment; on the contrary, it extends to ‘eligible service’, and that includes all service after 1 May 1982, which means that even if he had been a contractual staff, he would have been entitled to severance pay. The Tribunal holds that the Bank must pay him severance pay with interest. —Amora v. ADB, par. 60, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 14.

SEXUAL HARASSMENT

1. In General

51. If the misconduct that is charged by a staff member is truly “sexual harassment,” then the Bank has a specific administrative order, A.O. 2.11, that governs the situation. Most pertinently, the A.O. defines “sexual harassment,” it makes clear the Bank’s condemnation of such conduct, and it creates a procedure for investigating such charges, with assurances of fairness to both the accuser and the alleged harasser. A.O. No. 2.11, para. 4.1, provides in pertinent part:

Sexual harassment is conduct of a sexual nature which is unwanted by the recipient and which the perpetrator knew or should have known was offensive to the recipient. Sexual harassment is defined as any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature . . . which is made a condition of employment, promotion or other personnel action or creates an intimidating, hostile or offensive environment. The following forms of conduct, if unwelcome, may be considered sexual harassment: . . . Verbal conduct of a sexual nature which may include unwelcome sexual advances, propositions or pressure for sexual activity, offensive flirtations, suggestive remarks, innuendoes or lewd comments or noises. —Yamagishi v. ADB, par. 51, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, page 122-123.

54. The Tribunal finds, as did the Director, AMC, that the three alleged incidents under discussion – the loud argument and table pounding, the disparaging reference to the Applicant’s age, and the warning that a good evaluation would not be given – if they occurred at all, cannot properly be characterized as “sexual harassment” as defined in A.O. 2.11. They may have been unwelcome to the Applicant, and caused her discomfort, but they cannot reasonably be viewed as being of a “sexual nature.” They are not at all similar to the examples given in A.O. 2.11: unwelcome sexual advances, propositions or pressure for sexual activity, offensive flirtations, suggestive remarks and lewd comments or noises. Accordingly, it was not necessary for the Respondent to adhere to the precise complaint and investigation procedure set forth in A.O. 2.11, para. 6.7. —Yamagishi v. ADB, par. 54 Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, page 124.

45. As noted earlier we do not subscribe to the Applicant’s position that the wide range of problems, which she has faced since her employment with the Bank and Institute,
constituted sexual harassment. While it may indeed be true that this case is an outgrowth of lax administration at the Institute, the Applicant’s claim that “bad management is within the scope of harassment” does not give the Tribunal jurisdiction in the absence of persuasive evidence of violation of the Administrative Orders by the Bank.

46. Rather, we are governed by A.O. No. 2.11, paragraph 4.1, which defines sexual harassment as follows:

   Sexual harassment is conduct of a sexual nature, which is unwanted by the recipient, and which the perpetrator knew or should have known was offensive to the recipient. Sexual harassment is defined as any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature (i) which reasonably results in physical, sexual or psychological harm or suffering of another person in the Bank workplace … (ii) which reasonably interferes with work or work productivity; or (iii) which is made a condition of employment, promotion or other personnel action or creates and intimidating, hostile or offensive environment …. The following forms of conduct, if unwelcome, may be considered sexual harassment:

   i. Physical conduct of a sexual nature which may range from unwanted touching, kissing, pinching, groping or patting, to assault and coercing sexual intercourse …. 

   ii. Verbal conduct of a sexual nature …. 

   iii. Non verbal conduct of a sexual nature which may include, among other things, sexually offensive pin-ups sexually offensive pictures or other offensive material, objects or written materials, leering suggestive looks, whistling and gestures which are sexually suggestive or rude. —Ms. X v. ADB, pars. 45-46, Decision No. 74, 11 January 2006. ADBAT Reports, Volume 7, pages 106-107.

49. It is beyond question that certain behavior such as grabbing or groping are on their face are both “unwanted by the recipient” and actions which the “perpetrator knew or should have known” were unacceptable and offensive. But for what could be perceived as casual touching, particularly when it is repeated without protest, i.e., for transgressions that are not blatantly and knowingly unwanted, it is incumbent on the claimant to so notify the alleged harasser of that offense. In the case of touching of fingers, the expert on sexual harassment employed by the ADB to train new hires and employees on the subject opined that, depending on the cultural environment, touching of hands may or may not constitute sexual harassment. For instance, the mere touching of hands may turn into “caressing”, depending on the placing of the hands, how it occurred and the frequency of the contact. The same holds true with “looking at somebody.” When dealing with a touching of fingers, which Mr. Q was originally quoted as saying was incidental, it is difficult for the perpetrator to know without further notice whether such behavior is unwanted, particularly if repeated on several occasions. Given the fact that such physical contact on a half dozen occasions over three years could have been considered as incidental, or casual without knowing offense, it was incumbent on Ms. X to make it clear to Mr. Q that such behavior was not merely unacceptable, but was in fact offensive. She apparently recognizes that such notice was appropriate when she said “excuse me” on one occasion in April
2003. But her acquiescence in protesting repetitions of that conduct failed to convey the message that it was unwanted. Ms. X acknowledged in her testimony in Tokyo that “Maybe that is the way he is. Maybe I was not a sexual target for him.” Making sure that he “gets it” is a requirement of the Administrative Order. If that message is not conveyed, the perpetrator is not on specific notice that such behavior is unwanted and the offended employee, failing to so inform the other party, can hardly claim to have been the victim of knowingly unwanted advances. The same reasoning applies to the other contacts the Applicant had with Mr. Q. She made no comment advising that his looking or staring at her, or even his request that she sit on the sofa rather than at the table, was offensive to her and not to be repeated.

50. Indeed when looked at as a whole, the Applicant’s withdrawal of her hand with the phrase “excuse me” was quite insufficient to forestall further brushing or touching of her fingers or notice to stop glaring or request to sit at a sofa to support a charge of sexual harassment. One could conclude that he did not know his behavior was unwanted. Mr. Q, if he did the things of which he is accused, was entitled to clearer notice that such advances were unacceptable before repetition of such prohibited behavior could be used to sustain a finding of sexual harassment. Indeed, if the Applicant had been more explicit earlier in the period, it would have placed Mr. Q on notice, permitted the opportunity for reformation of behavior, and avoided the later occurrences, and this proceeding. —Ms. X v. ADB, pars. 49-50, Decision No. 74, 11 January 2006. ADBAT Reports, Volume 7, pages 108-109.

66. The burden of proof rests on the person who makes the allegations, including those of harassment. (Mr. E, para. 53.) A “preponderance of evidence” is the standard to be reached by a complaint (AO 2.11, para. 6.2.2). Since proven harassment may lead to disciplinary action (AO 2.11, para. 1), the investigators of such claims are thus to conduct their investigation in accordance with Appendix 2 of AO 2.04 (Disciplinary Measures and Procedures). These also refer to the standard of proof for an investigation under the heading of “Preponderance of Evidence” (AO 2.04, para. 6). Appendix 1 of AO 2.04 defines this term to mean “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, Appendix 1, para. 11). —Ms. G v. ADB [No. 2], par. 66, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 101.

2. Procedure

52. If there is a signed complaint of sexual harassment, then A.O. 2.11, para. 6.7, provides, inter alia, that:

a. The alleged harasser is to be advised and given a copy of the complaint and any related report.

b. The alleged harasser is given the opportunity to respond in writing to the allegations.

c. An investigation is to be conducted by a staff member(s) or an expert(s) designated by BPMSD, in consultation with the aggrieved individual and the
alleged harasser, to determine the facts in the case as well as whether a prima facie case exists of sexual harassment.

d. The alleged harasser is to be informed of the results of the investigation and given the opportunity to respond in a meeting with the staff member(s) or expert(s) conducting the investigation.

e. The facts determined in the initial investigation and fact-finding exercise, including the response of the alleged harasser, are to be reviewed by the Director, BPMSD [in ADBI, it is the Director, AMC, who has this responsibility], who decides whether to:

i. dismiss the complaint; or

ii. orally counsel the alleged harasser; or

iii. commence formal disciplinary proceedings pursuant to A.O. No. 2.04.

—Yamagishi v. ADB, par. 52, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, page 123.

3. Tribunal Jurisdiction (see Tribunal, Jurisdiction, Sexual Harassment Cases and Administrative Review, Effect of Filing Appeal against Decision)

53. x x x Even so, the Tribunal clearly has jurisdiction to hear and rule upon applications that properly present sexual harassment and sexual discrimination grievances, for these clearly implicate an interpretation of a staff member’s contract of employment and terms of appointment, which include a ban upon such misconduct. (See Alexander, Decision No. 40, 1998, IV ADBAT Reports 41, para. 74.) A staff member ultimately vindicated through administrative review and Tribunal action can be made whole through the award of compensatory damages and other remedies. —Yamagishi v. ADB, par. 53, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, page 124. (See also Administrative Review, Effect of Filing Appeals Against Decision; Tribunal, Jurisdiction, Sexual Harassment Cases)

40. The Report concluded that the Applicant’s “behavior includes elements of sexual harassment as well as general harassment” and that he had “demonstrated unwelcome verbal behavior that had created an intimidating and offensive work environment”. It is true that the Report went further to “raise the question” as to whether the Applicant’s attitude and mindset were compatible with an organization of many nationalities and cultures and went on to note “There is no doubt in our mind that some of his behavior is incompatible with ADB work environment.” We find those conclusions, as the Applicant claims, beyond the scope of their authority. The investigators were not asked to investigate or report on how the Bank was to respond thereto. Such matters are within the province of the Bank and were not within their authority to conjecture. They were explicitly told not to provide their recommendation as to remedy or discipline. Their comments in that regard constitute dicta and are binding neither on the Bank nor on this Tribunal. However, given the absence of any substantial conflict on the facts found during the investigation or contained in the Report, we do not find that the unsolicited comments in any way justify rejection of the Report. —Mr. Y v. ADB, par. 40, Decision No. 94, 2 March 2011. ADBAT Reports, Volume 9, page 28.
The Tribunal finds no evidence that the conclusion in the investigation report on the allegation of sexual harassment has been done improperly or not in accordance with A.O. 2.11. The Applicant’s contention that the Tribunal should hear evidence in relation to the harassment investigation is beyond the purview of the Tribunal and the provisions of A.O. 2.11. We find that the Applicant has failed to adduce any persuasive evidence that the assessment of her performance by her Supervisor was “distorted” or tainted by his personal feelings towards her and instead is based on her work performance considerations.

Moreover, the significant delay in bringing her 17 December 2009 formal complaint of sexual harassment raises questions as to their standing. The four incidents which allegedly took place between December 2008 and 7 June 2009 were not formally raised until December 2009. Her explanations for this extensive tardiness being that she had been busy with her work and had not read the A.O. on harassment till after she learnt that she had not been confirmed as a member of the staff in November 2009 are not convincing. The Tribunal concludes that the Applicant has failed to discharge her burden of proving that the alleged four incidents influenced the non-confirmation decision. —*Ms. D v. ADB*, pars. 34 - 35, Decision No. 95, 8 September 2011. ADBAT Reports, Volume 9, pages 49 - 50.

A strict reading of the texts of both AO 2.04 and AO 2.11 suggests that BPHP/BPHR is normally to investigate a claim of harassment unless it has referred the matter to one of the alternative investigation options listed in AO 2.04, para. 8.1(b), or unless the President has designated another person or persons pursuant to AO 2.04, para. 8.1(c). The Tribunal notes that the President has wide powers to designate the investigators chosen to examine claims, as illustrated by Sections 8.1 (b) and (c), and to direct the BPHP/BPHR to do so in his name. In this instance, the DG, BPMSD (of which BPHP forms a part) appointed the investigators from units other than those listed in AO 2.04, para. 8 “to assist in his evaluation of the complaints”. —*Ms. G v. ADB [No. 2]*, par. 73, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 103.

The Tribunal concludes for the reasons given above that the appointment of two investigators outside BPHP/BPHR was within the Bank’s power of delegation. —*Ms. G v. ADB [No. 2]*, par. 76, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 104.

As the investigators failed to interview all the additional suggested witnesses or to explain why they had not, and because they looked at only the allegations concerning the 28 March 2014 shouting, the Tribunal concludes that the Investigators’ Report falls short of reflecting a full set of facts “accurately gathered and properly weighed” (cf. Lindsey, para. 12). The Appeals Committee had relied upon that report in making its recommendation to the President to dismiss the harassment complaint. The President adopted the recommendation without further comment. Thus the Tribunal finds that in this regard the procedures were not properly followed in dismissing the harassment complaint without conducting further investigation. —*Ms. G v. ADB [No. 2]*, par. 83, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 105.

The Tribunal also notes that the investigators did not respect the time-frame of 15 days given by the BPMSD. The record does not indicate any extension having been requested or
SOURCES OF LAW

1. In General

4. As the outcome of this case depends in large part on the view that the Tribunal takes of the facts, it will be convenient, before analyzing these, to indicate the principal rules of law within the framework of which the facts must be considered. In addition to the constituent instruments of the Bank and of the Tribunal, as well as general principles of law, these rules are to be derived from the contract between the Bank and the staff member, the Staff Rules and Regulations of the Bank, the Personnel Handbooks for professional and support staff, and Administrative Orders and Circulars, as promulgated and applied from time to time, subject to the recognition and protection of any acquired right of the staff, and, by analogy, from the staff practices of international organizations generally, including the decisions of international administrative tribunals dealing with comparable situations. There is, in this sphere, a large measure of “common” law of international organizations to which, according to the circumstances, the Tribunal will give due weight. —Lindsey v. ADB, par. 4, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 2.

2. Domestic Law of Member Countries Not Applicable

6. In this connection, the Applicant argues that the principle of res judicata of a Tribunal decision is based on the assumption that it has been reached with substantive and procedural due process being afforded to the Applicant, and that, because of the alleged gross irregularity in the proceeding of the Respondent’s withholding the material evidence, the principle does not apply here. In so doing, the Applicant bases his argument in part on the Rules of Civil Procedure and the relevant court cases of a Member State of the Asian Development Bank. Being an international institution, the Administrative Tribunal is normally regulated by the internal law of the Bank and by international law, independent of domestic laws of member countries. A reference to domestic laws may not be inappropriate in certain exceptional situations if it is made for the purpose of interpretative analogy or as evidence of general principles of law that may be considered applicable by the Tribunal where the relevant law is lacking either in the form of written law or unwritten law. However, the present issue is not such that warrants reference to a domestic law in order to fill the lacunae in law, since the applicable law in this case is clearly established, as described in para.2 above. —Haider v. ADB (No. 2), par. 6, Decision No. 48, 21 September 2000. ADBAT Reports, Volume 5, page 46.

53. It will be recalled that the Applicant made three charges against her immediate supervisor in August 2002, labeling them “harassment,” and that she reiterated those three charges on 18 September 2002 under the label “sexual harassment.” She had been advised by an attorney in the meantime that an employee alleging sexual harassment could not lawfully be
relieved of her employment. This was misinformation. Whatever national or international law her counsel might have had in mind is not binding upon the Bank, which is an international organization and the law of which, with respect to the employment rights of staff members, is internal to the Bank and determined ultimately by the Tribunal. (See generally Haider (No. 2), Decision No. 48 [2000], V ADBAT Reports 45.) x x x —Yamagishi v. ADB, par. 53, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, pages 123-124.

**TRANSFERS**

1. **In General**

63. The Applicant repeatedly sought transfer out of his position in RSDD to other departments which he felt could better utilize his skills and to assure an independent assessment of his work during the remainder of his probationary period, alleging a violation of Administrative Order No. 2.03, para. 3.1. We have examined that provision, and while it does permit reassignment on a lateral basis to a new activity or office, the authority to make such a move is not mandatory at the instigation of the staff member but rather is within the sole discretion of the ADS if it determines that “the interests of the ADS or the staff member’s development needs so warrant.” In that respect the fact that supervisors in other departments or divisions might be willing to accept a staff member as a transfer does not constitute grounds for requiring his current supervisor to initiate such transfer. In addition it should be noted that relative to advertised openings, para 5.6 specifies that “staff members are not eligible to apply for an advertised position if they are on probation.” —Dalla v. ADB, par. 63, Decision No. 73, 19 August 2005. ADBAT Reports, Volume 7, pages 85-86.

31. It is natural for staff members to have preferences in respect of their work. However, “staff members will have their preferences considered but cannot always expect to have them honored. When Bank interests dictate reassignment elsewhere, those interests will prevail.” (Einthoven v IBRD, WBAT Decision No. 23 (22 March 1985)). The Applicant had no entitlement to work for the Executive Director only and it was inaccurate for her to describe her “official duty” as the Executive Assistant to the Executive Director. It is in the interest of an international organization to transfer staff members when necessary to reduce tensions among the staff. Such organizational interest prevails over personal preferences of the staff members concerned. Besides, prior to 2006, the Applicant expressed her wish to move up to another job stream, and Mr. Speltz supported her wish in strong words in the Performance Evaluation Reports. Also, in the memorandum dated 23 January 2006, while notifying the Applicant of the Bank’s plan to transfer her to another position, the Director, BPHR, offered to assist her to search for an administrative assistant position elsewhere in ADB. In this manner, the Bank made reasonable efforts to find her a position of her liking.

41. A transfer should not injure the dignity of the person. The ILO Administrative Tribunal stated that “The Director-General has discretion in exercising his authority [to assign staff to different posts], but he must always abide by the Staff Regulations and the terms of the contract between the organisation and staff member. The executive head may not of his own
accord alter the staff member’s grade, reduce his salary or injure his dignity.” (In re Tarrab (No. 9), ILOAT, Judgment No. 534, (18 November 1982)). The same Tribunal stated in ILOAT Judgment No. 2229 (16 July 2003) that “[A transfer of a non-disciplinary nature] must show due regard, in both form and substance, for the dignity of the official concerned, particularly by providing him with work of the same level as that which he performed in his previous post and matching his qualifications.”

42. In the present case, the transfer of the Applicant occurred only after she had failed to secure another position in ADB. Her transfer to the BPHR senior administrative assistants’ pool was intended to be temporary; she was free to apply for other positions of her liking. Moreover, the transfer was lateral in nature; she retained her personal level of Level 7, as well as her salary and all related benefits; her salary in fact was even increased because of the salary increase following her “Fully satisfactory” rating in the 2005 PDP. On receiving the memorandum from the Director, BPHR, dated 23 January 2006, the Applicant identified positions of interest to her but they were only at Level 6. After applying for some of these, she was advised that due to A.O. 2.03 para. 5.7, if she were selected for a Level 6 position, her personal level would be reduced from Level 7 to Level 6. In response to an e-mail from the Applicant, the BPHR agreed that in the event that she was selected to a Level 6 vacancy, the requirement under A.O. 2.03, para. 5.7 would be waived. Furthermore, the Director, BPHR, assigned challenging work to the Applicant within BPHR appropriate for her level, mindful not to draw attention to her transfer out of the US ED’s office. Under the circumstances, the Tribunal finds that the transfer of the Applicant was not of a disciplinary nature and that there was no ground for the claim that it injured the dignity of the Applicant. — Agliam v. ADB, pars. 31, 41, 42, Decision No. 83, 25 January 2008. ADBAT Reports, Volume 8, pages 81, 84 - 85.

52. The Applicant argues that his lateral transfer in the absence of his consent was an abuse of the Respondent’s discretionary power and lacked good faith When considering whether consent is required prior to the lateral transfer of the Applicant it is useful to review the jurisprudence of this Tribunal, and that of other international tribunals, with respect to such transfers. In Agliam (id., at 73, para. 33), this Tribunal found that the President of the ADB has wide discretion in deciding upon a transfer in the interests of the Bank. Indeed, this Tribunal has considered it a duty to transfer staff to reduce tensions and restore good working relations. — Mr. F v. ADB, par. 52, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 41.

60. The evidence also supports the Respondent’s claim that the Applicant had, at least impliedly, consented to the move to OREI. It appears, nonetheless, that any implied consent was misplaced because the Respondent and Applicant were at cross-purposes. The Respondent believed it was responding to the Applicant’s request to a lateral transfer, while the Applicant believed he was moving to OREI on a promotion into an advertised position for which he had applied. The parallel processes of promotion and lateral transfer appear to have become intertwined in the mind of the Applicant to mean a “promotional transfer”. It is possible that, if the Applicant had known in advance that the move to OREI was to be a transfer at Level 5, he would not have consented to the transfer, impliedly or otherwise. It is equally possible, if not more likely, that he might have consented to the lateral transfer, as this met his request to be moved out of SARD.
61. Even if there had been no genuine consent to the lateral transfer, it remains within the discretion of the Respondent to make the transfer under AO 2.03 para. 3.1. Consent by the Applicant was not therefore a pre-condition to the transfer. —*Mr. F v. ADB*, pars. 60 - 61, Decision No. 104, 6 August 2014. *ADBAT Reports*, Volume 10, page 43.

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

58. Moreover, the job description/advertisement for the EROD position specified four expected outcomes. Of these four outcomes, three were concerned with economic research work, and of these three, one was headed “Commodities, Energy, and Global Economic Monitoring.” This indicated that the position would “establish systems for monitoring high-frequency data on the global macro- economy, global financial markets, and key commodity and Energy markets” and “prepare reports on the implications of global economic events in these markets for the regional economic outlook.” From this terminology the Tribunal concludes that the 3F project, although not explicitly mentioned in those terms, was nevertheless part of the advertisement/job description. The Respondent has a flexibility to assign staff to “any of the activities or offices of ADB” as provided in paragraph 1.1 of AO 2.03. This Tribunal has also held in Agliam, Decision No. 83 [2008] VIII *ADBAT Reports*, para. 31 that “staff members will have their preferences considered but cannot always expect to have them honoured.

However, it is a fact that the Bank did not deny that its decision prior to the Applicant taking up the post to discontinue funding for this project was not communicated to her before she joined the Bank.

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

60. Another ground on which the Applicant relied was the Bank contracted with her in bad faith in that it misrepresented the job for which she was recruited. According to her case, the Bank should have been “estopped” from transferring her from EROD to ERMF. However, the Tribunal does not accept that the Bank has intentionally misrepresented the facts in bad faith.
or that the principle of estoppel applies in this case. — *Claus vs. ADB*, pars. 57 – 60, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, pages 65-66.

89. AO 2.03, para. 3.1 foresees a lateral transfer of a staff member “if the interests of ADB or the staff member’s development needs so warrant.” The BPMSD determined that neither criterion applied, after its careful consideration of her complaints regarding both the alleged harassment and her dissatisfaction with the performance appraisal. On this basis, her transfer request was denied. The Tribunal determines that this decision followed proper procedure and did not involve any arbitrariness, discrimination or improper motive. It is for the Bank to determine what is in its own interests in relation to a transfer, which is a discretionary matter. The Tribunal thus does not grant the plea to order a transfer. Despite this, the Bank might wish to reconsider a transfer in light of the Investigators’ Report’s finding of “poor communication between [the Parties]”. — *Ms. G v. ADB [No. 2]*, par. 89, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 107.

2. President’s Discretion

28. The President of ADB, who is responsible for the satisfactory working of the Bank, has wide discretion in deciding upon a transfer in the interests of the Bank. Section 1 of ADB’s Staff Regulations reads: “Staff members of the Bank are subject to the authority of the President and to assignment by him to any of the activities or offices of the Bank.” In accordance with the Staff Regulations, the letter the Bank issued to the Applicant offering her a regular position as a secretary in IFED in 1990, contained the condition that “the Bank may assign you to any other Department/Office as it may see fit,” to which she agreed. That the head of an international organization has discretion to transfer its staff is established in international administrative law. (See *In re Hardy (No. 4)*, ILOAT Judgment No. 1757 (9 July 1998) and *Saaf*, UNAT Judgment No. 954 (28 July 2000)). The ILO Administrative Tribunal considered it even “the duty of any international organization to take whatever measures can reduce tensions among his staff, bring about good working relations and improve efficiency.” (*In re Saunders (No. 4)*, ILOAT Judgment No. 1018, (26 June 1990)).

29. It is equally established in international administrative law that the President’s discretion to transfer must not be abused. The United Nations Administrative Tribunal stated: “[T]he established law is that, while the Administration has a discretion to transfer . . ., the discretion must not be abused. The discretion to transfer may have been abused, inter alia, if an appropriate procedure was not followed, or the decision was implemented in an arbitrary manner which resulted, for example, in injury to the good name and dignity of the staff member, or undue harm and injury was caused to the staff member.” (*Saaf*, UNAT Judgment No. 954 (28 July 2000)). While the Tribunal will be wary of interfering with an exercise of the President’s discretion, it is incumbent upon the Tribunal to do so if the discretion is abused. It is the burden of the Applicant to prove that the discretion was abused. If a transfer is used as a hidden disciplinary sanction, in addition to general rules against abuse of discretion, the transfer must also comply with specific rules protecting staff members in the case of disciplinary sanctions. (See ILOAT Judgment No. 2229 (16 July 2003)). — *Agliam v. ADB*, pars. 28-29, Decision No. 83, 25 January 2008. ADBAT Reports, Volume 8, pages 80-81.
67. There is no credible evidence to support his allegation of abuse by the Respondent in the sense of acting in bad faith or in the sense of deliberately misleading him. To the contrary, the Respondent responded promptly and in good faith to requests by the Applicant for a transfer. The parallel application for an advertised three-year position with OREI at Level 6 proved to be a distraction for the Applicant, who linked his expectations for promotion to an advertised position at OREI with the prospect of a lateral transfer to another department.

68. The evidence does not support the Applicant’s allegations that the Respondent had failed to be “fair, impartial and transparent” in respect of his lateral transfer. Put simply in the words of the Applicant, “we were working in parallel on two different levels.” If a mistake had been made, it could have been made by both parties; a mistake that, if made by the Respondent, was made in good faith. — Mr. F v. ADB, pars. 67 - 68, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 44.

71. It is true that Respondent’s references to “transfers,” for example in the Joint Memo, did not address the level at which the Applicant’s transfer would be made. While the Respondent could have been clearer in stating the level of the proposed transfer of the Applicant, the Applicant’s burden of proving that the Respondent failed to be fair, impartial and transparent has not been met. In fact, the evidence indicates the Respondent had acted in good faith to assist the Applicant to move from a department where he was unhappy. — Mr. F v. ADB, par. 71, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 45.

74. An examination of the relevant documents set out in the Respondent’s Answer indicates that the Respondent met the requirements of AO 2.03 paras 11 and 12 and Appendices 3 and 4. Annexes 3 and 4 of Respondent’s Answer provide the job descriptions for PN55050 at the new Level 6 and PN 10106 at the new Level 5, which shows a higher degree of responsibility for the Level 6 position and broader skills required. Moreover, the Respondent was required to meet balance requirements, and has done so. In any event, a promotion of the Applicant to Level 6 would not be based merely on availability of staff level complements, but would also require satisfaction of his “merit and capacity to assume increased responsibilities” as stipulated in AO 2.03 para. 4.1. — Mr. F v. ADB, par. 74, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 46.

**TRIBUNAL**

1. Admissibility of Application

10. According to the Respondent, “the application fails to state a claim over which the tribunal has jurisdiction pursuant to art. II paragraph 1 of the Statute of the Tribunal”. This provision states: “The Tribunal shall hear and pass judgment upon any application by which [an] individual member of the staff … alleges nonobservance of the contract of employment or terms of appointment of such staff member. The expressions “contract of employment” and “terms of appointment” include all pertinent regulations and rules in force at the time of alleged nonobservance including the provision of the staff retirement plan”.

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11. The conditions of admissibility of an application before this Tribunal are:

a) the allegation of nonobservance of the SRP (art. II, para. 1);

b) being a current or a former member of staff (art. II, para. 2);

c) having exhausted all the remedies available within the Bank (art. II, para. 3(a)); and

d) having filed the application within ninety days after the latest of the following: (i) the occurrence of the event giving rise to the application, or (ii) receipt of notice, after the Applicant has exhausted all other remedies available within the Bank, that the relief asked for or recommended will not be granted (art. II, para 3(b)).

12. Three conditions are fulfilled in this case:

a) the Applicant alleges the nonobservance of the SRP;

b) he is a former member of the staff; and

c) he has exhausted the remedies within the Bank: on 1 April 2010 he brought a claim to the Pension Committee, and on 24 February 2011 the Administration Committee rejected the claim. —Srinivasan Kalyanaraman v. ADB, pars. 10 – 12, Decision No. 96, 8 September 2011. ADBAT Reports, Volume 9, page 57.

42. The Tribunal, first of all, notes that Respondent had agreed that the Applicants could apply directly to the Tribunal pursuant to Article II(3)(a) of the Statute and Rule 6(8) of the ADBAT Rules and that it would not object to IS joining the Application (instead of submitting individual grievances). Respondent has indeed not raised preliminary objections to the admissibility of the cases or to the jurisdiction of the Tribunal, other than regarding the locus standi of those Applicants who did not have children at the moment the Application was lodged. It is true that both parties have agreed to submit the cases directly to the Tribunal. It may thus be argued that Respondent has waived its rights to raise preliminary objections.

43. The Tribunal underscores, however, that this does not diminish its powers to make its own assessment. The Tribunal has its own responsibility in admissibility matters and may and, when necessary, must deal with them sua sponte, i.e. on its own motion. The United Nations Appeals Tribunal (UNAT) held in this respect:

… this competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law. (See Judgment No. 2015-UNAT-

33. In so far as their claims relate to the future, these are also inadmissible, since the Tribunal, as it held in Decision No. 109, cannot deal with potential or hypothetical cases. —*Perrin, et al vs. ADB [No.3]*, par. 33, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 201.

a. Exceptional Circumstances

27. The Tribunal has power under Article II, paragraph 3, of the Statute to entertain an application in “exceptional circumstances”, notwithstanding non-compliance with subparagraphs (a) and (b). “Exceptional circumstances” are those which prevent compliance with the requirements as to time and internal remedies. They do not include the extraordinary nature of the grievance. In any event, Article II, paragraph 3, of the Statute does not empower the Tribunal to entertain applications concerning a cause of complaint which arose before 1 January 1991, even in “exceptional circumstances.” —*Nelson v. ADB*, par. 27, Decision No. 7, 31 March 1995. ADBAT Reports, Volume 1, page 85.

32. Exceptional circumstances would include those which prevent compliance with the requirements as to time and internal remedies; for instance, where the internal appeal machinery is not functioning; where the internal appeals body refuses to take a decision, or where by its statements or conduct it manifests an intention not to take a decision within a reasonable time; or where the Applicant is prevented from filing such an internal appeal due to illness, or an act of God. It has been held that exceptional circumstances do not include those relating to the “extraordinary nature of the grievance” (*Nelson*, Decision No. 7 [1995]).

33. The Applicants allege that the continuing uncertainty, anxiety and apprehension regarding their diminished financial circumstances, which their options for their families, caused by the amendment of their conditions of employment are exceptional circumstances justifying the submission of the Application to the Tribunal by the most direct route permitted by the Statute. However, the gravity of the injury *per se* is not an exceptional circumstance. —*Mesch and Siy v. ADB (No. 3)*, pars. 32-36, Decision No. 18, 13 August 1996. ADBAT Reports, Volume 2, paged 128-129.

93. Article II(3) of the Tribunal Statute provides that: “No ... application [to it] shall be admissible, except upon exceptional circumstances as decided by the Tribunal”. In this case, the Tribunal considers that exceptional circumstances exist, including the fact that the Appellant continued to raise the question of the legitimacy of the additional disciplinary measure. As the Applicant continually raised the question, the Tribunal considers in these circumstances that there was no need for a fresh application before an Appeals Committee to exhaust internal remedies before applying to the Tribunal. For these reasons, the Tribunal considers that the second disciplinary measure is properly before it. —*Mr. H vs. ADB*, par. 93, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 131.
b. Exhaustion of Internal Remedies

i. In General

25. In regard to the Applicant’s claim that he delayed to seek internal remedies for reasons of prudence, the Tribunal recalls the provision in the Bank’s Personnel Handbook for Professional Staff that “staff will be entitled to invoke administrative review as well as the grievance and appeals procedures, without fear of reprisal, including ultimate recourse to an Administrative Tribunal whose decision shall be binding on the Bank and the staff.” In the absence of evidence of an objective basis for a fear of reprisal in this case, the Tribunal concludes that “prudence” was no excuse for delay. —Behuria v. ADB, par. 25, Decision No. 8, 31 March 1995. ADBAT Reports, Volume 1, page 97.

25. Article II(3) of the Statute provides that an Application is not admissible (apart from exceptional circumstances as decided by the Tribunal), unless the Applicant has exhausted internal remedies, except where the parties have agreed to direct submission to the Tribunal, and such application is filed within ninety days after the event giving rise to the application, or receipt of notice after exhaustion of internal remedies that the relief asked for will not be granted, whichever is later. —Mesch and Siy v. ADB (No. 3), par. 25, Decision No. 18, 13 August 1996. ADBAT Reports, Volume 2, page 126.

15. The Tribunal, under Article II, para. 3(a), of its Statute, is instructed that “No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless the applicant has exhausted all other remedies available within the Bank....” The Tribunal has held that such exhaustion requires timely resort to both administrative review and the Appeals Committee. Behuria, Decision No. 8, [1995], I ADBAT Reports 96, para. 23:

...it is not sufficient merely to submit a grievance or an appeal to the internal appeal bodies. Such grievance or appeal must be submitted also in conformity with prescribed time-limits.

It should be noted that the Appeals Committee took jurisdiction of these claims by the 56 Applicants because “it is not clear when the actual counting of days [for seeking administrative review] should begin” and because the staff members had acted in good faith – so that declining to address the merits would be because of a mere “technicality.” The Tribunal agrees with this outcome with respect to these Applications, but for somewhat different reasons.

16. First, the purpose of the exhaustion requirement in Article II, para. 3(a) of the Statute of the Tribunal is to assure that staff members promptly and fully make their grievances known so that the most knowledgeable and directly affected parties the staff members and their supervisors may amicably adjust their differences, before resort to the more formal and adversary procedures of the Tribunal. That purpose was just as much accomplished when the Core Group voiced the Applicants’ grievances on 8 February, 22 March, 6 April, and 11 May of 2001, as they would have been had 180 staff members (the number of complainants at that time) written separate letters to Human Resources representatives.
17. Even though the pertinent language in Administrative Order No. 2.06, para. 1 appears clearly to contemplate only individual requests for administrative review, as well as for appeals to the Appeals Committee, the Tribunal’s implementation of the exhaustion requirement is not so strict: Article II, para. 3, allows the Tribunal to rule an Application admissible, even assuming a technical failure to exhaust, when there are “exceptional circumstances.” The Tribunal finds such exceptional circumstances present here. Even assuming (as the Respondent contends) that the 90-day time limit for administrative review began to run when the Applicants learned of Mr. A’s promotion in early February, the Bank was fully aware of the substance of the Applicants’ claims almost immediately thereafter and it in fact responded on the merits (as well as with procedural objections) from the outset. —Canlas et al. v. ADB, pars. 15-17, Decision No. 56, 8 August 2003. ADBAT Reports, Volume 6, pages 46-47.

44. The Applicant claims that the submission of her 22 February 2008 Supplement demonstrated the interrelationship of the three decisions involving the first “U”, the second “U” and the termination, and that to segment the Bank’s action into separate claims dilutes the cogency of her overall protest of bad faith. The Tribunal understands her concern, but as she acknowledges the first “U”, the second “U” and the termination are separate events and each, if protested, requires exhaustion of internal remedies before the Tribunal is able to assert jurisdiction over such actions. The Applicant failed to comply with that requirement and the Tribunal is not persuaded by her assertion that such compliance was by logic, not needed. She obviously was aware of the requisite procedures by having successfully appealed the first “U” to this stage. The Tribunal finds no exceptional circumstances to excuse a departure from the procedures of which she was obviously aware and by which she was obviously bound. Her claim of the three actions being covered by her initial Application does not justify her unilateral assumption that they are better processed as one. The law calls for adherence to the prescribed rules for each claim, with potential consolidation of related claims or direct application to the Tribunal occurring only as a result of agreement with the President of the Bank. The evidence shows that she timely filed an application on the second “U” but there is no evidence of a separate application having been filed on the termination decision. We are mindful of the Bank’s agreement to consolidation of the challenges on the first and second “U” ratings but have determined to proceed with the present Application which has been fully processed through the available internal remedies: the challenge to the 2006 PDP and the “U” rating included therein. The International Labour Organization Administrative Tribunal (ILOAT) in Glorioso (No. 2), ILOAT Judgment No. 550 (1983) in consideration 1, which involved a similar request for joinder with subsequent applications, likewise decided that the Tribunal “will deliver a separate judgment on the present case, which raises distinct and quite separate issues …”. —Ibrahim v. ADB, par. 44, Decision No. 86, 15 August 2008. ADBAT Reports, Volume 8, pages 128-129.

14. The facts show that the Applicant did not utilize the internal appeals mechanism of the Bank despite these having been clearly laid down in AO Nos. 2.06 (Administrative Review and Appeals Procedures) and 2.07 (Administrative Tribunal) and also pointed out by the Tribunal’s Executive Secretary when returning the earlier communications. The case file also does not show that the President of the Bank has agreed to submit the Application directly to the Tribunal. An Applicant must first seek remedies within the internal administrative processes of the Bank, and only when the President of the Bank has rendered a final administrative decision
regarding that complaint may an Application be filed with this Tribunal. Other international administrative tribunals have also recognized the importance of the requirement for exhaustion of internal remedies. “[T]he judicial remedy provided by the Tribunal is designed as a forum of last resort for the resolution of employment disputes after the administration of the organization has had a full opportunity to assess a complaint to determine if corrective measures are appropriate.” (Ms. C. O’Connor, IMFAT Judgment No. 2010-1, para. 29).

15. This present Tribunal has also held that when an applicant has not complied with the requirements of exhaustion of internal remedies, the Tribunal must decide that it has no jurisdiction to entertain such a claim and must dismiss it. (See Jianming Xu, ADBAT Decision No. 69 [2005] VII ADBAT Reports).

16. The Tribunal holds that the Applicant did not comply with the requirements of exhaustion of internal remedies under Article II, paragraph 3 (a) of the Tribunal’s Statute. It does not find any exceptional circumstances warranting a waiver of this requirement. In fact, no such circumstances were presented to it. The Tribunal therefore concludes that it has no jurisdiction to entertain the Applicant’s claim and that the Application must, in accordance with paragraph 11 of Rule 6, be dismissed summarily as clearly irreceivable. As a consequence, the Applicant’s claim for damages is also denied. —Ocampo v. ADB, pars. 14 - 16, Decision No. 122, 25 February 2019. ADBAT Reports, Volume 10, page 400.

39. Article II (3) of the Tribunal’s Statute limits the Tribunal’s authority to hear disputes only where, except upon exceptional circumstances, “the applicant has exhausted all other remedies available within the Bank.” This Tribunal has consistently decided that the exhaustion of internal remedies is a prerequisite for the substantive examination of the merits. (See Isip, Decision No. 9 (1996), para. 53; Rive, Decision No. 44 (1999), para. 12; Ibrahim, Decision No. 86 (2008), paras. 42-46.) The Applicant has not presented evidence that would give rise to a finding of exceptional circumstances which might excuse his failure to exhaust internal remedies regarding the 2017 Performance Review. The Tribunal finds that the Applicant’s request for rescinding the rating for his 2017 PR is not admissible, since he did not exhaust all remedies available within the Bank and did not initiate the procedures to challenge his 2017 PR at the relevant time.

40. Therefore, the Tribunal’s findings will be confined to examining the challenges concerning the unsatisfactory assessment of the Applicant’s performance after the PIP had been initiated. —Abrigo v. ADB, pars. 39 - 40, Decision No. 123, 21 October 2020.

73. The Applicant’s fresh allegation of improper motivation did not comply with the requirements of exhaustion of internal remedies under Article II, paragraph 3(a) of the Tribunal’s Statute. A bare allegation cannot give rise to the exceptional circumstances that might warrant a waiver of this requirement. In fact, no such circumstances were presented to it. The Tribunal therefore concludes that it has no jurisdiction to entertain the claim of improper motivation. —Abrigo v. ADB, par. 70, Decision No. 123, 21 October 2020.
ii. **Period to File Grievance Proceedings**

12. It is the Tribunal’s conclusion, however, that the Applicant failed to comply with the exhaustion requirement set forth in Article II, Section 3(a) of the Statute. An essential element of the “exhaustion” of available remedies is that they be invoked in a timely manner. As the Tribunal has stated in *Behuria*, Decision No. 8, [1995] I ADBAT Reports 96, para. 23:

> It is an established principle that in order to fulfill the requirement of exhausting all other remedies available within an organization (imposed by provisions such as Article II, paragraph 3(a)), it is not sufficient merely to submit a grievance or an appeal to the internal appeal bodies. Such grievance or appeal must be submitted also in conformity with prescribed time-limits.

This principle has been consistently applied by other international administrative tribunals. E.g., *In re Brocard*, ILOAT Judgment No. 676, para. 1 (1985); *Abadian*, WBAT Reports 1995, Decision No. 141, para. 26. Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors - when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies, as is the case here. —*Alcartado v. ADB*, par. 12, Decision No. 41, 5 August 1998. ADBAT Reports, Volume 4, page 72.

9. It is necessary for the Tribunal to identify with greater precision the nature of the legal claims that are properly before it. Article II, Section 3(a) of the Statute of the Tribunal provides:

> No such application shall be admissible, except upon exceptional circumstances as decided by the Tribunal, unless ... the applicant has exhausted all other remedies available within the Bank.

The Tribunal has frequently held that, in or order to exhaust remedies, applicants must timely comply with A.O. No. 2.06, which requires that a grievance be submitted within six months of the date of notification of the challenged decision. —*Rive v. ADB*, par. 9, Decision No. 44, 7 January 1999. ADBAT Reports, Volume 5, page 18.

10. To the extent the Applicant is claiming that the performance ratings in his PERs over many years, and the accompanying salary increases, fail adequately to reflect the high quality of his performance, such discrepancies could well have been known by the Applicant, and challenged by him, promptly after the issuance of the respective PERs. This was never done, let alone done within the six-month period stipulated in A.O. No. 2.06 for the filing of grievances. The same is true for the several promotions that were sought by, and denied to, the Applicant, both before and after his assignment to BRO from 1993 to 1996. The fundamental requirement of timeliness, set forth in the Statute and the Administrative Orders, would be too readily circumvented if a staff member were permitted to use current adverse statements by supervisors here, the 3 June 1996 memorandum and the 9 July cc:Mail as allegedly evidencing illicit motivation to be imputed to decisions made by the Respondent many years before. See
2. The Tribunal dismissed the Application for non-exhaustion of internal remedies are required by Article II, Section 3(a) of the Statute of the Tribunal. The Tribunal held that an “essential element of the exhaustion of available remedies is that they be invoked in a timely manner”, and in particular that a grievance must be filed within six months from “the date the staff member is notified of the decision” contested, as required by Administrative Order (“A.O.”) No. 2.06, Section 4.1 as then written. The Tribunal found that the Applicant’s grievance was time-barred by measuring from any of three possible “notification” dates: 16 August 1993, when the Applicant was orally advised that another person had been selected for the post; 23 February 1994, when written “regrets” were sent to unsuccessful candidates; and again at approximately the latter date, when the successful job applicant began serving as the Applicant’s supervisor. —Alcartado v. ADB (No. 2), par. 2, Decision No. 46, 19 December 1999. ADBAT Reports, Volume 5, page 33.

c. Immunity from Suit

15. The Applicants could also have taken the course of suing PSI, the direct employer of Mr. Macalindong, in tort in the courts of the Republic of the Philippines. The plea of immunity would not have been open to PSI. However, the Applicants have not proceeded in this way. In choosing to proceed against the Bank, the Applicants must take the Bank as they find it, a defendant exempt from suit in the local courts and open to proceedings only in this Administrative Tribunal and limited to actions for breach of the contract of employment. —Bares, et al., v. ADB, par. 15, Decision No. 5, 31 March 1995. ADBAT Reports, Volume 1, page 56.

67. In the present case, the statements (the “crime” according to the Applicant) were all made in the framework of the selection process. In this context, the Tribunal also recalls the Appeals Committee’s decision to uphold the Appeal was based on the shortcomings in the procedures and not on the contents of the statements made by the officials in the selection process. The statements were made in the process of the selection procedure and, therefore, it was in an official capacity for which the persons are protected by the immunities that the Bank enjoys. These immunities are essential to the functioning of international organisations such as the ADB and well recognized by international law. It is for the Bank to decide whether or not it will waive these immunities in specific circumstances. —Mr. H vs. ADB, par. 67, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 125.

74. Regarding the lodging by the Applicant of a criminal complaint before the local authorities against a number of her former Bank colleagues, the Tribunal reiterates its findings in Mr. H, ADBAT Decision No. 108 (6 January 2017), para. 88 that a legitimate or bona fide discharge of the official duties by Bank officials in the assessment of the Applicant’s performance in accordance with the Bank’s rules and procedures cannot be construed as “criminal conduct”. The Tribunal therefore disagrees with the Applicant’s statement that her employment claims before the Tribunal and her criminal complaint are distinct. For a former senior and experienced Bank official to have taken such action with the local authorities was
incompatible with the system of internal review which is linked to the immunities from jurisdiction enjoyed by the ADB pursuant to agreement with the Government of the Philippines. —*Ms. Maria Lourdes Drilon vs. ADB*, par. 74, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, page 166.

54. Regarding the filing of a civil action against the Bank in the national courts of Indonesia, the Tribunal reiterates its findings in *Drilon*, ADBAT Decision No. 110 (6 May 2017), para. 74 that such action is “incompatible with the system of internal review which is linked to the immunities from jurisdiction enjoyed by the ADB” pursuant to its agreement with member States as provided in Article 55(i) of the Agreement Establishing the ADB. The Tribunal notes that this action constituted serious misconduct as contemplated by AO 2.04 (“Disciplinary Measures and Procedures”) and breached AO 2.02, para. 4.11, which precludes Applicant from pursuing employment-related grievances in a national legal system. Moreover, the Tribunal strongly disapproves of such action when an Applicant has an application pending before the Tribunal.

55. The Tribunal also notes that when the Applicant wrote to the ADB on 5 June 2017 accusing the members of the Review Panel of criminal acts and threatening to take legal action, he copied it to several other national Governments via their embassies. This contradicted the terms of his appointment with the Bank as an international civil servant, and damaged the reputation of the Respondent. This Tribunal has exclusive jurisdiction to settle matters involving alleged non-observance of staff members’ terms of employment. For these reasons, the Tribunal has decided to take the Applicant’s actions into account in deciding on relief. —*Mr. I vs. ADB*, pars. 54 - 55, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, page 233.

2. Award of Damages

26. Mr. A claims as follows (para. II. d, Application)

(i) the equivalent of 3 years ‘salary (equal to the length of time I would have served at NARO) to facilitate my pursuing an experience, under a special leave of absence, similar to what I would have had at NARO; (ii) estimated actual damages of $33,186 based on three years’ salary, escalated by 4% per year, divided by the number of level 4 and 5 applicants (11) meeting the selection criteria for the NARO position ($33,148), representing an approximate value of (and the percent chance of receiving) the missed opportunity to be properly considered for a three-year assignment at NARO plus communications costs of I $38 involved in the tribunal application, administrative review, and appeal.

The Tribunal is of the opinion that these claims are without merit: even if the selection panel had decided to consider first the applicants of the level of Mr. A - Senior Specialist - there was no certainty that he would be selected for the vacant position.
27. Indeed:

- According to para 5.7 of the A.O. 2.03: “Staff members may apply for a position with a lower level than their current personal level.”

Thus, that text allowed staff members of Level 6 - Principal Specialist - to apply for a position of Senior Specialist - Level 5.

Mr. A does not deny that the selection panel - on its first meeting of 15 April 2004 - reviewed all fifteen applications (three at Level 6, four at Level 5, seven at Level 4 and one National Officer) forwarded - with all the required documents - by BPMSD.

There were - besides Mr. A’s application - three other candidates from Level 5: any one of whom could have been selected instead of Mr. A, a selection option which was within the Bank’s discretion. There was no assurance that Mr. A would have been selected among the applicants from his own level.

28. It follows that the decision of the panel committee to select Mr. D might have been taken even if the Levels description had been correct without the alleged mistake asserted by the Bank above.

29. Consequently, the Tribunal agrees with the Bank that the error in level listing constituted harmless error and that there is no causal link between the decision of the panel committee and the alleged damages and thus denies this portion of the claim.

30. The Tribunal understands the disappointment of Mr. A. The offered position was very attractive for him: at the time of the announcement, he was a staff member of the East and Central Asia Department, People’s Republic of China Resident Mission and the vacancy was for a job of “Senior Liaison Specialist ... North American Representative Office”, with assignment to be in his country of origin.

31. The Applicant has failed to prove not only the fault of the defendant but also any causal link between that fault and the moral damages alleged. As the UN Administrative Tribunal noted in Rodriguez, UNAT Judgement No. 167 (23 March 1973). para. VI, “in awarding damages [the Tribunal] has to be satisfied that the damages claimed follow naturally as a consequence of the action contested.”

32. It is true that the announcement contained a mistake. But, as seen above, even if the selection panel had decided to consider first the applicants of Mr. A’s Level, there was no assurance that he would have been selected; he was just one candidate out of four candidates of the same level, none of whom protested, while the Bank retained the right to examine the candidacy of the Level 6 applicants as well. Each applicant runs the risk of not being selected and the Bank was not at fault for that fact, even if it created some disappointment. —Mr. A v. ADB, pars. 26-32, Decision No. 77, 02 August 2006. ADBAT Reports, Volume 7, pages 139-140.
28. Although the language of Article X does refer to compensation based on basic salary, it does not specify the effective date for determining that basic salary. In Decision No. 86, we rescinded the Bank’s imposition of the initial “U” rating. From that rescission must also flow a rescission of the basic rate then in effect, recognizing that the Decision called for the Applicant’s reinstatement at a rate that would reflect what she would have received but for the Bank’s action. As noted above we have provided a calculation to reflect what that rate would have been, based on a reasonable progression in compensation. Since the Bank opted to exercise its right to provide the equivalent of three years’ compensation in lieu of effecting her reinstatement, it is the basic salary rate to which she was entitled at the time of the Bank’s decision not to reinstate her that must control the determination of her three-year equivalency. Accordingly, the payment of the equivalent of three years’ basic salary is to be based on the salary to which the Applicant was entitled as of 30 September 2008. —**Ibrahim v. ADB, par. 28**, Decision No. 86-B, 19 August 2009. ADBAT Reports, Volume 8, page 28.

10. In Decision No. 86 we found that the termination of 6 March 2008 had been mooted by our action overturning the initial “U” rating, and ordered the Applicant reinstated and made whole. Our authority to order specific performance is limited by the second sentence of Article X of the Statute of the ADB Administrative Tribunal which reserves to the President of the Bank the authority to determine whether to implement that specific performance. The requirement that the Tribunal fix an amount of compensation “at the same time” provides the basis for granting compensation in lieu of an order to take the further action to reinstate:

   ... should the President of the Bank ... decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case ....

11. At the time the Tribunal ruled that the second “U” and the 6 March 2008 termination action were voided, we found that the Applicant should have been continued as an employee of the Bank. Although as required by Article X, we formulated an amount of compensation to be provided in the event that the President decided not to take the reinstatement order, it follows from our rescission of the initial “U” rating that she continued to be an employee of the Bank, notwithstanding the Bank’s voided 6 March 2008 termination.

12. In negating the termination action of 6 March 2008, in Decision No. 86, the Tribunal anticipated the Applicant’s return to work with compensation for earnings and benefits lost.

13. The Bank was alerted to our action to continue the employment of the Applicant on 15 August 2008 when our Decision No. 86 was promulgated, but it was not until 30 September 2008, that the President of the Bank exercised his option of not taking the “further action” of reinstatement called for in the Decision of the Tribunal. We find that she is entitled to be made whole for losses from her improper earlier termination until 30 September 2008, when the President exercised his Article X option to provide compensation instead of implementing our reinstatement decision.

14. Thus as noted in the Decision we find that the Applicant is entitled to reimbursement for lost pay and benefits up until the Bank’s decision on 30 September 2008 to
exercise its option not to reinstate the Applicant. As noted in the Decision and subsequent clarification, that is designed to reimburse her for lost earnings in expectation of her reinstatement. The Bank’s authority and subsequent decision not to take the “further action” of reinstatement does not detract from its obligation as set forth in the 15 August 2008 Decision to make the Applicant whole for the financial losses she had suffered by its action prior to that date. The Tribunal recognizes the authority of the President of the Bank to decline to take the action of reinstatement. However we believe that authority is to be distinguished from the Bank’s obligation to make whole the Applicant for her improper termination on 6 March 2008. The decision of the Tribunal orders reimbursement of the earnings lost to the Applicant as a consequence of the Bank’s flawed act of removal. The Tribunal views the additional three-year payment as separate action, as provided for in Article X, for the Bank’s decision not to embrace the “further action” of implementing her return to her former position, and distinct from its obligation under the directive to make her whole for earnings lost.

15. Thus the Bank’s exercise of its authority on 30 September 2008 to compensate the Applicant with the equivalent three years’ basic salary in lieu of her reinstatement we view as the appropriate payment for then terminating her employment. It is not a substitute for the money owed until that date. —Ibrahim v. ADB, pars. 10-15, Decision No. 86-B, 19 August 2009. ADBAT Reports, Volume 8, pages 147-148.

19. As indicated above, we find the Applicant is entitled to reimbursement for lost earnings during the period “from the imposition of the initial “U” rating until the Bank opted to terminate her in lieu of returning her to her position. Had it not been for the imposition of that “U” rating, it is reasonable to conclude from her prior history that her compensation thereafter would have been in excess of the basic rate for the period involved.

20. We find appropriate the method of calculation for the period from the imposition of the initial “U” rating until 30 September 2008 as being the average salary increase for all staff in 2007 and 2008 excepting those given Special Recommendation or Exceptional Ratings.

21. The objective of Decision No. 86 was to reimburse the Applicant for “earnings cost” to reflect the level of-compensation she could reasonably have expected to achieve and not to provide her with any windfall beyond her losses. In fact, the Applicant mitigated her damages during the period in question by taking a new job and it is thus necessary to determine the extent of any interim earnings during that period she was out of work to provide an offset to the amount to be paid by the Bank. As noted in Yang Ro Yoon (No.4) IBRD Decision No. 317 (2004), para. 56, it is the task of the Applicant to demonstrate she “suffered a net loss of income”. Given her work as an Editor in the interim, she should produce evidence of such interim earnings as a prerequisite to her receipt of reimbursement for any such lost net earnings. —Ibrahim v. ADB, pars. 19-21, Decision No. 86-B, 19 August 2009. ADBAT Reports, Volume 8, page 149.

43. We are unable to grant the first claim of the Applicant: US$125,643, i.e., “the cost in net present value terms of not being promoted to level 8”. There is no assurance that the Applicant would have been promoted to level 8 regardless of what happened in his 2007 PDP.
44. However, we consider that an award of compensation in a sum of US$15,000 to be appropriate recompense for the failure of the Bank to provide an equitable procedure for his annual assessment and its impact on the Applicant.

45. Inasmuch as we cannot substitute our discretion about the evaluation of the performance of the Applicant for that of the Bank, we lack authority to change the overall rating of “Satisfactory” to “Exceptional”.

46. But, taking into consideration the inadequacies of the creation of the final 2007 PDP, we grant the second claim of the Applicant that the year-end assessment conducted by the Chairman, DEC of 18 January 2008 be expunged from the Applicant's records.

47. We do not grant the last claim of the Applicant: inasmuch as it does not seem practicable or useful to make a new assessment two years after the facts. —Leonard v. ADB, pars. 43-47, Decision No. 92, 19 August 2009. ADBAT Reports, Volume 8, page 233.

43. We are unable to grant the first claim of the Applicant: US$125,643, i.e., “the cost in net present value terms of not being promoted to level 8”. There is no assurance that the Applicant would have been promoted to level 8 regardless of what happened in his 2007 PDP.

44. However, we consider that an award of compensation in a sum of US$15,000 to be appropriate recompense for the failure of the Bank to provide an equitable procedure for his annual assessment and its impact on the Applicant. —R. Keith Leonard v. ADB, pars. 43 - 44, Decision No. 92, 19 August 2009. ADBAT Reports, Volume 8, page 233.

84. The Tribunal has found that the Applicant’s claim is well-founded in part. The primary remedy envisaged by Article 10 of the ADBAT Statute is rescission of a contested decision or specific performance of an obligation invoked, with the fixing of compensation to be paid by the Bank if it declines to accept rescission or specific performance. However, in the circumstances of the present case the Tribunal considers that rescission or specific performance would be impractical and inappropriate. The Tribunal also considers that two of the three remedies requested by the Applicant - disciplinary action against the three supervisors and nullification of the Applicant’s job duration with the Respondent - are either inappropriate or not within the Tribunal’s powers. Nonetheless, it is reasonable to conclude that the Applicant suffered intangible injury as a result of the Respondent’s breach of AO 2.11 and AO 2.02. For this he should be compensated. (See Alexander, Decision No. 40 [1998] IV ADBAT Reports 41, para. 88, and Rive, Decision No. 44 [1999] V ADBAT Reports 15, para. 23).

85. As regards the amount of compensation, there are two considerations which pull in opposite directions. On the one hand, the issue of the six month performance review reveals a weakness in the Applicant’s case, which could depress the amount of compensation. But for the Applicant’s resignation, as an inadequately performing probationer, he could have been terminated, in the absence of improvement in performance, from the end of the one month period envisaged in the performance review. On the other hand, the Country Director demonstrated inadequate support for the Applicant after his informal complaint of harassment on 9 May 2011, contrary to AO 2.11 and the supervisors’ failure to respond to his reasonable request for their
advice over induction programs breached both AO 2.11 and AO 2.02. The Application referred to “mental trauma” and being “tortured” by the supervisors. While such language is overly dramatic, it is likely that the Applicant suffered intangible loss as a result of the Respondent’s breach of its own procedures. Pragmatically balancing these two considerations, the Tribunal will award equitable compensation of US $6,000. —*Mr. E v. ADB*, pars. 84 - 85, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 28-29.

83. In relation to Decision I, the Tribunal finds that neither rescission nor specific performance as provided in Article X of the Tribunal’s Statute would be appropriate in the present case. In all the circumstances, it would be in order to award the Applicant some reasonable equitable compensation for intangible injury caused to the Applicant by the Respondent’s action (see Alexander, Decision No. 40 [1998] IV ADBAT Reports and Rive, Decision No. 44 [1999] Volume V, ADBAT Reports).

For the above reasons, the Tribunal unanimously decides that:

i) The intangible injury suffered the Applicant as a consequence of the Bank's breach of its own procedures will result in the Tribunal awarding equitable compensation of US$ 35,000 and $5,000 for the reasonable costs incurred by the Applicant: x x x —*Claus vs. ADB*, par. 83, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, page 72.

50. Nonetheless, the Tribunal believes that the Respondent could have taken more care to act in the spirit of its own PR Guidelines and Tips. In these circumstances, it is recommended that the Applicant be given an ex gratia payment.

For the above reasons, the Tribunal unanimously decides to:
(i) dismiss the Applicant’s claims; and
(ii) orders the Bank to make an ex gratia payment of US$ 5,000 to the Applicant. —*Ms. G v. ADB*, par. 50, Decision No. 106, 23 September 2015. ADBAT Reports, Volume 10, pages 85-86.

93. As the Applicant’s rights to transparency of procedures and to a proper conduct of the investigation under AO 2.04 have not been fully respected she should receive compensation. (*Mr. E*, para. 84, citing Alexander, Decision No. 40 [1998] IV ADBAT Reports 41, para. 88, and *Rive*, Decision No. 44 [1999] V ADBAT Reports 15, para. 23).

For the above reasons, the Tribunal unanimously decides to:
(a) direct the Bank to compensate the Applicant for the injury sustained in the amount of US $7,000;
(b) award the Applicant reasonable costs in the amount of US $4,000; and
(c) dismiss the Applicant’s other claims. —*Ms. G v. ADB [No. 2]*, par. 93, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 108.

98. The Tribunal does not find that the Applicant intended to harass the Bank or any of its officers or employees in bringing “this case” to the Tribunal. It accordingly finds that the
conditions under Article X para. 6(b) are not met and denies the Respondent’s request for costs. Noting that the Respondent is currently withholding some payments to the Applicant on the expectation of a decision granting costs to the Respondent, the Tribunal orders all amounts payable to the Applicant to be released without delay.

99. As the Tribunal has upheld the Applicant’s dismissal as valid, he has lost his core argument. However, the finding that the additional disciplinary measure was not justified warrants an award of costs to him in the sum of USD $1000. —Mr. H vs. ADB, pars. 98 - 99, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 132.

3. Decisions

a. Clarification/Review/Revision of Decisions

8. Article IX of the Statute provides that the decisions of the Tribunal shall be final and binding, so that there is no appeal against them. What the Applicant is asking the Tribunal to do is to review its decision with which he is not satisfied, on the basis of the same facts and arguments, by alleging mistakes of law and, perhaps, mistakes in the appraisal of facts, which are not permissible grounds of review (see In re Villegas (No. 4), ILOAT Judgment No. 442 (1981)). —Viswanathan v. ADB (No. 2), par. 8, Decision No. 33, 6 January 1997. ADBAT Reports, Volume 3, page 64.

4. The Applicant has failed to comply with the explicit preconditions set forth in Article XI of the Statute for the revision of judgments. Article IX of the Statute expressly provides that the Tribunal’s judgments in each case shall be final and binding, a principle that would be altogether undermined if requests for revision were to be granted on grounds such as those put forward here. As has been stated in Skandera (WBAT Reports 1982, Decision No 9, para. 7.): “[T]he powers of revision of a judgment are strictly limited and may be exercised only upon compliance with the conditions set forth” in the Statute. It is indispensable in such a proceeding that the requesting party identify a fact discovered after the Tribunal’s judgment which “by its nature might have had a decisive influence on that judgment and which at that time “was unknown” both to the Tribunal and to the requesting party. —Wilkinson v. ADB (No. 2), par. 4, Decision No. 34, 6 January 1997. ADBAT Reports, Volume 3, page 68.

1. x x x Article XI of the Statute of the Tribunal empowers the Tribunal to revise a judgment in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to [the requesting] party. —Samuel v. ADB (No. 3), par. 1, Decision No. 37, 7 August 1997. ADBAT Reports, Volume 3, page 121.

13. The Applicant has also requested the Tribunal to revise its decision as to the compensation awarded in the Decision in order to “address the inherent inequities” suffered by him by virtue of the “abusive conduct” of the assessors. This application must be rejected as Article IX, paragraph 1 of the Statute provides that the judgments of the Tribunal shall be “final and binding”. Article XI, paragraph 1 permits a request for revision in certain cases such as upon
discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal. In this case, there are no circumstances warranting the Applicant’s request for revision and hence the application for revision is dismissed. —*Chan v. ADB (No. 4)*, par. 13, Decision No. 4, 5 August 1998. ADBAT Reports, Volume 4, page 79.

5. The relevant provisions of the Statute of the Tribunal that explain the force of a Tribunal judgment are twofold:

**Article IX, para. 1:** All decisions of the Tribunal shall be taken by majority vote and its judgments in each case shall be final and binding.

**Article XI, para. 1:** A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.

The Applicant asserts that the alteration of the Administrative Order that details the powers of the Appeals Committee is a “fact” which was not known to him or to the Tribunal and which “by its nature might have had a decisive influence on the judgment of the Tribunal.”

6. This contention must be rejected. Even if it were to be concluded that the difference between the 1994 and 1998 versions of the Administrative Order relating to the grievance procedure was a “fact”, it was not a fact that was unknown both to the Tribunal and to the Applicant at the time the judgment was delivered, and it was certainly not a fact which had an influence – let alone “a decisive influence” – on the judgment of the Tribunal. —*Alcartado v. ADB (No. 2)*, pars. 5-6, Decision No. 46, 19 December 1999. ADBAT Reports, Volume 5, page 34.

2. Article XI, paragraph 1 of the Statute of the Tribunal empowers the Tribunal to revise a judgment in the specified circumstances, namely, “in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and [the requesting] party.” The principles of finality and of *res judicata* of Tribunal judgments are well established through the language of this provision and by the previous decisions of this Tribunal as well as by other administrative tribunals under comparable provisions. Requests for revision of a judgment must satisfy the conditions laid down therein, as this Tribunal clearly stated in *Viswanathan (No.2)*, Decision No. 33 [1997], III ADBAT Reports 63, 64, para. 80, that:

[T]he decisions of the Tribunal are “final and binding” so that there is no appeal against them. What the Applicant is asking the Tribunal to do is to review its decision with which he is not satisfied, on the basis of the same facts and arguments, by alleging mistakes of law and, perhaps, mistakes in the appraisal of facts, which are not permissible
grounds of review (see In re Villegas (No. 4), ILOAT Judgment No. 442 (1981)).
—Haider v. ADB (No. 2), par. 2, Decision No. 48, 21 September 2000. ADBAT Reports, Volume 5, page 45.

12. A request for the revision of the Tribunal’s Decision is made possible pursuant to Article XI of the ADB Administrative Tribunal’s Statute (the “Statute”) which lays down three conditions for the admission of a request for revision of a prior judgment, namely:

i. the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;

ii. the showing that at the time the judgment was delivered that fact was unknown both to the Tribunal and to that party; and

iii. the submission of a request for revision within a period of six months after the party acquired knowledge of that fact. —de Alwis v. ADB (No. 2), par. 12, Decision No. 66, 28 July 2004. ADBAT Reports, Volume 6, page 134.

6. In accordance with past practice, the Tribunal will entertain this request for clarification as it has done before in the case of Mesch and Siy (No. 2), Decision No. 6 [1995], I ADBAT Reports 67, 72, para. 10, where we quoted the International Court of Justice, thus:

The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, I.C.J. Reports 1950, p. 395 at p. 402.)

7. By way of example, the question of whether or not the Tribunal disqualified the Applicant from rental subsidy for the year 2003-2004 is clearly outside the scope of its decision as it merely denied the right to subsidy in 2000-2001, 2001-2002 and 2002-2003. Categorically it declared: “However, the Tribunal does not purport to rule on any other claims for subsidy that the Applicant might make for any other period.” (de Alwis, ADBAT Decision No. 57 [2003], para. 32). Another Application may be filed to resolve this issue in the light of the main case in as much as it is still justiciable. —de Alwis v. ADB (No. 3), pars. 6-7, 20 January 2005. ADBAT Reports, Volume 7, page 34.

2. To be fair to the Applicant we are considering this Application as one for revision. There are three requirements of a revision petition under Article XI of the Statute, viz.,

a) Discovery of a new fact

b) Which at the time of the delivery of the judgment was unknown both to the Tribunal and the party

c) Which by its nature might have had a decisive influence on the judgment

3. Paragraph 2 of the Article XI says that the Applicant must show that all the said conditions have been complied with. It is also necessary that the Applicant must approach the Tribunal within six months of the acquisition of knowledge of such facts.
4. The conditions are obviously stringent. Since Article XI impinges upon the intent of Article IX, Article XI has to be construed very strictly. We find that none of the requirements have been met.

5. The general impression that one gets from the Application under consideration is that it is argumentative. The Applicant is questioning the decision of the Tribunal rather than pointing out any newly discovered facts which might influence the decision. Not only have no newly discovered facts been brought on the record but no date regarding the acquisition of such knowledge has been mentioned so that we might decide as to whether the Application has been filed within the prescribed time. On the merits of the case, it would be extremely inappropriate for the Tribunal to enter into an argument with the Applicant on matters already decided. —Lim v. ADB (No. 2), pars. 2-5, Decision No. 81, 17 August 2007. ADBAT Reports, Volume 8, page 55-56.

5. For the information of the parties, the Tribunal considers that there is no need for clarification considering that the Decision dated 15 August 2008 is quite clear. —Ibrahim v. ADB, par. 5, Decision No. 86-A, 27 October 2008. ADBAT Reports, Volume 8, page 142.

4. The rule provided for in Article XI “has to be construed very strictly” (see Lim No. 2 supra). It is the party who requests the revision, i.e. the Applicant, who has the burden of proving that his or her request fulfills these conditions.

5. The Applicant essentially repeats the arguments already put forward before the Tribunal. She argues that she has the voice recording of the meeting held on 17 November 2009. However, she cannot seek to introduce this as a new fact since she has acknowledged “I have kept the voice record on this meeting” and hence it was in her possession well before her Application of 2011. As held in de Alwis (No. 2) Decision No. 66 [2004], VI ADBAT Reports, p. 35, para. 17, “[w]hat the Applicant is asking the Tribunal to do is to review its decision with which [the Applicant] is not satisfied, on the basis of the same facts and arguments’, by alleging mistakes of law and mistakes in the appraisal of facts, which are not permissible grounds of review.”

6. In as much as her request contains no requisite new fact as specifically required by the Statute, the Tribunal finds that her request does not fulfill the above conditions and therefore denies the request. —Ms. D v. ADB [No. 2], pars. 4 – 6, Decision No. 99, 15 August 2012. ADBAT Reports, Volume 9, page 75.

3. The Applicant repeats the arguments already put forward before the Tribunal, such as the nature of the commutation table and the discounting factors, and criticizes the Decision for its appraisal of the consequences of his seniority or skills. As held in de Alwis (No. 2) Decision No. 66 [2004], VI ADBAT Reports, p. 35, para. 17, “[w]hat the Applicant is asking the Tribunal to do is to review its decision with which [the Applicant] is not satisfied, on the basis of the same facts and arguments, by alleging mistakes of law and mistakes in the appraisal of facts, which are not permissible grounds of review.”
4. In the Reply dated 18 August 2012, the Applicant asserted that he was requesting “revision” of the Decision. Article XI, paragraph 1 of the Statute provides one exception to the principle of finality of Tribunal judgments, whereby a request for the revision of a judgment is made permissible, provided that three conditions are met:

“a) Discovery of a new fact
b) Which at the time of the delivery of the judgment was unknown both to the Tribunal and the party
c) Which by its nature might have had a decisive influence on the judgment.” (Lim (No. 2) Decision No. 81 [2007] VIII ADBAT Reports 55, para. 2).

5. Furthermore, the request must be submitted within six months after the party acquired knowledge of such fact. Paragraph 2 of Article XI provides that the Applicant’s request shall contain the information necessary to show that the conditions laid down in paragraph 1 have been complied with, as well as giving all supporting documentation.

6. The rule provided for in Article XI “has to be construed very strictly” (see his (No. 2) supra). The Applicant, the party requesting revision, has the burden of proving that the request fulfills these conditions. —Srinivasan Kalyanaraman v. ADB [No. 3], pars. 3 – 6, Decision No. 100, 31 January 2013. ADBAT Reports, Volume 9, page 78.

9. The explanation given by the Applicant, however, is not a fact, but an argument. Neither is it new; it was not unknown to the Applicant at the time of the delivery of the judgment. In fact, it formed the basis or the “Assumption” of the Applicant’s claims. Moreover, the article in The Economist had been published more than 5 years before the original Application dated 31 March 2011. The article was easily accessible to anyone, including the Applicant, when he submitted the original Application. The Applicant could have submitted it as a supporting document in the original Application, and he fails to explain why he did not do so.

10. Accordingly, the Tribunal finds that the Applicant’s request for revision of its judgment does not fulfill the conditions laid down in Article XI, paragraph 1 of the Statute. —Srinivasan Kalyanaraman v. ADB [No. 3], pars. 9 – 10, Decision No. 100, 31 January 2013. ADBAT Reports, Volume 9, page 79.

9. As held in de Alwis (No. 2) Decision No. 66 [2004], VI ADBAT Reports, p. 35, para. 17, “[w]hat the Applicant is asking the Tribunal to do is to review its decision with which [the Applicant] is not satisfied, on the basis of the same facts and arguments by alleging mistakes of law and mistakes in the appraisal of facts, which are not permissible grounds of review.” We find no new fact presented which was previously unknown both to “the Tribunal and to th[el] party” that would have had a decisive influence on our judgment as specifically required by the Statue.

10. The Applicant also raises an argument rather than a fact as to the appropriateness of the burden of proof used by this Tribunal, asserting that we should be bound by a standard higher than the balance of probabilities. While Article XI makes no provision for reconsideration based on standards of proof, we noted in paragraph 39 of Decision No. 101 that our controlling
standard of proof is that set forth in Appendix 2 of A.O. 2.04 para 8.1: “(t)he standard of proof for the investigation is a Preponderance of Evidence”. That requirement is repeated in A.O. 2.04 para 9.2 and in Appendix 1 of A.O. 2.04 as “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 the misconduct.”

11. We are bound by and affirm that definition, which we find was properly applied in this case. —*Hua Du v. ADB [No. 2]*, pars. 9 - 11, Decision No. 102, 31 July 2013. ADBAT Reports, Volume 9, page 108.

38. The principles of finality and res judicata of Tribunal judgments are set out in the Tribunal’s Statute and are well recognized by previous decisions of this Tribunal and other comparable international administrative tribunals.

39. Article IX (1) of the Statute provides that judgments of the Tribunal “shall be final and binding”. The possibility of revision of a decision has been permitted under Article XI as an exception to the principle of finality:

“...in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and [the requesting] party.”

40. In summary, Article XI requires an applicant to show:

(i) the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;
(ii) when the judgment was delivered, that fact was unknown both to the Tribunal and to the applicant; and
(iii) the request for revision has been made within six months after the applicant acquired knowledge of the fact.

41. The jurisprudence of the Tribunal has been consistent in declining to review its earlier judgments where the Applicant fails to meet the conditions set out in Article XI. In particular, this Tribunal has refused a request for review where the applicant fails to adduce a new and relevant fact that was not known to either the Tribunal or applicant at the time of the judgment. —*Ms. D vs. ADB [No. 3]*, pars. 38 - 41, Decision No. 111, 28 February 2018. ADBAT Reports, Volume 10, page 175-176. (*See also Res Judicata*)

50. For these reasons, Ms. D has failed to meet the conditions set by Article XI because she has not produced any fact, that was unknown to her or the Tribunal at the time of the judgments in Decision No. 95 and Decision No. 99, that might decisively influence the outcomes of those judgements. This conclusion is consistent with the fundamental principle of the rule of law which is that of the finality of judgments. It is in the public interest to have certainty in law and judgments of the Tribunal are subject to revision only if other legal conditions are fulfilled. Additionally, the Tribunal agrees with the World Bank Administrative Tribunal in *Van Gent*
(No. 2) *supra* that the power of revision under Article XI cannot be used as a cover for an unsatisfied litigant. — *Ms. D vs. ADB [No. 3]*, par. 50, Decision No. 111, 28 February 2018. ADBAT Reports, Volume 10, pages 177-178.

17. According to Article IX, paragraph 1 of the Statute, “All decisions of the Tribunal ... shall be final and binding.” Article XI, paragraph 1 of the Statute provides for one exception to this principle of finality of Tribunal judgments, whereby a request for the revision of a judgment is made permissible, provided that three conditions are met:

a) the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;

b) the showing that at the time the judgment was delivered that fact was unknown both to the Tribunal and to that party; and

c) the request to revise the judgment is made within a period of six months after that party acquired knowledge of such fact.

18. This Tribunal in Ms. D (No. 3), Decision No. 111 (28 February 2018), confirmed that Article XI “has to be construed very strictly.” (Citing Lim (No. 2), Decision No. 81 [2007], VIII ADBAT Reports. See also, Hua Du (No. 2), Decision No. 102 [2013], IX ADBAT Reports, para. 7; Kalyanaraman (No. 3), Decision No. 100 [2013], IX ADBAT Reports, paras. 6 and 9). — *Ms. J v. ADB [No. 2]*, pars. 17 - 18, Decision No. 120, 28 February 2019. ADBAT Reports, Volume 10, page 385.

16. The Tribunal has admitted requests for clarification in the past (Mesch and Siy (No.2), Decision No. 6 [1995], Chan (No. 4), Decision No. 42 (5 August 1998), Lim (No. 2), Decision No. 81 (17 August 2007), and Decisions No. 86-A and 86-B, supra). The Tribunal also decides to do so in this matter. — *Ms. Cruz v. ADB [No. 2]*, par. 16, Decision No. 121, 28 February 2019. ADBAT Reports, Volume 10, page 392.

b. Implementation of Decisions

17. The decisions of this Tribunal must be promptly implemented. However, what is “prompt” cannot be rigidly defined in terms of a period of days or weeks. It depends on the nature of each decision. Nonetheless, in the present case, it is difficult to see what justification there can be for so long a delay in making the interim payments, even taking into account the complexity of the issues facing the Bank. The appropriate remedy for delay is, of course, an order requiring payment of interest. In this case, however, payment of interest at the rate of 5% p.a. has already been ordered and the Bank has paid it. The Tribunal therefore makes no order for damages or enhanced interest in respect of the delay in implementation. — *Mesch and Siy v. ADB (No. 2)*, par. 17, Decision No. 6, 31 March 1995. ADBAT Reports, Volume 1, page 74.

31. Interest on delayed payment shall be calculated and paid at 5% per annum. — *Ibrahim v. ADB*, par. 31, Decision No. 86-B, 19 August 2009. ADBAT Reports, Volume 8, page 152.
20. Turning now to the key issue at hand - the interpretation of Article X, para. 1 of the Statute of the Tribunal on remedies – the text provides in relevant part:

… If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case; ….

The “further action” referred to in Article X, para. 1 means further action by the Bank, not – as the Applicant has argued – further action by the Tribunal. The Tribunal’s interpretation of Article X, para. 1 of the Statute is supported by the text submitted to and approved by the ADB Board of Directors when the Board endorsed the Statute of the Tribunal in 1991. This text stated, “The judgement of the Administrative Tribunal would be binding on the Bank and without appeal. However, the Bank would have the option to pay compensation (as determined by the Tribunal) in instances where it decided that it would be against the Bank’s best interests to comply with a decision requesting specific performance…. [followed by illustrative examples]” - *Ms. Cruz v. ADB [No. 2],* par. 20, Decision No. 121, 28 February 2019. ADBAT Reports, Volume 10, page 393.

c. Res Judicata

8. Article IX of the Statute of the Tribunal provides that all Decisions of the Tribunal shall be final and binding. The Tribunal holds that upon Decision No. 51 being rendered, it became res judicata in relation to the second Application, even though that Application was already pending before the Tribunal. —*Toivanen v. ADB (Nos. 2, 3 and 4),* par. 8, Decision No. 53, 10 August 2001. ADBAT Reports, Volume 6, page 15.

38. The principles of finality and res judicata of Tribunal judgments are set out in the Tribunal’s Statute and are well recognized by previous decisions of this Tribunal and other comparable international administrative tribunals.

39. Article IX (1) of the Statute provides that judgments of the Tribunal “shall be final and binding”. The possibility of revision of a decision has been permitted under Article XI as an exception to the principle of finality:

“...in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and [the requesting] party.”

40. In summary, Article XI requires an applicant to show:

(i) the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;
(ii) when the judgment was delivered, that fact was unknown both to the Tribunal and to the applicant; and
(iii) the request for revision has been made within six months after the applicant acquired knowledge of the fact.

41. The jurisprudence of the Tribunal has been consistent in declining to review its earlier judgments where the Applicant fails to meet the conditions set out in Article XI. In particular, this Tribunal has refused a request for review where the applicant fails to adduce a new and relevant fact that was not known to either the Tribunal or applicant at the time of the judgment. —Ms. D vs. ADB [No. 3], pars. 38 - 41, Decision No. 111, 28 February 2018. ADBAT Reports, Volume 10, page 175-176. (See also Clarification/Review/Revision of Decisions)

19. The Bank asserts that the "mistaken" understanding by the Tribunal of the “number of vehicles” column in the 2 August table that the Bank had produced and provided to the Tribunal was a “new fact” that was unknown to both the Tribunal and itself. It also asserts that this fact was unknown to it when the decision was delivered as it only became aware that the Tribunal had “misread” that column upon receipt of Decision No. 116.

20. The Tribunal rejects the Bank’s submission. The relevant facts were the number of vehicles purchased by the Applicant and the other staff member that were an abuse of the TEV privilege. These facts were known by the Bank at the time of the decision and therefore the requirements under Article XI are not met. The Bank is instead questioning the finding of the Tribunal itself. The Tribunal reiterates its position that its findings, as decisions of the final instance of the judicial remedial system in the Bank, are res judicata and cannot be appealed. As held in de Alwis (No. 2), Decision No. 66 [2004], VI ADBAT Reports p. 35, para. 17, “[w]hat the [Respondent] is asking the Tribunal to do is to review its decision ... by alleging mistakes ... in the appraisal of facts, which are not permissible grounds of review.” Many similar decisions can be found in other international administrative tribunals.

22. In the same manner, the Tribunal considers that the Applicant’s attempt to modify the award in Decision No. 116 fails to meet the requirements of Article XI of the Statute. The fact that the Applicant had already been dismissed prior to the 20 October 2017 decision of the President of the Bank was known at the time of the Tribunal’s deliberations. The Applicant is simply questioning the “correctness” of the Tribunal’s appraisal, hence this cannot be covered by Article XI of the Statute. The Tribunal adds that even if the fact of dismissal prior to the 20 October 2017 decision of the President of the Bank had been unknown to the Tribunal at the time of its decision, the amount of compensation awarded would not have been affected, since when determining the amount the Tribunal took into account the fact that she had committed misconduct. —Ms. J v. ADB [No. 2], pars. 19 - 22, Decision No. 120, 28 February 2019. ADBAT Reports, Volume 10, page 386.

4. Intervention

53. Any person to whom the Tribunal is open under Article II of its Statute may apply to intervene in a case upon satisfying the condition stated in Rule 18. The right claimed by the
Intervenors is identical to that claimed by the Applicants, and is therefore one which might have been affected by the judgment of the Tribunal, and so that condition is satisfied. Neither paragraph 2(d) of Article II of the Statute nor Rule 18 imposes a further condition of compliance with paragraph 3 of Article II of the Statute. As for the time at which intervention was sought, Rule 18 expressly permits an application for intervention to be made “at any stage.”

54. The Intervention is therefore receivable.


41. Any person to whom the Tribunal is open under Article II of its Statute may apply to intervene in a case upon satisfying the condition stated in Rule 18. The right claimed by the Intervenor is identical to that claimed by the Applicant, and is therefore one which might have been affected by the judgment of the Tribunal, and so that condition is satisfied. The refusal to consolidate the applications of Messrs. Singh, Viswanathan and Samuel was precisely because they did not raise the identical issue, and so the Order of 16 August 1995 is of no relevance. As for the times at which intervention was sought, Rule 18 expressly permits an application for intervention to be made “at any stage.”

42. The Interventions are therefore receivable.

43. Since the principal Application fails, so do the Interventions. But as the Tribunal has not ruled on the merits, the dismissal of the Application will not affect the substantive rights of the Intervenors. —*Mesch and Siy v. ADB (No. 3)*, pars. 41-43, Decision No. 18, 13 August 1996. *ADBAT Reports, Volume 2*, page 130.

5. Joinder of Cases

45. The general practice of international administrative tribunals is that the power to join cases is reserved to the tribunal concerned (see *Samuel* (No. 2), Decision No. 15 [1996] *ADBAT Reports II*, para. 47) and that a tribunal joins cases when these are “identical” (cf. Administrative Tribunal of the International Labour Organization (“ILOAT”), Case No. 1001) or “raise the same issues.” (cf. ILOAT, Judgment No. 1203). At this stage this Tribunal is unable to join the present cases because essential elements that could assist it in establishing whether the cases are basically identical have not been provided. A first glance at the list that was provided of the Applicants and their children indicates that their situations are not identical. For example, some Applicants do have children who are not (yet) of school-going age, others are no longer entitled since their children have exceeded the age limit for EA, and again others have no children at all. Applicants have also failed to indicate which of the several changes in the new rules have adversely affected which individual Applicant. It is the responsibility of the Applicants to submit adequate and convincing facts in support of their claims. —*Perrin, et al. vs. ADB*, par. 45, Decision No. 109, 6 May 2017. *ADBAT Reports, Volume 10*, page 143.
6. **Jurisdiction**

   a. **In General**

2. The jurisdiction of the Tribunal is established by the terms of its Statute. This provides in Article II, paragraph 1, as follows:

   “The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member. The expressions ‘contract of employment’ and ‘terms of appointment’ include all pertinent regulations and rules in force at the time of alleged nonobservance.” —*Lindsey v. ADB*, par. 2, Decision No. 1, 18 December 1992. *ADBAT Reports, Volume 1, page 1.*

11. However, this statement of some elements of the right of staff members to the enjoyment of due process must be balanced by recollection of the possession by management of a broad discretion to determine the policy of the Bank and its operational needs. In some respects this discretion is absolute; in others it is not. In case of dispute, the determination of the review ability of the discretion falls within the jurisdiction of the Administrative Tribunal. Like any other judicial body, it possesses the competence to determine its own competence. In general, reviewable discretions are those the exercise of which can have an effect upon the position of staff members in their individual relationships with the Bank. For example, on the one hand, decisions as to whether a particular post should be established, or on the number and levels of staff to be employed in a given division or on the choice of equipment are not reviewable. On the other hand, determinations relating to the performance of a staff member or to changes in levels of staff salary are reviewable.” —*Lindsey v. ADB*, par. 11, Decision No. 1, 18 December 1992. *ADBAT Reports, Volume 1, page 4.*

   x x x The Tribunal was given jurisdiction in respect of complaints by staff members alleging non-observance of their contracts of employment and terms of appointment. That Statute does not prescribe any pertinent exception or qualification in respect of the jurisdiction of the Tribunal, and so that jurisdiction extends to non-observance of contractual terms resulting from the infringement of that principle. —*Mesch and Siy v. ADB (No. 3)*, par. 22, Decision No. 18, 13 August 1996. *ADBAT Reports, Volume 2, page 126. (See also Contract of Employment, Amendment of Terms, Power to Amend; Tribunal, Jurisdiction, Review of Management Decisions, Amendment of Contract of Employment)*

25. The power of the Tribunal to hear such applications is set out in Article II, para. 1, of the Statute which provides:

   The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member.
26. Outlining its power of review in disciplinary cases, the Tribunal in Zaidi, Decision No.17 [1996], II ADBAT Reports 89, 92, followed Carew, Decision No. 142, World Bank Reports 1995:

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. —Domdom v. ADB, pars. 25-26, Decision No. 47, 21 September 2000. ADBAT Reports, Volume 5, pages 41-42.

8. The Tribunal Statute establishing the Administrative Tribunal granted it jurisdiction in Article II, paragraph 1, over

any application by which an individual member of the Staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member.

That grant identifies “contract of employment” and “terms of appointment” as being governed by all pertinent regulations and rules in force at the time of the alleged non-observance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.

Additionally in Article II, paragraph 2, the Statute defines “member of the staff” as being any current or former member of the Bank Staff….

On their face, the foregoing provisions appear to provide the rationale for acceptance and processing on the merits of the Applicants’ claims. However, Article XIV declares that even if the statutory appeal procedure prescribed in Article III, paragraph 3, has been followed to bring the case to the Tribunal

the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to 1 January 1991, provided, however, that the application is filed within ninety days after the entry into force of this statute. —Soerakoesoemah, et al. v. ADB, par. 8, Decision No. 68, 20 January 2005. ADBAT Reports, Volume 7, pages 19-20.

41. Regardless of the difficulties Ms. X was facing at work, and her efforts to improve the workplace by challenging the shortcomings at the Institute, our role in seeking to deal with the problems giving rise to her complaints is constrained by the authority designated to the Tribunal by its Statute.

42. Article II of the Statute of the Tribunal defines our jurisdiction as follows:
The Tribunal shall hear and pass judgment upon an application by which an individual member of the staff of the Bank alleges non-observance of the contract of employment or terms of appointment of such staff member. The expressions “contract of employment” and “terms of appointment”, include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the staff retirement plan and the benefit plan provided by the bank to the staff.

We are constrained by the foregoing terms of the Statute as well as Paragraph 2.2 of A.O. No. 2.06 which provides:

A staff member can seek administrative review only of decisions that contravene a staff member’s contract of employment or terms of appointment. The expressions “contract of employment” and “terms of appointment” include all pertinent regulations and rules in force at the time of the alleged contravention. —Ms. X v. ADB, pars. 41-42, Decision No. 74, 11 January 2006. ADBAT Reports, Volume 7, pages 103-104.

16. The Applicant seeks relief for the procedural failings acknowledged by the Respondent in adopting Decisions 1 and 2, arguing that those two decisions are a necessary precondition to the issuance of Decision 3, that the Appeals Committee decisions on those irregularities were not set aside by the President and thus remain final, and that since the Appeals Committee lacked the competence to award damages for those procedural issues as well as for the deferred substantive questions, it falls to this Tribunal to award compensation for both the procedural and substantive issues carried over from the Appeals Committee findings on Decisions 1 and 2.

17. The Bank argues that the jurisdiction of this Tribunal is restricted to issues involving Decision 3, which it recognizes is part of the contract of employment under Article II of the Statute of the ADB Tribunal. It asserts that the Applicant failed to file for a review of Decisions 1 and 2 within the 90 day time limit following the President's 4 October 2006 decision and that those earlier two decisions have been superceded and made moot by the issuance of Decision 3. It urges that this Tribunal not rule upon complaint regarding a decision not now in effect.

18. The evidence shows that Decision 1 became effective on 1 January 2006 but was superseded with retroactivity to that same date by Decision 3 on 15 May 2006. Decision 2 was never put into effect. The Applicant filed his application on 13 March 2007 which, although timely for challenging the Bank's actions under Decision 3, failed to meet the admissibility requirements of Article II para. 3 of the Statute for a challenge to Decision 1. That provision requires not only exhaustion of available remedies within the Bank but also a filing within 90 days of the occurrence of the event giving rise to the Application, if as here, it is a date later than the Bank's denial of a claim or failure to provide relief in a granted claim.

19. The Applicant's claim that Decisions 1 and 2 survive the pronouncement of Decision 3 lacks validity. If the Applicant had any right to challenge Decision 1 while it was extant, that right expired 90 days after 1 January 2006, its effective date. The fact that Decision 2 never went into effect, precludes any right to challenge its proposed content.
20. Accordingly, we must dismiss the claims alleging that Decisions 1 and 2 were flawed by irregularities in the administrative review procedure and in the decision process, that the reduction in reimbursement rate and elimination of the stop-loss cover under Decision 1 constituted non-observance of the contract of post-employment medical insurance, and that the segregated treatment of stop-loss cover and premium payments under Decision 2 are a breach of contract. —Suzuki et al. v. ADB, pars. 16-20, Decision No. 82, 25 January 2008. ADBAT Reports, Volume 8, pages 62-63.

26. The Authority of this Tribunal is established under Article II of the ADBAT Statute as follows:

The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges non observance of the contract of employment or terms of appointment of such staff member. The expressions “contract of employment” and “terms of employment” include all pertinent regulations and rules in force at the time of alleged non observance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.

Included among the benefit plans provided to the Applicant is access to the Medical and Dental Retainer Plans established by A.O. 3.10. —Chang v. ADB, par. 26, Decision No. 84, 25 January 2008. ADBAT Reports, Volume 8, page 95.

13. Concerning the time limit of ninety days, we have two relevant dates in this case. The first is 14 June 2010, when, in the perception of the Applicant, he believed he would become entitled, pursuant to principles which he claims to be applicable in this case, to receive the restoration of his full pension after the expiration of a period of 15 years from the date of his retirement and reaching the age of 70. These conditions were not fulfilled until 14 June 2010. As acknowledged by the Respondent in its Answer “under the SRP there is no express time limitation on bringing a claim regarding one’s pension benefits through the internal SRP governance mechanism, a request to the administration committee.” The Applicant brought a claim to the Pension Unit for restoration of his full pension on 2 July 2009, nearly a year before the 15-year period was completed on 14 June 2010, and submitted this Application on 31 March 2011, nine months after that date, subsequent to the exhaustion of the remedies available within the Bank. The action of the Applicant was thus not tardy under his interpretation, without prejudice to later consideration of the correctness of his interpretation.

14. The second relevant date is 24 February 2011, when the SRP Administration Committee denied the request of the Applicant by writing “it is up to the ADBAT to decide the receivability of your appeal.” The time limit of ninety days set out in Article II (3)(b)(ii) started at the Applicant’s receipt of the Bank’s denial on 24 February 2011 and the Application was filed on 31 March 2011, i.e. within the time limit of ninety days. Thus, the Tribunal finds that the Applicant in this case acted in a timely manner.

15. To support its contention that the Tribunal lacks jurisdiction, the Respondent relies on its judgment in Soerakoesoemah et al. (Decision No. 68 [2005] VII ADBAT Reports,
15) in which the Tribunal dismissed the claims of more than 200 pensioners who had commuted pension and claimed their restoration.

16. The case of *Soerakoesoemah et al.* was similar to the case of the Applicant, but the issues at stake were not the same, because in that case, some of the pensioners had retired before the date of the establishment of the Tribunal and/or the other pensioners had filed their application in 2005, i.e. there had been five years of unchanged circumstances after the occurrence of the event which, in their argument, had given rise to their claim without them taking action. — *Srinivasan Kalyanaraman v. ADB*, pars. 13 – 16, Decision No. 96, 8 September 2011. ADBAT Reports, Volume 9, page 58.

54. *xxx* The Respondent’s exercise of discretionary power is subject to review by the Tribunal, but only in circumstances of where the challenged management decision is arbitrary, discriminatory, improperly motivated, adopted without due process or involves an abuse of power or discretion (see *Lindsey*, Decision No. 1 [1981] I ADBAT Reports 5, para. 12). This approach is reflected in the explicit guideline determining the Appeals Committee’s competence in respect of discretionary decisions by Heads of Departments. It also accords with the generally recognized principles of international administrative law (see World Bank Administrative Tribunal decision in *de Merode et. al.*, WBAT Reports 1981, Decision No. 1, para. 28). In relation to the alleged abuse of discretionary power, the burden of proof is on the Applicant (see *Azimi*, Decision No. 88 [2009] VIII ADBAT Reports 175, para. 31). — *Mr. E v. ADB*, par. 54, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 20.

39. The Tribunal reaffirms that it is within its exclusive powers to rule on its jurisdiction, as well as on the admissibility of an application, either *ratione personae* or *ratione temporis*. In other words, it is not for the parties to agree which grievances are admissible, or to conclude that the Tribunal will examine them on the merits. — *Perrin, et al vs. ADB [No.2]*, par. 39, Decision No. 112, 28 February 2018. ADBAT Reports, Volume 10, page 190.

42. The Tribunal has set out its scope of review with respect to termination decisions in the following terms:

“The Tribunal’s scope of review of this Application, which involves a managerial decision, is to “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[1991], 1 ADBAT Reports 5, para.12). The Tribunal is to examine allegations of non-observance of the Applicant’s contract of employment, which includes the applicable rules of the Bank (Article II, para. 1 of the Statute of the Tribunal). The Tribunal’s role is not to substitute its views for managerial decision properly taken”. (*Ms. G (No.2)*, Decision No. 107 (19 August 2016), para. 65).
See also Mr E., ADBAT Decision No.103 (12 February 2014), para. 54; Haider, Decision No. 43 [1999], V ADBAT Reports 6, para. 18; and Breckner, Decision No. 25 [1997], III ADBAT Reports 17. —Mr. I v. ADB, par. 42, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, page 230.

28. The Tribunal has set out its scope of review with respect to termination decisions in the following terms:

“The Tribunal’s scope of review of this Application, which involves a managerial decision, is to “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, (1991), 1 ADBAT Reports 5, para. 12). The Tribunal is to examine allegations of non-observance of the Applicant’s contract of employment, which includes the applicable rules of the Bank (Article II, para. 1 of the Statute of the Tribunal). The Tribunal’s role is not to substitute its views for managerial decision properly taken”. (Ms. G (No.2), Decision No. 107 (19 August 2016), para. 65).

See also Mr E., ADBAT Decision No.103 (12 February 2014), para. 54; Haider, Decision No.43 [1999], V ADBAT Reports 6, para. 18; and Breckner, Decision No.25 (1997), III ADBAT Reports 17. —Ma. Editha T. Cruz v. ADB, par. 28, Decision No. 115, 21 July 2018. ADBAT Reports, Volume 10, page 243.

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

“In [disciplinary] cases the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.” (Hua Du, Decision No. 101 [2013] IX ADBAT Reports 94, para. 31). —Ms. J v. ADB, par. 46, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 259.

54. 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].
55. 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). —Mr. K v. ADB, pars. 54 - 55, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 289.

53. 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].

54. 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). —Ms. L v. ADB, pars. 53 - 54, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 324.

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). —Ms. M v. ADB, pars. 47 - 48, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 359.

68. The Tribunal reiterates its basic competence with respect to the scope of review, which has been expressed from its inception in many decisions. For example, Lindsey, Decision No.1, (1991), 1 ADBAT Reports 5, para.12 stated that the:

“Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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”. —Abrigo v. ADB, par. 68, Decision No. 123, 21 October 2020.

b. Determination of Own Competence

11. However, this statement of some elements of the right of staff members to the enjoyment of due process must be balanced by recollection of the possession by management of a broad discretion to determine the policy of the Bank and its operational needs. In some respects this discretion is absolute; in others it is not. In case of dispute, the determination of the review ability of the discretion falls within the jurisdiction of the Administrative Tribunal. Like any other judicial body, it possesses the competence to determine its own competence. In general, reviewable discretions are those the exercise of which can have an effect upon the position of staff members in their individual relationships with the Bank. For example, on the one hand, decisions as to whether a particular post should be established, or on the number and levels of staff to be employed in a given division or on the choice of equipment are not reviewable. On the other hand, determinations relating to the performance of a staff member or to changes in levels of staff salary are reviewable.” —Lindsey v. ADB, par. 11, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 4.

24. The Tribunal holds that it has competence to consider whether a decision of the Bank embodied in a Resolution of the Board of Directors is a nullity because it purports unilaterally to amend a fundamental and essential term or condition of employment. —Mesch and Siy v. ADB (No. 3), par. 24, Decision No. 18, 13 August 1996. ADBAT Reports, Volume 2, page 126.

60. As this Tribunal held in Mariam Pal, Decision No. 52 (2001), para. 32:

The function of the Tribunal is one of review and it does not intervene in the area of management discretion which is the prerogative of management. However it will intervene if there is arbitrariness or an abuse of discretion.
61. In the present case there is a significant and unexplained discrepancy between the Applicant’s record with the endorsement thereof in ratings of Fully and Generally Satisfactory provided by her supervisors and the “U” rating which is the subject of this Appeal. For a system such as the PDP to function effectively it should, in timely fashion, inform those involved, and those reviewing such actions as to the reasoning for actions taken. That was done in all stages up to the issuance of the final “U” rating by the DG, CWRD who apparently had had only four months’ supervision of the Applicant. That short exposure made it even more important that he provide some explanatory comments to support a decision at such odds with the rest of the then available record.

62. As the Tribunal noted in its initial decision Carl Gene Lindsey Decision NO.1 (1992), para. 38:

... (I)f the risk of arbitrariness is to be avoided, performance evaluations should be recorded in written form after an exchange of views between those concerned .... It is this absence of record which makes it so difficult to understand how the quality of the Applicant’s performance in his first year of service could be deemed to have so seriously declined thereafter.

63. In this case the period of putative decline in quality of performance is much shorter and the decline much starker, at the best from her 31 July 2006 interim review, at the worst from the few weeks following her supervisor’s ratings in the same review. In the absence of any entry by the DG, CWRD setting forth a view that differs from the record we have no explanation for the discrepancy. —Ibrahim v. ADB, pars. 60-63, Decision No. 86, 15 August 2008. ADBAT Reports, Volume 8, pages 134-135.

c. Interpretation of Own Decisions

10. This Tribunal is satisfied that it has the inherent power to interpret its own decisions and to give necessary directions as to implementation in the event of any uncertainty or ambiguity. Indeed, the parties have not suggested otherwise. At the same time, the Tribunal is guided by the statement of the International Court of Justice, in which, in dealing with a request for interpretation of one of its own judgments, it said:

“The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided.” (Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, I.C.J. Reports 1950, p. 395, at p. 402). —Mesch and Siy v. ADB (No. 2), par. 10, Decision No. 6, 31 March 1995. ADBAT Reports, Volume 1, page 72.
d. Interpretation of Contract of Employment

22. Usually, a contract signed by the parties is binding upon them. There are, however, some circumstances in which a contract may be set aside or varied by a competent tribunal. This happens, for example, when the contract fundamentally disregards reality.

23. It is the Tribunal’s conclusion that in the present case, the MOAs did not reflect the true relationship between the Bank and the Applicant.

24. There are several decisions by international administrative tribunals which define the power of a tribunal to set aside or vary a contract when it does not correspond to the true relationship of the parties. Thus, in In re Bustos, ILOAT Judgment No. 701 (1985), the ILOAT stated:

The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties - or at any rate the party which is in a position to formulate the document - do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties - or at any rate the stronger of them - do not wish to face. [T]he situation might be that the parties - or one or other of them - do not wish the contracts to be governed by the Staff Regulations; the easiest way of achieving that is for the parties to exhibit in the document a relationship which does not make the employee a staff member.

For the purpose of determining the period of notice due upon termination, the ILOAT treated a series of consecutive short-term contracts as a single long-term appointment.

25. Similarly, in In re Burt, ILOAT Judgment No. 1385 (1995), the ILOAT looked behind the mere wording of the written contract, which sought to give a particular label to the contract, because that was merely a device to deny the employee the protection of the Staff Rules, and gave effect to the real intention of the parties. —Amora v. ADB, pars. 22-25, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, pages 5-6.

e. Limits to Jurisdiction

i. In General

11. Instead, the case has been brought against the Bank in this Administrative Tribunal. The Tribunal is not akin to one of general jurisdiction within the national sphere. Here the proceedings are controlled entirely by the Statute of the Tribunal as promulgated by the Bank. Whatever is done by or in this Tribunal can be done only in accordance with that Statute. Article II, paragraph 1, of this prescribes that the Tribunal may deal only with an application which “alleges non-observance of the contract of employment or terms of appointment” of a staff
24. It is well to begin by noting that the task of the Tribunal is not to pass upon the sound or unsound nature of the President’s decision to dismiss the Applicant. The task of the Tribunal has been described in Lindsey, Decision No. 1 [1991] 1 ADBAT Reports 5, para. 12 in the following terms:

“…The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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.” (Emphasis supplied) —Gnanathurai v. ADB, par. 24, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, page 24.

31. In his Application the Applicant requests the Tribunal “to direct SRP of ADB to amend the commutation miles to render a fair and equitable treatment of ADB pensioners who exercise commutation option”, arguing that “[t]he amendment should provide for restoration of the commuted value of pension after 15 years’ expiry from the date of retirement of the attainment of 70 years of age”. He maintains this request implicitly in his Reply.

32. The first conclusion we draw from this request is that the Applicant recognizes that the existing rules do not require the conclusion he advocates.

33. Secondly, it is clear that this Tribunal lacks the authority to change the existing regulation which he challenges. His request is outside the jurisdiction of this Tribunal. Our authority is to determine the meaning and application of the SRP in force at the time of the Applicant’s retirement. We are unable to alter or amend such provisions.

34. Thus, as noted in Decision No. 68 of this Tribunal, quoting a decision of ILOAT (No. 2097 of 2001):

“If the contracts are valid and enforceable and not in breach of any applicable staff rule or principle of international law, the Tribunal has no power to reform there or to remake the bargain which the parties have chosen to make” (Soerakoesoemah, Decision No. 68 [2005] ADBAT Reports VII, 22, para. 14).

—Srinivasan Kalyanaraman v. ADB [No. 2], pars. 31 – 34, Decision No. 98, 8 February 2012. ADBAT Reports, Volume 9, pages 71-72.

65. The Tribunal’s scope of review of this Application, which involves a managerial decision, is to “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.” (Decision No. 1, Lindsey, [1991], 1 ADBAT Reports 5, para. 12.) The Tribunal is to examine allegations of nonobservance of the Applicant’s contract of employment, which includes the applicable rules of the Bank (Article II, para. 1 of the Statute of the Tribunal).
The Tribunal’s role is not to substitute its views for managerial decisions properly taken. —*Ms. G v. ADB [No. 2]*, par. 65, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 101.

48. International administrative tribunals have consistently held that under their statutes their competence is limited to hearing challenges to individual administrative decisions that directly and adversely affect a staff member and that they cannot hear appeals against legislative texts or amendments thereto (cf. *Kalyanaraman* (No. 2), Decision No. 98 [2012] ADBAT Reports IX, para. 33). They have thus ruled that a direct appeal against the latter texts is inadmissible. On the other hand, an individual decision implementing such a text may be challenged on the ground that the underlying legislative provision was illegal. —*Perrin, et al. vs. ADB*, par. 48, Decision No. 109, 6 May 2017. ADBAT Reports, Volume 10, page 144.

53. The first requirement is thus that there must be a specific administrative decision that directly and adversely affects an applicant in order to trigger jurisdiction, and that an application challenging a general rule is inadmissible. In other words, promulgation of a rule does not automatically affect the personal interests of staff. This is only the case when the new provision has been applied in a concrete manner. The United Nations Administrative Tribunal defined an administrative decision in *Andronov*, Judgement No. 1157 as follows:

… It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished form other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

55. At this stage the Tribunal cannot but conclude that the Application is lodged against potential effects of a general rule, which clearly requires implementation before an adverse effect in each individual case can be identified and considered. The Tribunal holds that an Applicant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him. However, she/he is not prevented from challenging the lawfulness of the general decision provided that all other conditions under the Tribunal’s Statute and Rules of Procedure are met.

56. The Applicants have failed to substantiate to what extent the new rules have adversely affected them when implemented and applied to them. They have not established which part of the several changes in the new rules has adversely affected each individual Applicant, and to what extent. The Tribunal recalls that it is the responsibility of Applicants, at the moment of lodging an Application, to substantiate their claims and to provide complete, adequate and convincing evidence in support of such claims. They have in the present cases failed to do so, including after a request was made by the Tribunal in this respect.
57. For all of these reasons, the Tribunal concludes that the Application as submitted is inadmissible. —Perrin, et al. vs. ADB, pars. 53 - 57, Decision No. 109, 6 May 2017. ADBAT Reports, Volume 10, page 147.

50. In relation to the remaining claims, the Tribunal has observed in Decision No. 109 that it cannot deal with potential and hypothetical situations. And although it is possible that certain of the impugned measures may have an adverse effect on some or many Applicants in the near future, and for some others in the not so near future, this is not sufficient reason to deal with their Applications here. There are just too many uncertainties about the future in a staff member’s professional or private life, or in that of their children, that the Tribunal cannot share Applicants’ conclusion that the measures will inevitably impact all of them adversely. For these reasons, all 59 Applications are inadmissible and the Bank’s preliminary objections, as amended during the proceedings, in their cases are upheld. —Perrin, et al vs. ADB [No.2], par. 50, Decision No. 112, 28 February 2018. ADBAT Reports, Volume 10, page 192.

ii. Appeals Committee Decisions

11. To the extent that the Applicant is claiming that the Appeals Committee misunderstood certain of his contentions and misapplied the facts in the record before it, this claim too is not properly before the Tribunal. The Tribunal has often stated that proceedings before the Appeals Committee are intended to lead to recommendations that are an advisory component of the Bank’s internal grievance procedure, and that the conclusions of the Appeals Committee are not of an adjudicatory nature so as to be subject to review by the Tribunal. Under Article I of the Statute, the Tribunal has jurisdiction to decide whether personnel decisions by the Bank violate a staff members contract of employment or terms of appointment; the Tribunal is not given appellate jurisdiction over the Appeals Committee. See Alcartado, supra, para. 18. —Rive v. ADB, par. 11, Decision No. 44, 7 January 1999. ADBAT Reports, Volume 5, pages 18-19. (See also Appeals Committee, Nature of Proceedings)

8. More significantly, there is no language whatever in A.O. No. 2.06 - whether in the 1994 or the 1998 version - with respect to the authority of the Appeals Committee to review Bank decisions that could have a “decisive influence” on the Tribunal’s determination that the Applicant’s Application was barred for failure to exhaust internal remedies. As the Tribunal has noted time and again, including in Decision No. 41, it does not sit to review the determinations or recommendations of the Appeals Committee. Rather, it has jurisdiction to hear claims that decisions of officials acting on behalf of the Bank have violated a staff member’s contract of employment or terms of appointment. Nothing stated in Decision No. 41 passed judgment upon the reviewing authority of the Appeals Committee. The Tribunal’s reference, mentioned in para.3 above, to paragraphs 9.2 and 15 of the 1998 version of A.O. No. 2.06 were meant simply to support a dictum about which there is no dispute, i.e., that “The Appeals Committee is not meant to be a formal adjudicatory body but rather a recommendatory body.” —Alcartado v. ADB (No. 2), par. 8, Decision No. 46, 19 December 1999. ADBAT Reports, Volume 5, page 35. (See also Appeals Committee, Nature of Proceedings)
f. Review of Management Decisions

i. Amendment of Contract of Employment

20. The issue that needs to be considered is not that formulated by the Bank, but a much narrower issue: namely, whether the Tribunal lacks competence to examine, review and invalidate, a decision of the Board of Directors which purports unilaterally to amend the contract of employment or terms of appointment of a staff member, even if that decision prejudicially affects a fundamental and essential term or condition of employment of a staff member, without the staff member’s consent, thereby violating his acquired rights.

21. The power of an organization to amend the contract of employment or terms of appointment has been lucidly set out in *de Merode*, WBAT Reports 1981, Decision No. 1:

35. [T]he Bank has the power unilaterally to change conditions of employment of the staff. At the same time, significant limitations exist upon the exercise of such power.

... 

40. ... The Tribunal notes that [the distinction between unilateral amendments which are permissible and those which are not] cannot rest on the extent to which a staff member accepted such power of amendment in his letter of appointment. Even if no reservation of the power of amendment were expressly included in the letters of appointment, such a power would be implied from the internal law of the Bank. Likewise, even if those cases where a power of amendment is reserved in terms which impose no limitation upon its exercise, this cannot be construed to accord to the organization an unrestricted power of amendment. The scope of the words as used in the exchange of letters must be read against the background of the Bank’s internal law, and it is not on the strength and extent of any individual’s acceptance that the power of amendment and its limitations may be defined.

... 

42. ... Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to [certain] limits and conditions ... 

44. ... The Tribunal prefers not to invoke the phrase “acquired rights” in order to describe essential rights. ... It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls “the doctrine of acquired rights” does not constitute the cause or justification of the unchangeable character of certain conditions of employment. It is
simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment.

22. Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions. Without deciding whether that principle could have been excluded by the provisions of the Charter of the Bank, it suffices to note that the Charter does not do so, and therefore the powers of the Board of Governors and of the Board of Directors of the Bank are subject to that limitation. However, when the Bank was founded there was no institution which was empowered to compel the Bank to comply with that principle. And when the Statute of the Tribunal was adopted, that limitation already existed: it was not one imposed or deemed to have been imposed by the Statute. The Tribunal was given jurisdiction in respect of complaints by staff members alleging non-observance of their contracts of employment and terms of appointment. That Statute does not prescribe any pertinent exception or qualification in respect of the jurisdiction of the Tribunal, and so that jurisdiction extends to non-observance of contractual terms resulting from the infringement of that principle. —*Mesch and Siy v. ADB (No. 3)*, pars. 20-22, Decision No. 18, 13 August 1996. ADBAT Reports, Volume 2, pages 124-126. (*See also* Contract of Employment, Amendment of Terms, Power to Amend; Tribunal, Jurisdiction, In General)

45. That the Tribunal so concludes does not mean that the Bank was altogether unfettered in the substance and process of the Resolution of the Board of Directors. The power to amend even a nonessential condition of employment, although within the discretion of the Bank, is subject to the substantive and procedural restrictions properly imposed on all such discretionary decisions. It is the duty of the Tribunal to ensure that this discretionary power is not abused, and that the exercise by the Bank of its discretion is not “arbitrary, discriminatory, unreasonable, improperly motivated, [and has not been] carried out in violation of fair and reasonable procedure.” (*Lindsey*, ADBAT Decision No. 1 [1992]). The World Bank Administrative Tribunal has formulated a number of more specific limitations upon the exercise of an institution’s power to amend nonfundamental and nonessential conditions of employment.

First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.

The principle of non-retroactivity is not the only limitation upon the power to amend .... The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing “the highest standards of efficiency and of technical competence.” Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be
made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal. (de Merode, supra, paras. 46-47). —Mesch & Siy v. ADB (No. 4), par. 45, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, pages 89-90. (See also Contract of Employment, Amendment of Terms, Limitations)

32. According to established jurisprudence, the evaluation of the performance of employees is a matter of managerial discretion; the Tribunal may not substitute its discretion in such matters for that of the Bank. Thus, we cannot decide whether the Applicant deserved or not:

a) the overall rating “Satisfactory” in the final 2007 PDP;

b) the number of assessments as “Always demonstrated” within the interim as contrasted to final PDP.

33. But, according to the same jurisprudence, “Such discretion … is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary … or adopted without due process.” (See Behuria Decision No. 11 [1996], II ADBAT Reports, para. 3). —Leonard v. ADB, pars. 32-33, Decision No. 92, 19 August 2009. ADBAT Reports, Volume 8, page 230.

63. It is appropriate in this context to, first of all, recall that “the Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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”. See Decision No. 1, Lindsey, [1991], I ADBAT Reports 5, paragraph 12. But the Tribunal must first review whether the changes were made according to the principles raised in paras. 55-57 as discussed below.

x x x

72. The review role of the Tribunal in this respect is limited. It is not its role to entertain each element underpinning, or not, the proposed and retained changes. That is the role of management: to be informed, make assessments, retain options, make proposals and consult with staff and their representatives about them. The Tribunal is persuaded that the record amply shows that this is what has happened. The Respondent gathered detailed relevant facts through a consulting firm, analyzed them and relied on them. The Applicants may question the facts or the analysis thereof, but they have not established that the Respondent acted improperly in this respect or abused its powers. It was by a reasoned judgment and after a balance of considerations that the Bank preferred one formula to another, being conscious that none could be perfect in all respects. —Perrin, et al vs. ADB [No.3], pars. 63 and 72, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, pages 211-212.
ii. **Appointment and Promotion Decisions**

11. The Tribunal emphasizes that appointment and promotion decisions are matters that are within the Bank’s discretion. As it has stated in a related context:

   The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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)*

In relation to the present case, this means that the Tribunal cannot substitute its discretion for that of the Bank. There are two – and only two – questions that the Tribunal must ask itself: was the decision reached in accordance with due process, and was substantive arbitrariness involved? *(Guioguo v. ADB, par. 11, Decision No. 59, 8 August 2003. ADBAT Reports, Volume 6, page 81.)*

20. The Tribunal has held that in such matters as appointments and promotions, its role is a limited one. In Haider, Decision No. 43 [1999], V ADBAT Reports 6, para. 18 it was decided that “the Tribunal may not substitute its discretion for that of the management”. Likewise as was stated in Lindsey:

   The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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.)* *(Safran v. ADB, par. 20, Decision No. 64, 8 August 2003. ADBAT Reports, Volume 6, pages 104-105.)*

30. The judicial role is properly confined to determining whether the Bank’s determination was made in compliance with the applicable rules, regulations and procedures it established for handling such matters. In this case, the Bank has also committed itself in A.O. 2.02, par. 2.1, to be “guided by fair, impartial and transparent personnel policies and practices ...”, and in paragraph 2.4, to make “the employment, promotion and assignment of staff ... without discrimination on the basis of sex, race or gender.” In paragraph 2.5, the Bank further commits itself as follows:

   ADB will take affirmative action to increase the representation of women on the professional staff at all levels.

It is therefore appropriate that the Bank’s action in denying the Applicant’s promotion be judged in the light of those commitments. *(Ms. A v. ADB, par. 30, Decision No. 87, 23 January 2009. ADBAT Reports, Volume 8, page 165.*
iii. **Performance Evaluation**

12. However, the fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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. In relation to the treatment of members of the staff, as has repeatedly been said by the World Bank Administrative Tribunal,

> “[t]he Respondent’s [Bank’s] appraisal is final unless, as a result of a review of the exercise of the Bank’s discretion, the Tribunal finds that there has been an abuse by the Bank in that its actions have been arbitrary, discriminatory or improperly motivated, or have been carried out in violation of a fair and reasonable procedure. (See, *Suntharalingam*, WBAT Reports 1982, Decision No. 6, para. 27.)” (Mr. X, WBAT Reports 1984, Decision No. 16, para. 39.)

In particular, in the case of evaluation of an employee’s performance, these facts may relate

> “not only to the technical competence of the employee but also to his or her character, personality and conduct generally, insofar as they bear on ability to work harmoniously and to good effect with supervisors and other staff members.” (See World Bank Administrative Tribunal decision in *Matt*, WBAT Reports 1982, Decision No. 12, para 47.) —*Lindsey v. ADB*, par. 12, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 5.

35. The Tribunal has entered into this detailed review of the Applicant’s relationship with the Bank because of the Tribunal’s obligation to ensure that the requirements of due process have been observed. As already stated, it is well-established that

> “the evaluation of the performance of staff members is a matter for management as long as its exercise of discretion is not ill-motivated, arbitrary, discriminatory or otherwise vitiated by any other abuse of power.” (See, e.g., *Gyamfi*, WBAT Reports 1986, Decision No. 29, para. 37.)

The Tribunal will not review the substance of the exercise of the Management’s discretion in relation to the Applicant unless there is evidence that it was so unreasonable that it could only have been arbitrary. The Tribunal does not find it necessary to go into this aspect of the matter, though it is bound to say that the letters of recommendation of the Applicant signed by the President of the Bank on 26 March 1991, by the Vice-President (Projects) on 2 April 1991 and by the Vice-President (Operations), on the same date, stating *inter alia* that the Applicant’s “performance and achievements have been outstanding” and that the Applicant had been “a highly effective manager”, are not documents which the Bank can properly disavow and, being intended as references, must be taken to be candid assessments of the Applicant upon which third
parties may safely rely. —*Lindsey v. ADB*, par. 35, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 14.

30. Although the Tribunal sets aside the above-mentioned decisions, it is not entitled to direct the Bank simply to grant a performance rating, merit pay increase or PIO promotion to the Applicant. Such a direction would constitute an affirmative exercise by the Tribunal of a discretionary power belonging to the Bank and a substitution of the Tribunal’s own judgment for that of the Bank. In *Lindsay*, the World Bank Administrative Tribunal said:

> “That the PTCO position was tailored for the Applicant is admitted by the Bank. But this fact does not by itself mean that the position was wrongly graded. The grading of positions is a matter of Bank management in which the Bank exercises a discretion. The Tribunal will review such matters only for the purpose of ensuring that the Administration has behaved in a procedurally correct way and that it has not reached a substantive conclusion that is not reasonably sustainable. It is not the task of the Tribunal to substitute its own assessment for that of the Bank.” (WBAT Reports 1990, Decision No. 92, para. 29).

Moreover, the record before the Tribunal does not indicate what the final performance rating of the Applicant would have been for 1987, 1988 and 1989 if the PERs for these years had correctly reflected the Applicant’s level of contribution and achievement and the real or intended evaluation by his Department Head. Nor can it be known what would have been the relevant decision after review of the corrected PERs by BPMSD and the Vice-President concerned and after any possible further review by the Bank’s three Vice-Presidents in the event of disagreement at the penultimate level. —*Tay Sin Yan v. ADB*, par. 30, Decision No. 3, 8 January 1994. ADBAT Reports, Volume 1, pages 46-47.

31. The Tribunal considers, therefore, that the appropriate course is to direct the Bank to consider once again the recommendations for performance rating and merit pay increase for the years 1987, 1988 and 1989, as well as PIO promotion of the Applicant for each of the subsequent years, this time on the basis of his corrected PERs. An indication that this is the proper course to follow is to be found in *Apkarian* where the World Bank Administrative Tribunal said:

> “Even if the Tribunal were to conclude that there had been an abuse of discretion or a violation of the Applicant’s procedural rights in the classification decision, the Tribunal should not substitute its judgment for that of the Respondent’s management by directing that the Applicant’s position be graded at level 17. At most, the case might be remanded for classification according to the new criteria to be promulgated.” (WBAT Reports 1988, Decision No. 58, para. 35) (Emphasis supplied).” —*Tay Sin Yan v. ADB*, par. 31, Decision No. 3, 8 January 1994. ADBAT Reports, Volume 1, page 47.
57. While setting aside the overall performance rating of S3 given to the Applicant, the Tribunal will not direct the Bank to grant a higher performance rating, salary increases or PIO promotion for the reasons set out in *Tay Sin Yan*, para. 30. The Tribunal will instead direct the Bank to reconsider whether a higher overall performance rating shall be given to the Applicant, and, if so, to pay him any consequential salary increases and to consider the PIO promotion of the Applicant. Whatever action the Bank may now take, the Applicant’s substantive right to a fair and objective performance evaluation has been infringed, and for that he is entitled to equitable compensation assessed by the Tribunal. —*Isip v. ADB*, par. 57, Decision No. 9, 8 January 1996. ADBAT Reports, Volume 2, page 16.

20. In previous decisions, the Tribunal has ruled that the evaluation of the performance of employees is a matter of managerial discretion and that the Tribunal may not substitute its discretion for that of management (*Lindsey*, Decision No.1 [1992], I ADBAT Reports 1, 14). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. The Applicant has not established any of these factors. —*Chan v. ADB (No. 3)*, par. 20, Decision No. 38, 6 January 1998. ADBAT Reports, Volume 4, page 6.

29. As the Tribunal has repeatedly stated, a general review of the evaluation of Bank employees by their superiors is beyond its jurisdiction:

[T]he fact that the Tribunal may review the exercise of [ ] discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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)

The matter of evaluating the performance of the Applicant is a matter for her supervisors. The Tribunal may interfere in such evaluation only under the strict conditions set out under the *Lindsey* formula, namely if it appears that the evaluation “has not been reached by the proper processes”, is “arbitrary, discriminatory or improperly motivated” or “could not reasonably have been taken on the basis of facts accurately gathered and properly weighed”. However, the Applicant makes several specific complaints against actions by the Bank the purpose of which is precisely to demonstrate that in the process leading up to the decision of 13 May 1996, there was procedural unfairness and a failure to observe due process, both in substantive and formal matters. —*Alexander v. ADB*, par. 29, Decision No. 40, 5 August 1998. ADBAT Reports, Volume 4, pages 48-49.

63. The main contention of the Respondent, clearly, is that in the evaluation of the Applicant’s performance, the Tribunal cannot substitute its own assessment for that of the Bank. However, it is equally axiomatic that the Bank’s discretion is not absolute but that the Tribunal
has the power to examine that the Bank has exercised its discretion in a non-discriminatory manner. As pointed out by this Tribunal:

Decisions with respect to the evaluation of staff members performance are within the discretion of the Bank (see Tay Sin Yan, ADBAT Decision No. 3 [1994], para. 30). Such discretion, however, is not unlimited and the Tribunal must ensure that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated, or adopted without due process (see Lindsey, ADBAT Decision No. 1 [1992], para. 12). (Behuria (No. 2), Decision No. 11 [1996] II ADBAT Reports 28, para. 3) —Alexander v. ADB, par. 63, Decision No. 40, 5 August 1998. ADBAT Reports, Volume 4, page 59.

18. In previous decisions, the Tribunal has consistently ruled that the evaluation of the performance of employees is a matter of managerial discretion, and that the Tribunal may not substitute its discretion for that of the management (Lindsey, Decision No. 1 [1992] I ADBAT Reports 5 para. 12). The Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed. It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation. Thus, for instance, the Administrative Tribunal of the International Labor Organization stated that:

[i]n the case of the probationer the organization must indeed be granted the broadest possible measure of discretion ... and its decision will be upheld unless some particularly serious or glaring flaw can be shown. (In re Verlaeken-Engels, ILOAT Judgment No. 1127 [1991], para. 30) —Haider v. ADB, par. 18, Decision No. 43, 7 January 1999. ADBAT Reports, Volume 5, pages 5-6. (See also Probationary Appointment, Managerial Discretion)

22. In Lindsey, Decision No. 1 [1992], I ADBAT Reports 1, the Tribunal stated certain principles which it would follow in regard to the review of the exercise of discretion by the Bank:

[T]he fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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. (id., at 5, para. 12)

Where the continuation or not of a staff member’s livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections. (id., at 4, para. 10)
If the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. (id., at 15, para. 38) —Toivanen v. ADB, par. 22, Decision No. 51, 21 September 2000. ADBAT Reports, Volume 5, pages 78-79. (See also Performance Evaluation, Evaluation Reports)

22. In Lindsey, Decision No. 1 [1992], I ADBAT Reports 1, the Tribunal stated certain principles which it would follow in regard to the review of the exercise of discretion by the Bank:

[T]he fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It 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. (id., at 5, para. 12)

Where the continuation or not of a staff member’s livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections. (id., at 4, para. 10)

[If] the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. (id., at 15, para. 38) —Toivanen v. ADB, par. 22, Decision No. 51, 21 September 2000. ADBAT Reports, Volume 5, pages 78-79. (See also Performance Evaluation, Evaluation Reports) [pp. 90-91]

32. The function of the Tribunal is one of review and it does not intervene in the area of management discretion which is the prerogative of management. However, it will intervene if there is arbitrariness or an abuse of discretion. In the instant case, the Tribunal notes serious discrepancies in the Bank’s documents purporting to evaluate the Applicant’s shortcomings, and flaws in the decision-making process which resulted in the decision not to regularize the Applicant’s appointment:

xxx

33. Based on the evidence adduced before the Tribunal, the decision-making process, starting from the 3 August 1998 PER to the decision to extend the Applicant’s contract and not convert it to regular employment, is flawed and in breach of the various Administrative Orders and consequently in breach of her contract of employment. —Pal v. ADB, pars. 32-33, Decision No. 52, 10 August 2001. ADBAT Reports, Volume 6, pages 8-9.
34. More central to her Application is the Applicant’s contention that the decision not to confirm her appointment after her probationary year was a violation of her employment contract. The Tribunal has held, in *Haider*, Decision No. 43 [1999], V ADBAT Reports 5, that “[t]he main objective of probation is to enable the organization to find out whether the probationer is suitable for employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment” and that, as with any evaluation of employee performance, “the Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed.” Indeed, in probationary situations most particularly, the Tribunal’s authority is limited. “It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation. . . [I]n the case of the probationer the organization must indeed be granted the broadest possible measure of discretion . . . and its decision will be upheld unless some particularly serious or glaring flaw can be shown.” The burden lies with the Applicant to prove these elements of her case.

35. At the same time, as the Tribunal also stated in *Haider*, “the probationer’s interest in being definitively employed should not be ignored nor deprived arbitrarily, if he has satisfied the obligations and standards required of him. Thus, for example, his duties must be well-defined, and he should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment.” The question for the Tribunal is therefore whether the Respondent treated the Applicant fairly, as just defined, and whether its non-confirmation decision was or was not an abuse of its discretion. —Yamagishi v. ADB, pars. 34-35, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, pages 117-118. *(See also Probationary Appointment, Managerial Discretion)*

31. The Tribunal has set out its scope of review with respect to termination decisions in the following terms:

“Evaluating the performance of the Applicant is a matter for her supervisor(s). The Tribunal may interfere in such evaluation only under the strict conditions set out under the Lindsey formula, namely if it appears that the evaluation has not been reached by the proper processes, is arbitrary, discriminatory or improperly motivated or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.” (Ms. G, Decision No. 106 [23 September 2015], para. 35 citing Lindsey, Decision No. 1 [1992] I ADBAT Reports 5, para. 12).

32. As decided in Claus, ADBAT Decision No. 105 (13 February 2015), para. 75:

“It is settled law that the assessment of staff member’s Annual Performance is essentially made by the Bank and it is not for the Tribunal to substitute its assessment. . . ."
iv. Severance Payments

13. In the Tribunal’s opinion, the Bank enjoys discretionary power in determining benefits such as severance pay. It is nevertheless the duty of the Tribunal to ensure that this discretionary power is not abused, and that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated, or adopted without due process (see Lindsey, Decision No. 1 [1992]). If there is an unjustifiable inequality of treatment, it would be violative of the principle of non-discrimination enunciated by the World Bank Administrative Tribunal in De Merode (WBAT Reports 1981, Decision No. 1, para. 47), in which it stated that administrative action “must not discriminate in an unjustifiable manner between individuals or groups within the staff.” —Viswanathan v. ADB, par. 13, Decision No. 12, 8 January 1996. ADBAT Reports, Volume 2, pages 38-39.

g. Particular Objections to Jurisdiction

i. Ratione Materiae (proper subject matter)

6. The Tribunal must first address the jurisdictional issue raised by the Bank. With respect to the Applicant’s severance pay claim, the Respondent objects to the jurisdiction of the Tribunal on the following grounds:

“The Bank’s severance pay scheme was adopted in its present form in 1982, and if, as the Applicant claims, the adoption of the scheme disadvantaged the Applicant and therefore constituted action by the Bank adverse to the Applicant, the Applicant should have challenged such action then. The Applicant’s delay in objection renders this portion of the Application inadmissible by the Tribunal, under Article II, paragraph 3(b) of the Statute of the Administrative Tribunal of the Asian Development Bank (the `Statute’).”

7. The Tribunal cannot accept this jurisdictional defence of the Bank. It is a well established principle that a member of the staff can properly claim before the Tribunal that there has been an infringement of his own rights. This is clear from the wording of Article II, paragraph 1, of the Statute of the Tribunal:

“The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member. The expressions `contract of employment’ and `terms of appointment’ include all pertinent regulations and rules in force at the time of alleged nonobservance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.”
8. Whether or not the Applicant could have contested the severance pay scheme in 1982, there is no doubt that he can contest the specific decision by which it was applied to his personal situation. Such a decision, if it infringes his rights or denies his benefits, gives him a cause of action. The Tribunal therefore rejects the objection to jurisdiction raised by the Bank, as far as the severance pay claim is concerned. —Viswanathan v. ADB, pars. 6-8, Decision No. 12, 8 January 1996. ADBAT Reports, Volume 2, pages 36-37.

14. The Tribunal agrees with the conclusion reached by the Appeals Committee on 28 July 1995:

The main issue in this Appeal was whether or not the Bank’s action in temporarily withholding Mr. R. Chan’s dependent benefits was a breach of the terms and conditions of employment between the Bank and Mr. Chan. The Committee is of the view that the Bank’s action did not concern the terms and conditions of the Applicant’s employment with the Bank. —Chan v. ADB, par. 14, Decision No. 21, 13 August 1996. ADBAT Reports, Volume 2, page 160.

10. The Respondent’s final preliminary objection is that the Tribunal is presented with no justiciable case or controversy, in light of the Applicant’s failure to state a claim. The Bank rests this objection on the assertion that once the Resolution was adopted, it became the relevant term and condition of the Applicants’ employment with respect to tax reimbursement, such that it clearly could not have been violated when the 1995 tax-reimbursement requests were denied by the Manager and the Director, BPMSD. Of course, this assumes the conclusion to the very question to be decided here: whether the Resolution was indeed a valid unilateral abrogation of the Applicants’ pre-existing right, established in Mesch I, to such reimbursement. To adopt the Respondent’s argument would be to deny jurisdiction to the Tribunal to decide whether a decision by the Bank (which could then always be said to establish the prevailing terms and conditions of employment) violated such governing principles as those found in the contract with the staff member, the Staff Rules and Regulations, the Personnel Handbook, Administrative Orders and Circulars, and general principles of law that limit the discretion of the Bank. Such a conclusion is untenable. See Lindsey, ADBAT Decision No. 1 [1992], para. 4; Mesch III, paras. 20-24. —Mesch & Siy v. ADB (No. 2), par. 10, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, page 74.

13. The challenges raised by the Applicants have their bases in the original 1968 structure of the SRP. They seek now to rely on a process created in 1991 to challenge a plan that predated the establishment of the Tribunal, in effect urging an ex post facto interpretation, application or even revision of the Statute that is barred by the terms of Article XIV. Whether their claim is based on the original SRP or any amendments, interpretations or pension elections made prior to 1 January 1991 or based upon the pre-1 January 1991 retirement or separation of former employees, the terms of Article XIV preclude such claims based upon events occurring prior to that date from being considered now. The language of Article XIV barring the Tribunal from hearing any application concerning a cause of complaint arising prior to 1 January 1991 also extends to precluding claims of those who retired after 1991 inasmuch as there was no change in the 1968 Plan to which they had agreed at the time of their retirement. That reasoning would also apply to those who are now seeking to revise what they had originally committed to, including
actuarial forecasts and commutation plans based on the then comparators at the time of their retirement. To permit such post-1991 claims based on pre-1991 decisions would open the door to complaints over current consequences and disbursements arising from pension election choices made prior to the creation of the Tribunal, election choices that are beyond the reach of the Tribunal under Article XIV. Applicants should not be permitted to recoup through the Tribunal for the consequences of decisions made at a time when they lacked such an appeal opportunity or to reshape their earlier decisions because of having outlived their anticipated survival or for their options made prior to the advent of the Statute and Tribunal.

14. Applicants seek rescission of some decisions of the SRP, particularly to achieve lump-sum benefits for Applicants, restoration of pensions to pre-commutation levels for those who so elected to commute their pensions, as well as supplementary pensions for those who retired in the early years of the Bank’s operation. Any one of those requests would constitute more than a rectification of an earlier inequity; it would constitute a rewriting of the SRP, which is beyond the authority of the Tribunal. As the International Labour Organisation Administrative Tribunal (ILOAT) stated in In re Deville and others, ILOAT Judgment No. 2097 (2001):

> If the contracts are valid and enforceable and not in breach of any applicable staff rule or principle of international civil service law, the Tribunal has no power to reform them or to remake the bargain which the parties themselves have chosen to make.

Even if there were grounds for such rescission, the Administrative Tribunal is not the appropriate venue for instituting changes in the SRP, nor is it empowered to remake the Applicants’ contracts of employment. —Soerakoesoemah, et al. v. ADB, pars. 13-14, Decision No. 68, 20 January 2005. ADBAT Reports, Volume 7, pages 21-22.

**ii. Ratione Personae (proper party)**

12. The dependency benefits relate exclusively to Ronald’s terms of employment and bear no connection whatsoever with the Applicant’s terms of employment. If any rights to due process were infringed, such violations would concern her in her capacity as a dependent of a professional staff member - and therefore a claim could be raised by Ronald and has been so raised - and not in her own capacity as a supporting staff member. Even if certain acts were specifically directed to her, - such as the information given to the Security in order to prevent her from entering the commissary, or a subsequent refusal of access if indeed that did happen - those acts were directed at her as Ronald’s spouse, not as the staff member Carolina. —Chan v. ADB, par. 12, Decision No. 21, 13 August 1996. ADBAT Reports, Volume 2, page 160.

20. The Tribunal takes this opportunity to emphasize that a staff member should not normally be entitled to assert before the Tribunal that another staff member has been accorded treatment contrary to Bank policies and rules. Article II, para. 1, of the Statute of the Tribunal provides in pertinent part: “The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank alleges non-observance of the contract of employment or terms of appointment of such staff member.” (emphasis supplied) The Tribunal has held before that it has the power to rule only upon a staff member’s claim that the Bank has rendered
a decision that violates that staff member’s employment contract and that has adversely affected him or her. [Carolina Chan, Decision No. 21 [1996], II ADBAT Reports 160, para. 12.] Staff members are not empowered to come to the Tribunal for the purpose of challenging violations of contracts of other staff members.

21. Much of what the Applicants have asserted during the processes of administrative review and the Appeals Committee, and now before the Tribunal is of this nature. Simply to assert that Mr. A’s promotion was a violation of pertinent administrative orders and other Bank policies does not provide a basis for the Tribunal’s jurisdiction. It is only because the Bank rejected the Applicants’ requests for identical treatment, and denied them their requested PIO promotion, that the Applicants can facially assert a violation of their own employment contracts, and thus a claim within the jurisdiction of the Tribunal. It remains to determine, however, whether the Applicants have established a convincing case upon the merits. —Canlas et al. v. ADB, pars. 20-21, Decision No. 56, 8 August 2003. ADBAT Reports, Volume 6, page 48.

iii. Ratione Temporis (timely filing with the Tribunal)

3. Subject to such exceptional circumstances as may be decided by the Tribunal (see Statute, Article II, paragraph 3), an application, to be admissible, must be filed within 90 days after the occurrence of the event giving rise to it. This rule could not be applied in the present case because the Tribunal, although established within 90 days after the relevant event, had not become fully operational and was therefore not able to adopt its Rules of Procedure within that period. The Bank therefore agreed to raise no objection to the Application if it was filed within 90 days after the adoption of the Rules of Procedure. The Application was posted on 7 April 1992 and was received on 6 May 1992, that is to say, after the expiry of this agreed 90-day period. However, the Tribunal, after receiving the comments of the Bank, determined that the facts before it constituted exceptional circumstances and decided that the Application should be treated as validly filed. —Lindsey v. ADB, par. 3, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 1.

26. The Applicant’s submission that the letter of 25 February 1994 from the Director, BPMSD, was the event giving rise to the Application or was notice that the relief asked for will not be granted is untenable. What the Applicant sought on 18 October 1993 was a review of the treatment allegedly meted out to him while in the employment of the Bank as well as relief by way of re-employment. The refusal of such review and relief on 25 February 1994 did not constitute a different cause of complaint arising after 1 January 1991. His complaint continued to be that he had been unfairly treated over the Burma Edible Oil Project. Where a complaint is time-barred or otherwise not within the jurisdiction of the Tribunal, a complainant cannot seek a review of such complaint and attempt to found the jurisdiction of the Tribunal upon a refusal of such review. The Tribunal holds that the application is inadmissible ratione temporis. —Nelson v. ADB, par. 26, Decision No. 7, 31 March 1995. ADBAT Reports, Volume 1, page 84-85.

24. The fact that the Applicant chose to wait until he obtained regular status in order to “[take] up the administrative review process again” does not mean that that process had not already been completed. What he sought, as his memorandum of 26 May 1994 states, was a reconsideration of his July 1991 request for a merit increase and not relief upon a new cause of
Where a complaint is not admissible, because it is time-barred or because internal remedies have not been exhausted, a complainant cannot seek a reconsideration of that complaint and attempt to found the jurisdiction of the Tribunal upon the refusal of such reconsideration. —Behuria v. ADB, par. 24, Decision No. 8, 31 March 1995. ADBAT Reports, Volume 1, page 96.

45. The Tribunal holds that it has jurisdiction *ratione personae*, as the Applicant was a member of the Bank’s staff holding a regular appointment within the meaning of Article II of the Statute of the Tribunal.

46. As far as jurisdiction *ratione temporis* is concerned, in regard to his claim for dependency allowances from 24 August 1979 to 20 April 1993, the Applicant had a continuing cause of action, arising upon each non-payment. Article XIV of the Statute confines the jurisdiction of the Tribunal to causes of complaint which arose after 1 January 1991, and hence the Tribunal has no jurisdiction to entertain claims in respect of dependency allowances for the preceding period. In respect of the allowances payable between 1 January 1991 and 20 April 1993, while the Tribunal has jurisdiction, the Applicant did not seek administrative review in due time, and he has thus failed to exhaust his internal remedies within the Bank as required by Article II, paragraph 3(a) of the Statute. —Amora v. ADB, pars. 45-46, Decision No. 24, 6 January 1997. ADBAT Reports, Volume 3, page 11.

7. The Tribunal concludes that, whether or not the Applicants could have contested the Resolution in late 1994 or early 1995, there is no doubt that they may properly contest the specific decision by which it was applied to their personal situation by the supervisors in BPMSD. The Manager, BPMSD, denied their reimbursement requests in April 1996; that was confirmed by the Director in September 1996; and the decision of the Appeals Committee was rendered on 14 November 1996; this Application was filed on 20 November 1996. It may well be that the Applicants were in some sense adversely affected by the adoption of the Resolution, for it clearly signaled that the taxes to be paid by them for their Bank earnings from 6 October 1994 would not be reimbursed. But, even if, as the Respondent contends, the decisions of the Manager and the Director, BPMSD, were ‘ministerial,’ it was those decisions that constituted a specific, personalized and definitive rejection of the Applicant’s claims for reimbursement of their taxes on their 1995 Bank income. As noted by the Tribunal in *Mesch I*, para. 22: ‘[T]he Bank’s obligation of reimbursement in each case could have arisen only upon a reasonably prompt claim being made, accompanied by proof of payment of such tax.’ This gave rise, for each Applicant, to a distinct cause of action.

8. The circumstances are in essence the same as in *Yiswanathan*, ADBAT Decision No. 12 [1996], involving the applicant’s claim for severance pay under a scheme that was adopted by the Bank in 1982 but not applied to him until his retirement in 1995. The Tribunal rejected the Bank’s contention that the applicant should have promptly challenged the announcement of its 1982 policy, invoking, among other things, Article II, paragraph I, of the Statute of the Tribunal, which empowers the Tribunal to ‘hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member.’ (emphasis supplied). See also Amora, ADBAT Decision No. 24 [1997], in which the Tribunal concluded that the applicant
‘had a continuing cause of action’ for the Bank’s recurrent refusals to pay annual dependency allowances. The Tribunal notes, finally, the blatant inconsistency between the Respondent’s claim, rejected in Mesch III, that the Resolution, as an act of the Boards of Directors and Governors, was altogether beyond the power of the Appeals Committee and the Tribunal to review - a claim that was obviously intended to deter a prompt challenge by the Applicants - and its claim in the present case that the Applicants had to seek prompt review of the Resolution lest their subsequent challenges to its direct application to them be ruled out of time. —Mesch & Siy v. ADB (No. 2), pars. 7-8, Decision No. 35, 7 August 1997. ADBAT Reports, Volume 3, pages 73-74.

31. One caveat is in order. The Applicant requests the review of both her 1994 and 1995 PERs. However, she has not contested her 1994 PER within the period of time (6 months) required. Therefore, the Tribunal does not have jurisdiction in regard to whatever irregularities she claims tainted the preparation of the 1994 PER. The Applicant claims, however, that in 1995 she was improperly dissuaded from challenging her 1994 PER. Inasmuch as the Tribunal does have jurisdiction in regard to the events of 1995, that dissuasion comes properly within its jurisdiction. It is to these facts - the claim by the Applicant that her grievance over the 1994 PER was curtailed and that her efforts of transfer were obstructed - that the Tribunal shall now turn. —Alexander v. ADB, par. 31, Decision No. 40, 5 August 1998. ADBAT Reports, Volume 4, page 49.

19. Nor can the Applicant cure his delinquency by sending an inquiry to the Respondent, as he did on 26 February 1997, in order to provoke a response, such as the one from the Officer-in-Charge, BPHR dated 3 March 1997, which simply reiterates and confirms a decision made many months before. As the Tribunal has previously stated in a similar context:

Where a complaint is not admissible, because it is time-barred or because internal remedies have not been exhausted, a complainant cannot seek a reconsideration of that complaint and attempt to found the jurisdiction of the Tribunal upon the refusal of such reconsideration. (Behuria, Decision No. 8 [1995], I ADBAT Reports 96, para. 24)

20. Other international administrative tribunals have also clearly concluded that actions or statements by the institution that merely confirm an earlier final decision are not to be treated as starting anew the pertinent time periods for filing grievances or requesting administrative review (Agerschou, WBAT Reports 1992, Decision No. 114, para. 42). —Alcartado v. ADB, pars. 19-20, Decision No. 41, 5 August 1998. ADBAT Reports, Volume 4, pages 74-75.

10. Although the first sentence of Article II, paragraph 3, requiring adherence to specified appeal procedures permits admissibility of applications ‘upon exceptional circumstances as decided by the Tribunal”, that potential exception to the sub-paragraph (a) and (b) compliance with the specified Article II, paragraph 3, appeal procedure, is also covered by the broader Article XIV exclusion of Article II, paragraph 3. While it is true that prior to the Statute and the establishment of this Tribunal there had been no comparable channel for raising complaints over alleged abuse of discretion in respect of continuing entitlements under the SRP, it is beyond the authority of this Tribunal to reopen any such alleged pre-1 January 1991
inequity. The drafters of the Statute when they had the opportunity to extend jurisdiction to an earlier date, opted not to do so, leaving open only a ninety-day window after entry into force of the Statute for filing of applications which in any event was not utilized by the Applicants in this case.

11. Although some 46 of the 222 Applicants appear to have retired or separated before 1 January 1991 and are thus disqualified from eligibility before the Tribunal because their cause of complaint arose prior to its establishment, even for those who had a semblance of claim after 1 January 1991 for events that occurred prior to that date, there appears to have been no utilization of the ninety-day window under Article XIV to file any claims. —*Soerakoesoemah, et al. v. ADB*, pars. 10-11, Decision No. 68, 20 January 2005. ADBAT Reports, Volume 7, page 21.

15. Applicants claim they filed at the earliest opportunity after they became aware that their claims were actionable and for years have gone through the Respondents’ administrative mill in the reasonable expectation that their needs would be addressed without having the resort to this Tribunal, and have not sat on their rights. Although the triggering event for their claims may be the 1 October 2000 changes in pension benefits for those not yet retired, the Applicants are bound by events and decisions they made under a plan that was in place prior to 1 January 1991. Under the terms of Article XIV they are time-barred in as much as the claims were not made within the time provided by the Statute. The Applicants accepted the benefits to which they subscribed. Additionally, beyond the ninety-day window of 1991, the concept of laches is properly invoked to preclude reopening long closed and long accepted conditions merely because later evidence may cast some doubt on the wisdom of the earlier choices. The stability and certainty of a pension scheme can only be assured if those covered are held to their choices, and if the Plan can rely on the permanence of those decisions. The same reasoning applies to those who received pension payments beyond 1 January 1991 based upon decisions made prior thereto. Their payments continued as originally provided and agreed to.

16. That the Bank undertook to provide amended and increased benefits effective 1 October 2000 for those not yet retired, does not alter the fact that for these Applicants their pension commitment had been made at a time excluded by the Statute from our review. Even for those who made their pension commitment between 1991 and the 2000 Plan revisions, there is no evidence that they made a timely filing. Their original retirement, pension and commutation arrangements continued as originally provided. Applicants’ effort to secure restoration of benefits or supplemental pensions were not provided for by the SRP, and the belated effort to secure them through this forum constitutes not only an untimely but also an impermissible challenge to the substantive provisions of the SRP. Although the Applicants claim that a prospect of equal treatment justifies extending the improvements to those already retired as well as to active employees, this forum is unable to address that claim because it lacks jurisdiction over pension commitments made prior to the creation of the Tribunal. —*Soerakoesoemah, et al. v. ADB*, pars. 15-16, Decision No. 68, 20 January 2005. ADBAT Reports, Volume 7, page 23.

14. The Tribunal finds that the act giving rise to this grievance of the Applicant was the decision of the Respondent embodied in its letter of 13 August 2002 informing him that the position he had applied for had been filled since he failed to meet the requirement of reporting
for duty within three months of his acceptance. Upon receipt of this letter, he had no reasonable expectation that a job was available. When he was told that “we will have to await the availability of another position”, it was not an employment contract or a commitment to hire him but merely an expression of the willingness of the Respondent to consider him along with other candidates for a future position.

15. The Applicant should have filed his Application with the Administrative Tribunal within ninety days of 13 August 2002, and not from the BPMSD’s letter of 30 January 2004 nor the General Counsel’s email of 25 March 2004 for these merely confirmed the final decision of the Respondent conveyed to the Applicant on 13 August 2002 and accepted by him with thanks. Indeed, precedent has it that subsequent actions or decisions which are merely confirmatory of an earlier final decision will not delay the running of time. As the Tribunal stated in Roman A. Alcartado, ADBAT Decision No. 41 [1998], IV ADBAT Reports, 69, 75, para. 20:

Nor can the Applicant “cure” his delinquency by sending an inquiry to the Respondent, as he did on 26 February 1997, in order to provoke a response, such as one from the Officer-in-Charge, BPHR, dated 3 March 1997, which simply reiterates and confirms a decision made many months before.

The ninety-day period began on 13 August 2002, and his failure to avail himself of the right of appeal by the end of that time window forecloses his right to any subsequent protests.

16. The facts moreover show that the Applicant did not utilize the internal appeals mechanism of the Respondent Bank when these were clearly laid down in its Administrative Orders. The exhaustion of internal remedies, needless to say, must occur within the prescribed time limits. See Rive, ADBAT Decision No. 44 [1999], V ADBAT Reports 15, para. 9. —Xu v. ADB, pars. 14-16, Decision No. 69, 20 January 2005. ADBAT Reports, Volume 7, pages 29-30.

h. Sexual Harassment Cases

53. It will be recalled that the Applicant made three charges against her immediate supervisor in August 2002, labeling them “harassment,” and that she reiterated those three charges on 18 September 2002 under the label “sexual harassment.” She had been advised by an attorney in the meantime that an employee alleging sexual harassment could not lawfully be relieved of her employment. This was misinformation. Whatever national or international law her counsel might have had in mind is not binding upon the Bank, which is an international organization and the law of which, with respect to the employment rights of staff members, is internal to the Bank and determined ultimately by the Tribunal. (See generally Haider (No. 2), Decision No. 48 [2000], V ADBAT Reports 45.) The Bank’s regulations provide that the filing of any sort of appeal against a workplace decision does not suspend the implementation of the decision under review. According to A.O. No. 2.06, para. 4, “a request for . . . administrative review shall not suspend the implementation of the decision subject to administrative review.” The Tribunal finds this to be a reasonable rule, in light of the lengthy and potentially indefinite suspension of decisions on matters such as confirmation, reappointment, discipline and the like that would follow if the rule were otherwise, fostering inefficiency and other harm to the
interests and mission of the Bank. Even so, the Tribunal clearly has jurisdiction to hear and rule upon applications that properly present sexual harassment and sexual discrimination grievances, for these clearly implicate an interpretation of a staff member’s contract of employment and terms of appointment, which include a ban upon such misconduct. (See Alexander, Decision No. 40, [1998], IV ADBAT Reports 41, para. 74.) A staff member ultimately vindicated through administrative review and Tribunal action can be made whole through the award of compensatory damages and other remedies. —*Yamagishi v. ADB*, par. 53, Decision No. 65, 28 July 2004. ADBAT Reports, Volume 6, pages 123-124.

7. Relief Granted

42. Article X of the Statute of the Tribunal provides as follows:

“If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank ... decide ... that the applicant shall be compensated without further action being taken in the case; provided that such compensation may not exceed the equivalent of three years’ basic salary of the applicant.” —*Lindsey v. ADB*, par. 42, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 17.

44. The Tribunal thus has a choice in this case between ordering the rescission of the decision or ordering specific performance of the obligation to carry out a proper review of the Applicant’s performance or fixing an amount of compensation to be paid to the Applicant. As the decision under consideration is a negative decision, i.e. not to convert or renew the Applicant’s fixed-term contract, it appears to the Tribunal that its finding that the decision is invalid renders it unnecessary to order its rescission. As to specific performance, even if a fresh consideration of the Applicant’s performance were ordered, it could not be properly carried out because of the absence of contemporaneous written evaluation reports covering the whole period of the Applicant’s employment. Therefore, the only alternative left is that of ordering payment of compensation. —*Lindsey v. ADB*, par. 44, Decision No. 1, 18 December 1992. ADBAT Reports, Volume 1, page 17.

87. In conclusion, the Tribunal observes that the Applicant has failed to prove her claim that the decision not to make her appointment permanent was characterized by procedural unfairness and lack of due process because of prejudice against her, or because she was discriminated against. The Tribunal is likewise unable to find any other evidence of the existence of a procedural flaw in her personnel evaluation that would have vitiated the decision of the Panel of Vice-Presidents of 13 May 1996 not to make her appointment permanent.

88. Although the Tribunal has been unable to find evidence of prejudice against the Applicant that would have amounted to a failure of due process, the Tribunal notes nonetheless that the Manager’s attitude did contribute to the strained relationship she had with him. As the Tribunal has concluded in paragraph 59, this applies particularly to the Manager’s “one-sided
focus on criticism and avoidance of positive encouragement, his attention to sometimes 
irrelevant detail, his failure to consult the Applicant when taking decisions that had an effect on 
her assignments and his occasionally impatient or sarcastic tone.” Although these faults in his 
managerial style did not materially affect the validity of the Applicant’s PER of 1995, they did 
cause some intangible injury to her for which the Tribunal deems it appropriate that the Bank 
provide compensation. —Alexander v. ADB, pars. 87-88, Decision No. 40, 5 August 1998. 
ADBAT Reports, Volume 4, page 67.

106. It is settled jurisprudence that this Tribunal may award reasonable legal fees and 
costs pursuant to Article X (2) of the ADBAT Statute, which provides:

If the Tribunal concludes that an application is well-founded in whole or in part, it may 
order that the reasonable costs incurred by the applicant in the case, including the cost of 
applicant’s counsel, be totally or partially borne by the Bank, taking into account the 
nature and complexity of the case, the nature and quality of the work performed, and the 
amount of the fees in relation to prevailing rates.

In addition, proof of costs must be provided:

From its inception (Lindsey, Decision No. 1 [1992], I ADBAT Reports), the Tribunal has 
stressed that an applicant’s Reply must contain proof of his costs. (Galang, Decision No. 
55 [2002], VI ADBAT Reports, para. 50).

The Tribunal notes that only part of costs has been provided.

107. The Tribunal has also noted that although an applicant may succeed only in part, 
where issues raised are of importance the Tribunal has considered it equitable to award costs:

“Although the Applicants have not succeeded on the merits, their pleadings nonetheless 
were very useful to the tribunal on issues that were important and complex, and the 
Applicants did prevail with regard to the preliminary objections. Accordingly, the 
Tribunal decides to award a sum towards their costs.” (Mesch and Siy (No. 4), Decision 
No. 35 [1997], III ADBAT Reports, para. 51. See also De Armas et al., Decision No. 39 
[1998], IV ADBAT Reports, para. 93.)

108. The Tribunal deems it totally proper and important that staff have the possibility 
to challenge the legality of changes to underlying general rules that apply or may apply to many 
present and future staff. The Applicants and the Respondent agreed to submit the case directly to 
the Tribunal in order to obtain a ruling on the legality of the measures in the interest of legal 
certainty. Accordingly, the Respondent initially did not raise preliminary objections.

109. Having considered the representation of the parties, the criteria set out in Article 
X (2), and the Tribunal’s jurisprudence, the Tribunal considers that the Applicants have raised a 
significant issue in law that had the potential to affect a much wider group of staff regarding their 
fundamental and essential rights.
110. It must at the same time be underlined, as the history of the present case shows, that some of the costs were avoidable. Time and resources were lost following inadequate preparation and presentation of the applications. Moreover, the Tribunal notes that the Applicants’ pleadings were assisted in great part by the Respondent’s voluntary provision of relevant documentation in support of their claims. The Tribunal considers that under these circumstances an amount of US$ 10,000 is a fair contribution towards costs. —Perrin, et al vs. ADB [No.3], pars. 106 - 109, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 218.

96. The Tribunal has found that the Applicant’s claim of discrimination is founded and therefore her claim for rescission of the dismissal decision is granted. However, should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case, the Tribunal has, in accordance with Article X (1) of the Tribunal’s Statute, fixed the amount of compensation to be paid to the applicant for the injury sustained. This amount of compensation to be paid by the Bank has been reduced on account of the fact that misconduct did occur. The Tribunal also considers it reasonable to conclude that the Applicant suffered intangible injury as a result of the Respondent’s breach of AO 2.06 in three particular matters. For this she should be compensated. (See Alexander, Decision No. 40 [1998] IV ADBAT Reports 67, para. 88, and Rive, Decision No. 44 [1999] V ADBAT Reports 22, para. 23). Having prevailed in part on her claim, a portion of the Applicant’s attorney’s fees are also granted. —Ms. J v. ADB, par. 96, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 271-272.

125. For the reasons cited above, the Applicant’s claim fails, but the Tribunal finds that he has sustained intangible injury in relation to the Respondent’s breach of AO 2.06 in two 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. —Mr. K v. ADB, par. 125, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 306.

140. 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 two 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. The amount has been fixed taking into account the prolixity in which her case was argued. —Ms. L v. ADB, par. 140, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 343.
8. Request for Confidentiality

60. As for the Applicant’s request for confidentiality, the Tribunal holds that the disclosure of the names of parties and the relevant facts in its Decisions must be the rule, and confidentiality the exception. The publication of allegations and findings would in every case cause some loss, damage or prejudice to the party affected, and that would not be sufficient to claim confidentiality: the burden lay on the Applicant to establish the likelihood of serious loss, damage or prejudice. That is not the case here, having regard to the Tribunal’s findings and decision. —Toivanen v. ADB, par. 60, Decision No. 51, 21 September 2000. ADBAT Reports, Volume 5, page 91.

49. x x x The request for confidentiality in respect of the Applicant’s name was uncontested by the Respondent and granted by the Tribunal. —Mr. F v. ADB, par. 49, Decision No. 104, 6 August 2014. ADBAT Reports, Volume 10, page 41.

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

81. The Tribunal can see no good ground to grant the above request as all information including details of the case and decision of the Tribunal are published on the ADB website, in accordance with Rule 2 of the Rules of Procedure of the Tribunal. It is noted that the Tribunal did not receive a request for anonymity from the Applicant pursuant to Practice Direction No. 3. —Claus vs. ADB, pars. 80 – 81, Decision No. 105, 13 February 2015. ADBAT Reports, Volume 10, page 71.

2. Both parties have requested that confidentiality be kept as regards identification of the Applicant and the persons referred to in the pleadings. Having considered this question in line with Practice Direction No. 3, the Tribunal has granted these requests. —Ms. G v. ADB [No. 2], par. 2, Decision No. 107, 19 August 2016. ADBAT Reports, Volume 10, page 87.

28. Under Practice Direction No.3 of the Tribunal’s Rules of Procedure the Respondent has requested confidentiality of the name of the Applicant’s supervisor. This is granted in view of the sensitivity of the issues and the fact that he is still an officer in the Bank. —Ms. Maria Lourdes Drilon vs. ADB, par. 28, Decision No. 110, 6 May 2017. ADBAT Reports, Volume 10, page 156.

25. Under Practice Direction No. 3 of the Tribunal’s Rules of Procedure the Applicants have requested that the details (i.e., the names) of the Applicants be redacted from this judgment. They also requested that the Tribunal “anonymize” in Decision No. 112 the 37 names that are listed at paragraph 47 of that judgment, a request that was not made before that Decision was issued. The Applicants submit that the fact that this second judgment has been out for some months would not have an effect on the Applicants’ request for anonymity, because what they were seeking was to avoid any issues further down the line, so they asked for the current version of the published judgment to be taken down and replaced with a properly
anonymized version. The Applicants submit that it is of critical importance that ordinary staff members perceive that the options for vindicating their rights are devoid of any opportunity for intimidation or retaliation. They added, to be clear, that they were not alleging that there have been instances of intimidation or retaliation, but they felt that there might be risks in the future. “At its lowest”, they felt that the inclusion of their names on the judgment(s) might result in prejudice to them. Given that redaction would not disadvantage the Bank in any way, they considered their request both reasonable and proper. Lastly, the administrative burden of redacting paragraph 47 of Decision No. 112 would be slight.

26. The Tribunal cannot agree with the reasoning behind the request. It, first of all, considers that anonymity only has an impact for the public at large, and not for the Respondent who anyway knows who the Applicants are. Second, this reasoning would mean that it would have to be applied to each and every appeal. The Applicants concede that there have not been instances of intimidation or retaliation, but they feel that there are risks in the future. This is a serious, and unsubstantiated, insinuation of a real risk of retaliation, which the Tribunal may consider only if it is corroborated by facts and convincing arguments, and which would anyway not disappear by simply “anonymizing” Applicants’ names. The Applicants have failed to provide any convincing element in support of their submission. Nor does the Tribunal itself have any indication whatsoever of a current or future risk of retaliation, which would indeed be a major violation of basic principles underlying the judicial process. In any event, according to Article IX, paragraph 1 of the Tribunal’s Statute, “[all] decisions of the Tribunal … shall be final and binding,” and therefore a request for anonymity cannot be granted retroactively concerning an earlier Decision that is final and published. The present proceedings cannot be used to correct an omission in the past. As a consequence, the requests as presented cannot be granted.

27. On the other hand, the main purpose of the present proceedings is to establish the legality of the changes in the EA. Both parties have agreed to submit directly to the Tribunal a matter that is of interest to a great number of present and future staff. The purpose is not to identify individual staff members and their private situations, and the Tribunal will maintain this approach throughout this Decision. — Perrin, et al vs. ADB [No.3], pars. 25 - 27, Decision No. 113, 21 July 2018. ADBAT Reports, Volume 10, page 200.

40. In accordance with Practice Direction No. 3 (19 August 2005) of the Tribunal’s Rules of Procedure, the Applicant has requested that his and all other names mentioned in his Application should be kept confidential in the publication of the decision. The Respondent has not made any submission on this point. In the circumstances, the Tribunal decides to grant confidentiality. — Mr. I v. ADB, par. 40, Decision No. 114, 21 July 2018. ADBAT Reports, Volume 10, page 230.

41. Applicant requests confidentiality of the entire proceedings and expressly requests that her name and position not be disclosed. Practice Direction No. 3 provides for confidentiality only in relation to the Applicant’s own name, or the name of any of his or her witnesses or any person cited in the pleadings. This Direction does not mention position or Department. However, since there is no reason for not anonymizing the position or Department’s name, the Tribunal accords anonymity also to the position and Department, along with the Applicant and any other
persons cited in the pleadings, taking all the circumstances into consideration. —Ms. J v. ADB, par. 41, Decision No. 116, 2 October 2018. ADBAT Reports, Volume 10, page 258.

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

46. 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 his 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 he held were elements considered by the Bank when imposing sanctions upon him, and as the Applicant has challenged the proportionality of those sanctions and alleged discrimination, this aspect of his request is denied. —Mr. K v. ADB, pars. 45 - 46, Decision No. 117, 2 October 2018. ADBAT Reports, Volume 10, page 287.

45. Although not requested, the Tribunal grants confidentiality in light of the particulars of the case. —Mr. H vs. ADB, par. 45, Decision No. 108, 6 January 2017. ADBAT Reports, Volume 10, page 121.

42. The Applicant has not requested confidentiality under the Rules of the ADBAT. The Tribunal has in the past granted confidentiality sua sponte [Ms. C, Decision No. 58 (8 August 2003)], and chooses to do so in this matter. It notes that three similarly situated Applicants have requested confidentiality, and the Tribunal takes the view that it must treat this Applicant no differently in terms of maintaining confidentiality of her name and of other individuals mentioned in her Application. —Ms. L v. ADB, par. 42, Decision No. 118, 2 October 2018. ADBAT Reports, Volume 10, page 320.

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
9. **Standard of Proof**

30. Administrative tribunals established by international organizations have almost universally held that administrative disciplinary proceedings are not criminal in nature and that the standard of proof necessary in criminal cases does not apply to such proceedings. In *Ogallev. Secretary General of the United Nations*, UNAT Judgment No. 484 (1990), the UN Tribunal held:

“… the Secretary-General is not required to establish beyond a reasonable doubt a patent intent to commit the irregularities, or that the Applicant was solely responsible for them. The Tribunal has held that once a *prima facie* case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question.”

(Emphasis added)

A.O. 2.04 (as revised on 13 December 2006) which governs ADB disciplinary procedures, provides that for the initiation of disciplinary proceedings, there must be a “preponderance of evidence” that the staff member has engaged in misconduct. Appendix 1 of the revised A.O. 2.04 describes preponderance of evidence as: “[e]vidence which is more credible and convincing than that presented by the other party…. the Evidence as a whole shows that it is more probable than not that the staff member committed misconduct.” In *Domdom Decision No. 47 [2000] V ADBAT Reports 42, para. 27* this Tribunal, discussing the appropriate standard of proof in disciplinary proceedings, found that:

“… there was credible evidence that the Applicant had participated in the bid manipulation scheme and had received some benefits, and that such conduct constituted ‘serious misconduct’ which entitled the Bank to dismiss him….”

(Emphasis added)

In other words, the evidence adduced must be credible to a reasonable person. In another UNAT case *Edongo*, UNAT Judgment No. 987 (2000) the Tribunal said:

“[i]n disciplinary cases, when the Administration produces evidence that raises a reasonable inference that the Applicant is guilty of the alleged misconduct, generally termed a *prima facie* case of misconduct, that conclusion will stand. The exception is if the Tribunal chooses not to accept the evidence, or the Applicant provides a credible explanation or other evidence, that makes such a conclusion improbable … the Tribunal stated in Judgment No. 484 *Omosola* (1990), paragraph II, that ‘once a *prima facie* case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question’”

(Emphasis supplied)

34. Drawing upon the above case law of other administrative tribunals, the Tribunal considers that when the facts in a case are of such nature, and are established in such manner, as
to give rise to a reasonable inference that an applicant is guilty of the alleged misconduct, a
prima facie case is established. At that point, the applicant must present his own arguments and
credible evidence to justify the acts alleged by the Respondent to constitute misconduct. In the
present case, the Applicant claims that the Respondent must establish by proof beyond
reasonable doubt that the Applicant did indeed receive an improper payment from Kjaer in
connection with an ADB transaction. The Tribunal disagrees. The applicable and widely held
principle is that in administrative proceedings, proof beyond reasonable doubt is not the
appropriate standard.

36. The right of an accused person to confront witnesses against him and to cross-
examine those witnesses is very widely recognized. The specific right to confront and cross-
examine witnesses presented against a person is, however, generally prescribed only in criminal
prosecutions. As already noted, ADB disciplinary proceedings are administrative in nature and
not criminal prosecutions.

\[ \text{x x x} \]

39. In the present case, the Respondent had established a prima facie case that the
Applicant had received an improper payment from Kjaer although the Applicant had not had the
opportunity to confront and cross-examine the two Kjaer officials. Those two officials were not
subject to the authority of the Respondent. The burden was on the Applicant to overturn the
prima facie case against him. At the May 2007 oral hearing, the Applicant cross-examined the
Auditor General, Mr. Pedersen and Mr. Almsteier but failed to rebut the prima facie case against
him. The Tribunal finds that the Auditor General was credible and persuasive when he conveyed
the Kjaer officials’ statements made to him to ADB Headquarters. —Gnanathurai v. ADB,
 pars. 33-34, 36, 39, Decision No. 79, 17 August 2007. ADBAT Reports, Volume 8, page 30-
32.

25. In its Decision No. 57 of August 2003, this Tribunal concluded that “It is a
precondition of granting rental subsidy that staff member has actually paid rent and that in cases
where reasonable doubts emerges as the correctness of the statements made by a staff member it
is incumbent on the staff member to substantiate the basis of his claim”. To substantiate his claim
for a rental subsidy, the Applicant simply produced a check written to his sister as payee;
however according to the assertion of the Applicant, the rental property is owned by YGC and
not by his sister. Thus, the Bank had a reasonable doubt “as to the correctness of the statements”
allegedly made by the Applicant to YGC.

26. So, it was-according to the quoted decision of the Tribunal-incumbent on the
Applicant to prove that he actually paid rent to YGC. The easiest way for the Applicant to prove
his payment of rent was to provide the bank records of YGC. The Tribunal does not agree that,
as argued by the Applicant, it would be an “unnecessary and unreasonable intrusion into the
financial affairs of a third person”; YGC is not a “real” third person or even a proper landlord; it
is an entity owned by his sister and nephew. And, in any case, the Applicant could not provide
those receipts; at the evidentiary hearing, Pearl - his sister - and one of the two shareholders of
YGC testified that YGC had no bank account and that she received the rent for the condominium
into her personal bank account. Furthermore, the Applicant does not propose another means “to substantiate the basis of his claim”: he had failed to take this elementary precaution after he had been found guilty by the Tribunal’s decision of August 2003 for the same behaviour; namely his failure to keep the necessary documents to prove, if required, that he did in fact pay the agreed rent to the corporate owner of the property. —*de Alwis v. ADB (No. 4)*, pars. 25-26, Decision No. 85, 25 January 2008. ADBAT Reports, Volume 8, pages 107-108.

53. The Applicant refers to a number of Administrative Orders and alleges that the Respondent is in breach of them. It must be emphasized that the burden of proof rests on the person who makes allegations, namely, the Applicant in the present case. Many of his allegations go to harassment and retaliation under AO 2.11 *Prevention of Harassment*. What the person making allegations under AO 2.11 has to prove – the standard of proof – is explicitly dealt with in the AO. According to paragraph 6.22 of AO 2.11, harassment investigators are to conduct their investigation in accordance with Appendix 2 of AO 2.04 *Disciplinary Measures and Procedures*. This provides that: “the standard of proof for the investigation is a preponderance of evidence,” which is in turn defined by Appendix 1 as “evidence which is more credible and convincing than that presented by the other party.” —*Mr. E v. ADB*, par. 53, Decision No. 103, 12 February 2014. ADBAT Reports, Volume 10, page 20.

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. …

x x x

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. —*Ms. M v. ADB*, pars. 80 – 81 and 96, Decision No. 119, 2 October 2018. ADBAT Reports, Volume 10, page 372.
10. **Suspension of Proceedings**

45. In view of the parties’ wishes to obtain an early adjudication on the legality of the EA changes, the Tribunal considers the Respondent’s filing of preliminary objections to its jurisdiction at this stage of the proceedings as a complication in expediting proceedings. In particular, the second sentence of Rule 7 (6) of the Tribunal’s Rules provides:

> Upon the filing of such objection, the proceedings on the merits shall be suspended.

For this reason, the Tribunal must suspend consideration of the merits at this stage.

46. In accordance with the last sentence of Rule 7 (6) of the Tribunal’s Rules:

> “... the Tribunal shall either uphold the objection, reject it, or declare that it shall be joined to the merits of the case and shall, if appropriate, fix a date for the Bank to file its Answer.”

51. Having decided on the objection to jurisdiction, the Tribunal, in accordance with Rule 7 (6) of the Tribunal’s Rules, directs the parties to resume the written procedure on the merits and fixes a date for the Bank to file its Answer. In consideration of the parties’ wishes to have an early resolution and of the fact that arguments have already been submitted, the Tribunal has decided to fix relatively short intervals for the respective submissions. —Perrin, et al vs. ADB [No.2], pars. 45 and 51, Decision No. 112, 28 February 2018. ADBAT Reports, Volume 10, page 192.

11. **Withdrawal of Application**

1. The Applicant filed an Application with the Tribunal on 5 April 2011 which was withdrawn without objection on 29 July 2011.

2. The Tribunal records the withdrawal of the Application. —Ms. B v. ADB, pars. 1 – 2, Decision No. 97, 8 September 2011, ADBAT Reports, Volume 9, page 60.