

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 103
(12 February 2014)**

**Mr. “E”
v.
Asian Development Bank**

**Roy Lewis, Vice-President
Gillian Triggs
Shin-Ichi Ago**

1. The Applicant is a former employee of the Asian Development Bank (“ADB” or the “Respondent”). He claims that he was severely harassed by three named supervisors, that the terms on which he was recruited were changed, and that facts were misrepresented to him. He claims further that he was the victim of abuse of the discretionary power exercised by the Respondent. He seeks the following relief: (a) disciplinary action against the alleged harassers; (b) substantial compensation; and (c) nullification of his six months’ job duration with the Respondent.

I. THE FACTS

2. The following facts provide background to the Applicant’s claim. The claim revolves around two legal issues: 1) whether proper procedures as set out in the Respondent’s Administrative Orders (“AOs”) were followed; and 2) whether the Respondent abused its discretionary power.

The Applicant’s appointment

3. The post of Assistant IT Coordinator within the India Resident Mission (“INRM”) was advertised on 11 August 2010. The advertisement for the post described it in the following terms.

“To coordinate and implement ADB’s policy in Information Technology (IT) in the Resident Mission (RM), including telephony and video-conferencing; to assist RM staff to get the best use of the present IT systems and develop, direct and implement the office automation plan; to assist in maintenance and operation of efficient communications systems for smooth functioning of RM; to assist in some of the administrative

functions with relation to budgetary management in the IT and communications area.”

Five expected “outcomes” were detailed including “IT Coordination.” The description of this outcome included “managing budgets ... with associated paperwork related to ordering, billing, and receipt of goods.” Education requirements were indicated as a “Bachelor’s degree in Information Technology (IT)/Computer Science or equivalent qualification.”

4. The Applicant was interviewed for the post on a date not indicated in the documentary evidence. The parties do not agree about what was said at the interview. According to the Applicant, he stated that he would be able to take the job if he was assigned core IT tasks and there was no mention of budgetary or finance matters. This was contradicted by the evidence of two of the interviewers. According to Mr. “X”, Senior Finance and Administration Officer, during the interview it was explained to the Applicant that he had to work as a member of the Finance and Administration Unit and deal with matters enhancing his understanding of the overall functioning of the Unit. According to Mr. “Y”, the Head of the Finance and Administration Unit, all candidates were informed that the person selected would have to work as a member of the Unit and thus take care of finance and administrative tasks.

5. By a letter dated 15 December 2010 entitled “Conditional Offer of Employment” the Applicant was offered employment with INRM as a Senior IT Assistant Level AS5 on an “underfill” basis. “Underfilling refers to appointing a candidate to a level which is lower than the level of the position and is used when the selected candidate does not fully meet the qualifications and/or requirements of the position.”¹ In accordance with the conditional offer letter, if the Applicant’s performance was considered satisfactory, after one year he was to be upgraded to the substantive level of the position for which he had applied, namely, Assistant IT Coordinator Level AS6. This was confirmed by a final offer letter dated 23 February 2011, which expressly stated that the appointment had a probationary period of one year.

6. The Applicant commenced employment on 14 March 2011 as a Senior IT Assistant within the Finance and Administration Unit of INRM. He had three supervisors within the Unit. Mr. X was his immediate supervisor. Mr. “Z”, another Senior Finance and Administration Officer, had a supervisory role. Finally, Mr. Y, the head of the Unit, was also a supervisor.

¹ Para. 5.1. AO 2.01, *Recruitment and Appointment of External Candidates*.

The Applicant's work plan and its immediate aftermath

7. On 4 May 2011 the Applicant's online work plan for the year 14 March 2011 to 13 March 2012 was issued. It stated that it was prepared and submitted by the Applicant, who was to report ultimately to the Country Director, INRM, ("the Country Director"), who approved the plan.

8. The Applicant was required by the plan to work towards three specified "outcomes" with corresponding "outputs," "tasks," and "indicators." The outcomes comprised "completion of all IT activities and maintenance within the given time"; "accomplishment of all routine tasks"; and "accomplishment of administrative tasks." The areas with which the Applicant was soon to take issue centered on routine and administrative outcomes. For routine outcomes, the output was described as "effective functioning of accounting areas," with tasks noted as including the preparation of vouchers, verification of bills, tax related matters, assisting in filing VAT returns, and budget preparations. The relevant indicators were described as "processed on time and proper verifications." For administrative outcomes, the Applicant's output was "procurement" with tasks noted as "handling the procurement of all IT related products, creating purchase order."

9. On the same day (4 May 2011), the Applicant spoke to Mr. X. He asked why the finance work assigned to him under the work plan. The Applicant alleged that when he raised this query, Mr. X started shouting at him and that he had done this earlier whenever the Applicant had asked anything about the work assigned to him. Mr. X denied that he behaved in the way alleged by the Applicant.

10. According to Mr. Y, the Applicant telephoned him on 6 May 2011 to tell him that he intended to resign. Mr. Y advised that under ADB's procedures any resignation had to be in writing. According to the Applicant, Mr. Y's allegation was false and he had never approached him about resigning.

11. On 9 May 2011 the Applicant emailed the Country Director a letter headed "query for mismatch of my current work profile with the advertised profile." He raised the following concerns.

- (1) There was a mismatch between the profiles in his work plan and the advertised vacancy. In particular, he complained that the finance-related work was "not at all mentioned in [the] vacancy advertisement."
- (2) On taking up his appointment the Applicant found that much of the IT work was outsourced to an external service provider called WIPRO. This had meant that during his two month tenure he had "only performed miscellaneous tasks."

- (3) He was “kept in dark by selection committee during interview even after I clearly mentioned then, that I’ll be able to join...only if I am assigned core IT related tasks”. He requested an explanation for the mismatch with his duties as advertised and why he was kept in the dark at the time of his appointment.
- (4) “I would also like to bring to your notice the bad behavior, a regular practice by [Mr. X] with me. He is highly impatient, short tempered and impolite...Being a fresher for task related to finance require little more time for its successful completion as I am only conversant with IT related tasks. But [Mr. X’s] impatience and habit to yell and shout on me, disturbs and hinders my normal performance of duties.”

12. On 10 May 2011 the Country Director responded by email. He thanked the Applicant for “taking up your issue at an early stage” and suggested it was too soon to reach conclusions and so run the risk of misunderstandings. He noted that the terms of recruitment of the post were unchanged by the work plan and that the post-holder was required “to understand and be familiar with the various dynamics of all the functions, both technical and commercial, performed by the Unit and have an overall concept about the functioning.” With regard to the Applicant’s complaints about Mr. X, it was noted that the Applicant could raise the issue with him in order to get feedback and then, if the issues remained unresolved, he could take them up further with Mr. Y, with the possibility of reverting to himself for general advice.

13. On 9 May 2011 (according to the Applicant) or 11 May (according to the Respondent) the Applicant met with his three supervisors. It appeared that neither the Applicant nor the supervisors made a note of this meeting. There was a conflict of evidence about what was said. According to the Applicant, Mr. Y shouted and asked him why he sent the email to the Country Director. He told him to resign immediately, otherwise he would ruin his career, spoil his six months performance report, not confirm his appointment, force him to resign, and respond negatively to any request for a reference. According to the supervisors, the meeting was used to explain the Country Director’s reply, the work plan and the performance evaluation that would be due after the first six months of employment, and the Applicant accepted that he would undertake the tasks envisaged by the work plan. It was suggested to the Applicant that he would need to improve his performance. It was denied that there was any shouting or harassment during the course of the meeting or that the Applicant was asked to resign.

14. On 18 May 2011, according to the Applicant, Mr. Z told him that he should take back his letter of 9 May to the Country Director and apologize for it. When the Applicant refused, Mr. Z allegedly abused him and threatened that his position would never be confirmed. Mr. Z denied that he had a meeting with the Applicant on 18 May or that he made the alleged remarks.

The Applicant's non-attendance at induction programs

15. On 31 May 2011, the Applicant received an email from the Respondent's training unit inviting him to attend a three day induction program on 12-14 July in Manila, which the email noted was "mandatory for all new staff within two to six months of appointment." The Applicant emailed all three of his supervisors on 31 May asking them to advise on the invitation as their support was required for his attendance at the induction program. He received no written response.

16. Another email was sent on 18 August 2011 from the training unit notifying the Applicant of the next induction program to be held on 27-29 September, with the reminder that attendance was mandatory for all new staff within 2-6 months of appointment. This email added that "we would like to extend this invitation to you for the last time. Failure to attend the program this year would mean that it will be no longer be available to you." On the same day (18 August 2011) the Applicant again sent emails to his three supervisors requesting advice, but received no written reply.²

Six month performance review

17. The Applicant's six month performance review was dated 26 September 2011. In Part 1-A of the performance review form he listed his key accomplishments under his work plan. In Part 1-B his three supervisors noted these as not being "confirmed." They gave the following assessment.

"These tasks were done after constant follow-ups and reminders. Some of the tasks had to be completed by involving other staff members due to the time deadlines and the urgency of the tasks. It is assessed that he is unable to take full responsibility to deliver the assigned tasks in time."

In response, the Applicant wrote:

"All the above mentioned tasks in Part 1-A were solely done by me and were completed in time. No constant follow-ups and reminders were made and no other staff member was involved in completion of the above tasks. Hence, I totally disagree with the statements..."

² Whether the Applicant was told by Mr. X that he could not attend these particular induction programs was a matter of dispute between the parties.

18. Part 2-A of the form was headed “Competency Assessment.” The possible assessments were “advanced,” “proficient,” “developing,” and “not proficient.” The Applicant was rated as either developing or not proficient as follows:

<i>ADB Wide Competencies</i>	<i>Assessment</i>	<i>Supervisor’s Comments, if any</i>
<i>Application of Technical Knowledge and Skills</i>	<i>Developing</i>	<i>Does not apply skills and knowledge to the office needs as required from time to time.</i>
<i>Client Orientation</i>	<i>Not Proficient</i>	<i>Lacks skills in dealing with internal and external clients.</i>
<i>Achieving Results and Problem Solving</i>	<i>Developing</i>	<i>Achieved results mostly after the deadlines after constant follow ups and reminders.</i>
<i>Working Together</i>	<i>Not Proficient</i>	<i>Lacks skills for working in a team.</i>
<i>Communication and Knowledge Sharing</i>	<i>Not Proficient</i>	<i>Lacks communication skills and does not share the knowledge. Does not interact with staff to solve issues in a proactive manner.</i>
<i>Innovation and Change</i>	<i>Not Proficient</i>	<i>Could not propose any new idea to improve the current IT systems or to solve problems.</i>

19. The supervisors put their overall comments on Part 2-B of the form.

“[The Applicant] has not been able to adapt to the overall systems and work requirements of INRM. [He] has been unable to assimilate the techniques/IT related skill requirements and rise to the occasion as per the demands of the job as he wishes to be very limited in his output and his support to the IT system. [He] has been unable to take responsibility of the IT support functions and the tasks that are assigned to him. Constant follow-ups and reminders were necessary for the required outputs. [He] lacks effective communication skills which affected the relationship with some of the external vendors and clients. He also has an attitude problem to meet the work demands and be a part of a team to build up strong IT system. In addition, he is very confrontational without exercising any initiative in the performance of his functions. In case [he] does not improve his performance to a satisfactory level in a month, INRM will proceed to recommend his termination during the probationary period.”

These comments were “endorsed” by the Country Director.

20. The final part of the form envisaged that the review would be discussed with the staff member, who would then make his own comments and sign. The discussion did not take place as the Applicant took sick leave after 26 September 2011 and did not return to work.

The Applicant's resignation

21. On 4 October 2011 the Applicant sent an email to the Country Director headed "Resignation Letter."

"I...would again like to inform you that due to continuous severe harassment and complete mismatch of my current work profile with the advertised profile...I am forced to resign from the post of Senior IT Assistant on 4 October 2011. Please accept my resignation letter with immediate effect."

22. On the same day, the Country Director informed the Applicant in writing that his resignation was accepted "with regret." On 10 October 2011 the Senior Director, Human Resources Division (BPHR), Budget, Personnel, and Management Systems Division (BPMSD), wrote a memorandum addressed to the Applicant formally accepting his resignation.

23. During the summer of 2011 the Applicant had made a successful application for an IT post at the Canadian High Commission in New Delhi. This post was due to commence on 4 October 2011, which was the date of his resignation from the ADB. The Applicant duly started his new job on that date. However, the next day – 5 October 2011 – the Commission revoked his contract on receipt of confirmation that he had previously been employed by the ADB, a fact which the Applicant had hitherto omitted to disclose. This omission was later acknowledged by the Applicant.

Formal complaint of harassment against the three supervisors

24. On 14 October 2011, the Applicant submitted a formal harassment complaint against his three supervisors. It was addressed to the Director General, BPMSD ("DG, BPMSD"). The Applicant made the following allegations.

- (1) He had been subjected to "continuous severe harassment" by his supervisors, who had committed "fraud" by assigning him work that was not included in the original advertisement.

- (2) In the meeting with his supervisors on 9 May, Mr. Y shouted at the Applicant and told him to resign immediately, otherwise he would ruin his career, spoil his performance review, not confirm his appointment and would create the conditions for him to resign.
 - (3) “Every third day” the Applicant was “called and snubbed” by Mr. Y and repeatedly told to resign, and Mr. X had “continued with his practice of shouting and yelling” at him.
 - (4) Mr. Z had called him into his office and told him that he should take back the 9 May letter he had sent to the Country Director. When the Applicant refused, Mr. Z had called him “a duffer, idiot and incapable” and stated that he would ensure that his appointment would never be confirmed.
 - (5) Further examples of harassment included (a) the decision of his supervisors twice to not allow him to attend the induction meetings in Manila that were mandatory; and (b) placing a WIPRO employee in INRM Taj Palace to handle IT related duties rather than himself, which he alleged was promised at his selection interview.
 - (6) “Due to this continuous severe harassment and complete mismatch of my current work profile with the advertised profile...I was forced to resign”.
25. By an email dated 21 October 2011, the Applicant reminded the DG, BPMSD that he had not yet received a response to his complaint. On 25 October the Senior Director BPHR on behalf of the DG, BPMSD advised the Applicant that the harassment complaint would be investigated under Administrative Order (“AO”) 2.11 *Prevention of Harassment*.
26. On 7 November 2011, Mr. Y emailed a memorandum to the DG, BPMSD denying the Applicant’s allegations and making the following points.
- (1) It was appropriate to give the Applicant opportunities to acquaint himself with the accounting software as it was extensively used in INRM.
 - (2) There was no shouting at the meeting with the three supervisors. The meeting was used to explain the Country Director’s reply to the Applicant’s complaint of 9 May 2011, the six month performance evaluation procedure, and the procedures for confirming appointments. The subject of resignation was raised only by the Applicant himself on 6 May.
 - (3) As regards the Applicant’s attendance at the induction training, “it was assessed that he was taking more time to familiarize with the work

requirements and therefore...it was decided to send him for induction after his six month performance evaluation.”

- (4) There were two work locations: the main office building and rented premises at the Taj Palace. “There was no possibility of the Applicant working only in one place at the rented premises [because] as IT assistant he had to look after the installation at both locations as the two places are interconnected and interfaced.” Outsourced staff from WIPRO provided support at both locations under an arrangement that pre-dated the Applicant’s employment.
- (5) He (Mr. Y) could not have snubbed the Applicant every third day because he was not the immediate supervisor, and only met with him on less than six occasions during his six months at INRM. On these occasions the direct supervisor, Mr. X, was present and guidance was given in relation to the Applicant’s performance issues.
- (6) The complaint of harassment was made after the negative performance report had been given to the Applicant and was prompted by it.

27. On 8 November, Mr. X communicated with the DG, BPMSD denying the Applicant’s allegations of harassment and fraud.

- (1) He denied that the Applicant had not been assigned IT-related work in accordance with the advertisement for the position. Attached to Mr. X’s memorandum were around 80 pages of emails, which in his view showed the IT work that the Applicant had done and in some cases illustrated the delays in completion.
- (2) No commitment was made during the selection interview that the Applicant would be placed in the new office of INRM. It was explained during the interview that he “has to work as a member of the Finance and Administration Unit and has to take care of other tasks as it will enhance his understanding of the overall functioning of the [Unit].”
- (3) The Applicant was not asked to resign at the meeting of 11 May or at other times. The Country Director’s email was explained, the work plan discussed, and the Applicant accepted that he would do the tasks specified in the plan. The six months review plan was also explained, and it was put to the Applicant that he needed to improve his performance.
- (4) It was decided that the Applicant “could attend one of the future induction programs as [he] was not able to assimilate the techniques and IT related skill requirements required for the position.”

- (5) Mr. X denied that he ever shouted at the Applicant and said that “all interactions were in a professional manner and were work related...in line with the highest standards of ADB.”
- (6) The Applicant’s complaint was in response to the negative performance rating. Under AO 2.11, a negative performance report was not harassment.

28. On 9 November 2011, Mr. Z produced his memorandum denying the Applicant’s allegations.

- (1) He in effect confirmed Mr. Y’s and Mr. X’s accounts of the 11 May meeting between the Applicant and his supervisors.
- (2) He denied meeting the Applicant on 18 May 2011, or telling him to withdraw his 9 May letter to the Country Director, or making any suggestion that the appointment would not be confirmed, or being rude to him.
- (3) The Applicant had very poor communication skills and “had a complete communication breakdown with the outsourced IT helpdesk staff, who he was supposed to manage as part of his job requirements.”
- (4) As regards induction programs, it was decided to defer the Applicant’s participation in consultation with the Country Director.
- (5) The Applicant’s six months performance review was conducted in a professional and fair manner. The complaint was “completely false and is a result of his negative performance report.”

29. The Applicant’s harassment complaint was investigated by two senior ADB staff from Manila. They considered his written complaint of 14 October and the memoranda of the three supervisors. Between 22 November and 2 December separate audio and/or video conference interviews were held with the Applicant, the three supervisors, the Country Director, the HR Manager at the Canadian High Commission, and Mr. “Q” Associate Finance and Administration Coordinator. Until May 2011 Mr. Q had worked in the same office as Mr. X and had witnessed his interactions with the Applicant.

30. The investigators’ Report on Complaint of Harassment was dated 9 December 2011. It concluded that the complaint was without merit.

“The [Applicant] was not able to provide any evidence of the alleged harassment... [He] was not able to provide dates, times or identify any

witnesses. He confirmed that while working at INRM he had not made any such record of harassment incidents which he could share with the investigators...interviews of parties consistently confirmed that [he] was unhappy with his work assignment at INRM and saw that the tasks given to him did not match his understanding about the job profile. However, no corroboration of harassment allegations was found.”

31. The investigators’ Report was supplied to the Applicant for comment. His response referred to a new development, namely, an advertisement for the Applicant’s replacement. On 23 November 2011 INRM advertised for an Associate Information Technology Coordinator. The advertisement was similar to that for the Applicant’s post but was more explicit about the administrative and financial work required of the post-holder. Thus, there was a specified need to “assist in other functions of the Finance and Administration Unit of INRM.” An additional expected outcome was “support to finance & administration functions.” This was described as “assists in the overall functions of the Finance and Administration Unit and carries out the tasks including procurement activities, records maintenance, commercial and accounting activities, budget monitoring and other administrative tasks.” The educational requirements were specified as “bachelor’s degree in Information Technology/Computer science or equivalent qualification, preferably with a degree in commerce or management.” The Applicant’s comments, which were dated 25 December 2011, responding to the investigators’ Report included a point about the 23 November 2011 advertisement. According to the Applicant, the new advertisement had changed the job purpose and educational qualifications, which “clearly proves that a big fraud has been done with me.”

32. On 29 March 2012 the DG, BPMSD, sent a memorandum to the Applicant and the three supervisors with his decision. Taking into account the written records, the investigators’ Report, and the Applicant’s comments, the DG, BPMSD concluded that “there [was] no preponderance of evidence to indicate that [Mr. Y], [Mr. Z] and [Mr. X] had engaged in harassment under AO 2.11.” He noted that the Applicant had not made the formal complaint of harassment until after the six month performance evaluation. This raised doubt about his motivation for filing the complaint.

Conciliation, Administrative Review and Appeal

33. The matter was submitted to compulsory conciliation, to Administrative Review, and to the Appeals Committee, all of which took place without resolution. The Report and Recommendation of the Appeals Committee to the President was dated 25 January 2013, The Committee concluded that proper procedures had been followed in the decision to dismiss the Applicant’s complaint of “severe harassment,” “change in terms of recruitment” and “misrepresentation of facts,” and that there had been no abuse of discretion. Further, the Applicant’s assignment of tasks was not indicative of a change in

terms of recruitment or misrepresentation of facts, and was consistent with the job description outlined in the advertisement of August 2010.

34. However, the Committee expressed concern about the management response to the Applicant's email of 9 May 2011 to the Country Director. In the Committee's view, Mr. X's alleged "bad behavior" fell within the definition of harassment in AO 2.11. While the Country Director's response of encouraging a resolution through informal discussion was not an abuse of discretion, the Committee observed that: "it would have been appropriate, if at the first instance of a harassment allegation, the [Applicant] could have been guided to seek advice or assistance from the ombudsperson or mediators or BPHR focal points," as envisaged by AO 2.11, paragraph 6.1.3. At the same time, he could have been referred to the harassment procedures under AO 2.11.

35. The Committee was also uneasy about the way in which the supervisors had handled the issue of the Applicant's attendance at the induction programs. As far as the Committee was aware, attendance was mandatory for all new staff within 2-6 months of appointment. The supervisors' respective responses to the DG, BPMSD indicated that the Applicant was not "ready" to participate in the program and that his participation needed to be deferred. The Committee concluded that this was neither harassment nor abuse of discretion, but made the following observation.

"[T]he Committee did not find any documentary evidence that the [Applicant] and BPDB ["Staff Development and Benefits Division"] were informed of this decision by the [Applicant's] supervisors and that readiness assessment be applied as a pre-requisite for attendance in the Induction Program...[T]here is a dichotomy in the requirements by BPDB for new staff to attend the Induction Program and the administrative exercise applied by the [Applicant's] supervisors. To this end, the Committee suggests that clear procedures and any prerequisites for attendance, including but not limited to supervisor(s)' approval, are established and timely communication is provided to all parties to ensure consistency in decisions taken."

36. The President approved the Appeals Committee's recommendation and his decision was forwarded to the Applicant on 6 February 2013.

Application to the Administrative Tribunal

37. This Application was filed with the Administrative Tribunal on 23 July 2013, pursuant to an extension of time granted by the Tribunal on 11 June 2013. The Applicant contests the Appeals Committee's Report, which he erroneously describes as a

“decision.” It is in fact the President who makes the decision on an appeal.³ Anyway, the Applicant objects to the rejection of his complaint of “severe harassment” by his supervisors and of “change in terms of recruitment” and “misrepresentation of facts.” He alleges that the Appeals Committee’s Report involved an abuse of discretion and an abuse of process. He also alleges that the Respondent’s behavior in relation to the induction programs and its acceptance of his resignation without investigation on 4 October 2011 were an abuse of discretion and/or process. The Applicant seeks the following remedies: (a) disciplinary action under AO 2.04 against the supervisors; (b) “heavy compensation” for the injury, including “mental trauma,” resulting from the “severe harassment and retaliation by [his] supervisors,” which forced him to resign from the post of Senior IT Assistant; and (c) the cancellation/nullification of his six months’ job duration with ADB.

38. The Respondent argues that the Applicant’s complaints have no merit and that the Application should be dismissed.

II. CLARIFICATION OF ISSUES

39. While paragraph 37 above attempts to encapsulate the essence of the Applicant’s pleas, his Application as a whole contains a great many contentions and allegations that are disputed by the Respondent. It will be helpful to define and clarify the principal issues that have to be determined by the Tribunal. These issues can be grouped under six headings.

- (1) Did the assignment of finance and administration work to the Applicant amount to a “change in terms of recruitment” and “misrepresentation of facts”?
- (2) Were proper procedures under the AOs followed in the Applicant’s six month performance review and was feedback used as harassment/retaliation?
- (3) Did the Respondent adhere to proper procedures or abuse discretion following the Applicant’s letter of 9 May 2011 to the Country Director re. Mr. X?
- (4) By accepting the Applicant’s resignation letter of 4 October 2011 forthwith, did the Respondent adhere to proper procedures or abuse discretion?

³ The Appeals Committee’s powers are set out in AO 2.06 *Administrative Review and Appeal Procedures*. The Committee has competence to “advise” and submit “a report” to the President, who makes “the final decision.” See paras. 9.2 (a), 14, and 15.

- (5) Did the Respondent adhere to proper procedures or abuse discretion in relation to the Applicant's formal complaint of harassment dated 14 October 2011?
- (6) In not allowing the Applicant to attend the induction program, did the supervisors adhere to proper procedures and otherwise act lawfully?

III. THE PARTIES' CONTENTIONS

40. The parties' arguments in relation to these six issues are now outlined.

Did the assignment of finance and administration work to the Applicant amount to a "change in terms of recruitment" and "misrepresentation of facts?"

41. The Applicant contends that the answer to this question is affirmative.
 - (1) The Applicant was assigned a large amount of finance work. For the period June to September 2011, he compiled a record of what he regarded as this type of work running to 55 pages with 633 entries. This work was assigned to him as a ploy to ensure that he could not achieve targets.
 - (2) The finance work assigned to the Applicant was major and was not mentioned in the advertisement for the post. The later re-advertised post contained details of support to finance and administration functions and specified under educational requirements that a commerce/management degree was preferred. This underlined the mismatch between the terms of recruitment and both his work plan and work assignment.
 - (3) During the Applicant's interview there were no questions on finance and he was kept in the dark by the selection committee about the finance and administration tasks that were to be assigned to him.
 - (4) With regard to his work plan, the Applicant never signed it and did not acknowledge its job content. On 9 May he had promptly informed the Country Director of the mismatch between the plan and the advertised post. In fact, Mr. X had prepared the work plan on paper and handed it to the Applicant for him to type on the computer. He "forced me to include the finance work in my work plan when I objected to it."
 - (5) The finance work, including the use of the Resident Mission Financial Management and Accounting System ("RMFMAS") software, required training. No training was provided to the Applicant, despite his lack of previous finance experience.

- (6) The Appeals Committee had incorrectly reached the conclusion that the accounting and procurement tasks were reasonably part of the Applicant's job.

42. The Respondent contends that there was no abuse of discretion or harassment or retaliation involved in the assignment of finance and administration work to the Applicant.

- (1) The job description in the 2010 advertisement specified "assist[ance] in some of the administrative functions with relation to budgetary management in the IT and communications area." Such administrative functions could reasonably include inputting financial information into RMFMAS and other computer systems used at INRM. The 2010 advertisement had thus sufficiently informed the Applicant of the job he was to undertake.
- (2) In any event, he had been informed of what he would be doing by Mr. Y during the interview.
- (3) The expectation was that the Applicant would simply do the work that formed part of his duties. Management was not limited to assigning tasks that had been precisely set out in the advertisements for each position. In a small office such as INRM flexibility in work functions was required.
- (4) The Applicant's work assignment was not part of a conspiracy by his supervisors to harass him. The Applicant's predecessor had been Mr. X, who had also been required in that position to do finance and administration work. RMFMAS was user friendly and the work required of the Applicant did not require special training.
- (5) The Applicant was assigned a substantial amount of IT and communications work, as evidenced by his own list of key accomplishments in his six months performance review. But his poor performance resulted in less IT and communications work being completed than would otherwise have been the case. For example, the Applicant did not supervise WIPRO staff "because of his poor communication skills and aggressive style of communication."
- (6) The amendments to the 2011 advertisement did not support the Applicant's claim that his work description had been fraudulently changed and work tasks unfairly assigned to him. The amendments were made not because the position had changed but to make the description more specific. "In short, the change in advertisement was made so that the Respondent could better find the right kind of person for the position, which clearly the Applicant was not."

- (7) The Applicant failed to prove that Mr. X had already prepared the work plan or that he forced the Applicant to include the finance work when he objected to it. Besides, a work plan was established online and derived from an iterative process, under which the employee prepared his/her plan using a template provided online and then submitted it to the supervisor for approval. A work plan was therefore not physically “signed” or “acknowledged” but was approved at the conclusion of online exchanges.

Were proper procedures under the AOs followed in the Applicant’s six month performance review and was feedback used as harassment/retaliation?

43. The Applicant contends that his six months performance report amounted to harassment and retaliation by his supervisors, which was prohibited by AO 2.11. His supporting arguments included the following.

- (1) His six month performance report was never discussed with him.
- (2) He was only given one month to improve instead of the usual six months. The latter period was envisaged by paragraph 10.2 of AO 2.05 *Termination Policy*.
- (3) He was not provided with training during his six month tenure and, when he asked his supervisors for help, he was ignored and not given any advice.
- (4) The assessments were “afterthoughts” because his alleged performance issues had never been brought to his attention prior to the report. Thus, his supervisors had never told him about or forwarded him any complaint emails from internal or external clients saying that he lacked the skills for dealing with them; none of his team members had ever complained to him about his lack of skills in dealing with them; his supervisors had not told him that he did not share knowledge; and he successfully completed his work in advance of deadlines and without reminders.

44. The Respondent contends that proper procedures were followed in the performance review and denies the Applicant’s claims of harassment and retaliation. In addition, the Respondent contends that paragraph 10.2 of AO 2.05 (six month opportunity to improve performance) did not apply to the Applicant as he was a probationer. Termination during probationary periods was governed by AO 2.01 *Recruitment and Appointment of External Candidates*. Paragraph 11.4 of AO 2.01 allowed a probationer’s appointment to be “terminated in the interest of ADB at any time during the staff member’s first 12 months of service.”

Did the Respondent adhere to proper procedures or abuse discretion following the Applicant's letter of 9 May 2011 to the Country Director re Mr. X?

45. The Applicant contends that proper procedures were not followed and discretion was abused.

- (1) Paragraph 5.1 of AO 2.11 required that management “bear added responsibility in [ensuring that the harassment policy of ADB is fully implemented including]...(ii) clearly communicating ADB’s policy on harassment to all their staff, including new staff; (iii) being responsive to and supportive of any person in ADB’s workplace who complains about harassment...Following up on any incident is also important to ensure the harassment has stopped and the complainant is not the subject of retaliation”. Further, paragraph 5.2 stipulated that “supervisors are expected to...ensure that staff feel free to use the appropriate channels outlined in this AO.”
- (2) The Country Director’s response that the Applicant could “always come to talk with [him] for general advise” did not fulfill the “added responsibility’ imposed by AO 2.11. He should have advised him to seek assistance from the ombudsperson, mediators, or BPHR focal points, as suggested in paragraph 6.1.3 of the AO. Also the Country Director made no attempt to follow up his email.
- (3) Immediately following the sending of his email on 9 May, the Applicant was subjected to sustained acts of harassment and retaliation by his supervisors. A notable instance occurred during the Applicant’s meeting with his supervisors on 9 May. Mr. Y shouted at him and told to resign immediately, or else his six month review and any external references would be prejudiced and his appointment would not be confirmed. Mr Z repeated these threats on 18 May. Mr. X continued to be rude and to shout at him.

46. The Respondent denies all the Applicant’s allegations.

- (1) The Country Director’s response was a reasonable application of the “informal procedure” rules under AO 2.11. He advised the Applicant to raise his concerns with Mr. X, and if this did not resolve the matter, to raise them with Mr. Y, and that he could always come and talk to [him] for general advice.

- (2) The supervisors' meeting with the Applicant took place on 11 rather than 9 May. They explained the Country Director's reply, the work plan and the performance evaluation that would be due after the first six months of employment. The Applicant accepted that he would undertake the tasks envisaged by the work plan. It was suggested that he would need to improve his performance. There was no shouting and no threats, and resignation was not mentioned, although it had been raised by the Applicant in a telephone call to Mr. Y on 6 May. There was no meeting with Mr. Z on 18 May.

By accepting the Applicant's resignation letter of 4 October 2011 forthwith, did the Respondent adhere to proper procedures or abuse discretion?

47. The Applicant contends that the answer to this question is affirmative in all respects.

- (1) His letter stated that his resignation was forced due to "continuous severe harassment." Even if this were considered to be an informal complaint, it still required investigation and could not simply be ignored. The Country Director failed to carry out his "added responsibility" under AO 2.11 paragraph 5.1 and instead immediately accepted the Applicant's resignation. Similarly, by just accepting his resignation, the Senior Director, BPHR, did not exercise his "added responsibility."
- (2) Both managers failed to take "prompt action to deal with any incident of harassment" required by AO 2.11 paragraph 2.
- (3) The immediate acceptance of his resignation showed that the decision was taken in retaliation. He was "forced to resign" due to the continuous severe harassment and mismatch of work. The Respondent's statement about him having resigned because he had found other employment was incorrect. The Applicant began his search for other work in view of being harassed by his supervisors.
- (4) Mr. Y gave the Canadian High Commission "bad information about [the Applicant] through [Mr. Z's] wife [who worked at the Commission]...due to which I lost my job in other organization."

48. The Respondent contends that the Applicant was not forced to resign because of "continuous severe harassment."

- (1) The Applicant chose to resign with immediate effect in view of his supervisors' critical assessment of his performance on 26 September 2011, and in the knowledge that he already had a job at the Canadian High Commission.
- (2) It was reasonable to accept the Applicant's resignation immediately, provided the resignation was not submitted under duress. The Applicant himself requested that his resignation have "immediate effect." The reason was not harassment but rather that he had obtained alternative employment that would begin on the day of his resignation.
- (3) The Applicant was removed from his job at the Canadian High Commission not because of any retaliation by the Respondent but because he had failed to disclose his prior employment with the ADB, which was a breach of the Commission's Code of Conduct.

Did the Respondent adhere to proper procedures or abuse discretion in relation to the Applicant's formal complaint of harassment dated 14 October 2011?

49. The Applicant contends that proper procedures were not followed and discretion was abused in dealing with his formal complaint.

- (1) The complaint was not dealt with promptly. The Applicant had to send the Respondent a reminder email and it took the Respondent twelve days to reply.
- (2) The harassment investigation had not given due consideration to all the evidence. Although the harassment investigators suggested that the Applicant had failed to provide dates, times, and the identity of witnesses, the Applicant had provided this information in his written complaints. When interviewed, the Country Director had said he "was not aware of any harassment" and yet the Applicant had sent him a complaint of harassment as early as 9 May 2011.

50. The Respondent contends that the Applicant's formal complaint of harassment was properly handled and that there was no abuse of discretion.

- (1) The credibility of the complaint was questionable because it followed closely on the heels of the adverse performance assessment.
- (2) Even if the Applicant felt harassed when Mr. X followed up on work that he had not done quickly enough, such behavior did not constitute harassment if there was a reasonable explanation for it. It was in any

event appropriate for the harassment investigators to conclude that there was no actionable harassment, in the absence of corroborating evidence. The Applicant was unable to satisfy the burden on him to prove the facts needed to substantiate his harassment allegations.

- (3) The Applicant's complaint was dealt with promptly.

In not allowing the Applicant to attend the induction program, did the supervisors adhere to proper procedures and otherwise act lawfully?

51. The Applicant contends that the supervisors did not follow proper procedures.

- (1) The Applicant's supervisors were aware that the induction programs were mandatory. Their decision to defer his attendance was "retaliation against me because I had sent the complaint email on 9 May 2011...against those supervisors." Retaliation was prohibited by AO 2.11.
- (2) The Applicant was not given any feedback or response in relation to his two requests to attend induction programs. Instead he was ignored.
- (3) The supervisors' subsequent explanation to the DG, BPMSD that he was not "ready" to attend the induction program was never put to him. In any event, the intranet information on the induction program did not suggest that a readiness assessment was to be applied as a pre-requisite for attendance.
- (4) Mr. X's opinion that he considered that the Applicant "would be able to attend one of the future induction programs" was unreasonable. The second invitation email from the training department explicitly stated that "with this, we would like to extend this invitation to you for the last time. Failure to attend the program this year would mean that it will be no longer available to you."

52. The Respondent denies the Applicant's case in respect of the induction programs.

- (1) It was true that the Applicant's supervisors did not respond in writing to his requests for advice. However, Mr. X told him verbally that, although he could not attend the sessions to which he was invited, he could attend one of the future induction programs.
- (2) While it was important for the development of field staff that they attended induction seminars, the Applicant was not performing well in his

probationary year and it made sense to delay his attendance until he improved his performance.

- (3) There would have been future opportunities to attend the induction program. The Principal Staff Development Specialist confirmed this in an email to ADB Counsel.

IV. FINDINGS AND CONCLUSIONS

Burden of proof

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.”

54. In addition to allegations that his supervisors harassed him and that senior managers failed to carry out their duties under various AOs, the Applicant alleges that the Respondent abused its discretion both directly through the discretionary actions of its managers and indirectly in the way that it investigated and processed his case. Indeed, he uses phrases such as abuse of discretion, abuse of process, abuse of due process and abuse of power interchangeably. 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.⁴ 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).

⁴ AO 2.06, para 9.2(d).

55. The Tribunal will now make findings and reach conclusions in relation to each of the issues that it has clarified above.

Did the assignment of finance and administration work to the Applicant amount to a “change in terms of recruitment” and “misrepresentation of facts”?

56. The Applicant claims that the finance and administration work he was required to do under his work plan and in practice changed the terms of his recruitment. The terms of recruitment were set out in the advertisement of 11 August 2010. This defined one of the required tasks as “assist[ing] in some of the administrative functions with relation to budgetary management in the IT and communications area.” It also defined one of the stated outcomes as “IT Coordination,” which involved “managing budgets...with associated paperwork related to ordering, billing, and receipt of goods.” These formulations are to be compared with those found in the Applicant’s work plan. This referred to the outcome of the “effective functioning of accounting areas,” with tasks noted as including preparation of vouchers, verification of bills, tax related matters, assisting in filing VAT returns, and budget preparations. It also referred to the output of “procurement” with associated tasks noted as “handling the procurement of all IT related products, creating purchase order.”

57. This comparison set out in the paragraph above shows that the content of the work plan was substantially consistent with the advertisement. The Country Director’s email of 10 May 2011 stated that the terms of recruitment were unchanged and that all aspects of the post, both technical and commercial, had to be understood and performed. This was particularly the case for a post holder who was appointed as a Senior IT Assistant on a probationary and underfill basis and who aspired to be upgraded to the level of the advertised post, that is, Assistant IT Coordinator, provided he achieved a satisfactory level of performance. Moreover, the post was located in the Finance and Administration Unit and within this specific organizational context a degree of flexibility across the Unit’s range of work was a legitimate expectation. Thus the Applicant’s job had not been materially changed and his claim of “change in terms of recruitment” is unfounded.

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 re-advertised 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.

Were proper procedures followed in the Applicant's six month performance review and was feedback used as harassment/retaliation?

61. The six months performance review is intended to be a process with inputs from the staff member and his/her supervisors in order to assess performance against the work plan, to allow the supervisors to make comments and for the staff member to respond. To a limited degree this happened in the Applicant's case: on Part 1 of the review form he inputted what he saw as his chief accomplishments and he registered his disagreement with the supervisors' critical comments about them. In Part 2 of the form the competency assessment was completed by the supervisors, who made highly critical comments about the Applicant's performance. The final part of the form envisaged that the review would be discussed with the Applicant, who would then make his own comments and sign. This discussion did not take place.

62. The fact that the discussion with the Applicant did not take place, however, was not due to the Respondent. The Applicant took sick leave after 26 September 2011, the date on the performance review form, and he did not return to work thereafter. In fact, he resigned his post with effect from 4 October 2011 and took up a position at the Canadian High Commission on the same day. Accordingly, the Tribunal does not accept the Applicant's allegation that the Respondent chose not to discuss the review form with him.

By the same token, the discussion of the adverse competency assessment, which he dismissed as “afterthoughts,” did not occur because he did not return to work.

63. The Applicant makes the specific complaint that he was only given one month to improve by the performance review instead of the usual six months, as required by paragraph 10.2 of AO 2.05 *Termination Policy*. In the Tribunal’s view, the Respondent has a convincing counter-argument. The Respondent correctly indicated that the six month opportunity to improve performance is not a mandatory requirement for someone in the position of the Applicant, namely, a probationary staff member. Probationers are subject to paragraph 7.1 of AO 2.05, which in turn applies the procedures in paragraph 11 of AO 2.01 *Recruitment and Appointment of External Candidates*. Section 11.4 of AO 2.01 envisages that a probationer staff member’s appointment may be “terminated in the interest of ADB at any time during the staff member’s first 12 months of service.”

64. The kernel of the Applicant’s case is that the adverse performance review, alternatively the feedback from the supervisors or lack of it, amounted to harassment and retaliation. In this connection, the Tribunal reminds itself of a relevant provision. Paragraph 4.5.2 of AO 2.11 provides as follows.

“In the course of their work, supervisors have a responsibility to take difficult decisions...A negative performance report, as such, is not harassment. Supervisors have a responsibility to give appropriate feedback and to take appropriate corrective action. However, such feedback should be made in a reasonable and constructive manner and should not be used as retaliation.”

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.”

66. As noted above, the feedback process in the present case was cut short by the Applicant's removal of himself from the employment of the ADB. It follows that the Applicant has failed to discharge the burden of proof in respect of his allegations of harassment and retaliation.

Did the Respondent adhere to proper procedures or abuse discretion following the Applicant's letter of 9 May 2011 to the Country Director re Mr. X?

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.

69. Faced with an informal complaint of harassment, the Country Director's email of 10 May suggested that the way forward was for the Applicant to have informal discussions. In itself that was not unreasonable and emphatically was not an abuse of discretion. However, the Tribunal must decide whether his response was adequate in terms of the procedural requirements of AO 2.11. Paragraph 5.1 of this AO, in so far as it is material, provides as follows.

"ADB is responsible for creating a work environment which is free of harassment. Every staff member has a responsibility to ensure that the policy of ADB is fully implemented. Management, Heads of

Departments/Offices, directors and supervisors bear added responsibility in this process including ... (ii) clearly communicating ADB's policy on harassment to all their staff, including new staff; (iii) being responsive to and supportive of any person in ADB's workplace who complains about harassment; (iv) encouraging a positive working environment of dignity and mutual respect, and in which any form of harassment is not tolerated..."

70. By virtue of his managerial position, the Country Director is among those managers who are required to “bear added responsibility.” His 10 May email fell short of fully discharging the “added responsibility” that managers must exercise to ensure the full implementation of ADB’s policy of creating a work environment free of harassment. Specifically, he did not “clearly” communicate the harassment policy to the Applicant, who was a new employee, and was not sufficiently responsive to and supportive of him as a person who complained, albeit informally, of harassment. In particular, the Country Director omitted to point the Applicant in the direction of the ombudsperson, or the designated mediators or a BPHR focal point, pursuant to the guidance contained in paragraph 6.1.3 of AO 2.11 in respect of informal complaints of harassment. In the light of the above, the Tribunal concludes that the Country Director’s response did not adequately meet the procedural requirements in AO 2.11.

71. Having dealt with the position of the Country Director, it is now necessary for the Tribunal to consider the question of whether the supervisors – Messrs. X, Y, and Z – acting on the Respondent’s behalf, behaved in a way that was contrary to AO 2.11. The Applicant’s evidential problem is that many of his allegations of harassment and retaliation against the supervisors were disputed by them and he was unable to point to any corroborative evidence, or even supporting evidence short of corroboration. Against this background it is difficult, if not impossible to answer such questions as these: what was said as between the Applicant and his supervisors on 9 or 11 May, as the case may be, and did the Applicant meet with Mr. Z on 18 May, and if he did, what was said? The Tribunal concludes that, in the absence of any corroboration or at least some supporting evidence, the Applicant has not on the preponderance of evidence proved his allegations. But the Tribunal can in any event determine this case on other grounds. AO 2.11 is not the only relevant procedure. The Tribunal is mindful of AO 2.02 *Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members*. Under paragraph 2.1 of this provision, it is stated that ADB “is guided by fair, impartial and transparent personnel policies and practices in the management of all its staff”.

72. On the basis of the supervisors’ own evidence, the Tribunal considers that there would have been a violation of AO 2.02. Their evidence was as follows. When they met with the Applicant on 11 May 2011 they explained the Country Director’s email of 10 May, the work plan, and the performance evaluation due after the first six months of employment, and they suggested that he needed to improve his performance. For his

part, the Applicant accepted that he would undertake the tasks envisaged by the work plan. The meeting was informal in the sense that it was not conducted pursuant to a formal employee performance procedure. But it was nevertheless a meeting of great importance for the Applicant, his work performance, and his future working relationships with his supervisors. Despite the Applicant's email to the Country Director complaining about the alleged mismatch between the plan and the advertisement, according to the supervisors the Applicant agreed to do the tasks specified in the work plan. Despite his strongly worded complaint about Mr. X's behavior towards him, on the supervisors' account he had now had a civilized conversation with them, without any shouting, in which they had told him that his work had to improve.

73. One would have expected that a meeting of this importance would have been noted, and that a copy of the note would have been given to the Applicant. A note would have recorded the discussion and provided a significant future reference point for both the supervisors and the Applicant. However, in the circumstances it may be reasonably inferred that (a) had there been a note, it would have been produced in evidence, and (b) such a note therefore did not exist. The supervisors' failure to make a note and to provide such a note to the Applicant was a poor personnel practice in that it lacked transparency and was not fair to the Applicant. Assuming that the supervisors' account of the meeting is substantially true, the lack of a note would arguably be in breach of the Respondent's obligations of fairness and transparency under paragraph 2.1 of AO 2.02. For an illustration of a personnel practice contravening this provision, see *Rive*, Decision No. 44 [1999] V ADBAT Reports 15, para. 15.

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.

By accepting the Applicant's resignation letter of 4 October 2011 forthwith, did the Respondent adhere to proper procedures or abuse discretion?

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.

Did the Respondent adhere to proper procedures or abuse discretion in relation to the Applicant’s formal complaint of harassment dated 14 October 2011?

77. The Applicant’s formal complaint of harassment was made on 14 October 2011. The Respondent set the harassment investigation procedures in motion on 25 October 2011. The Tribunal does not consider that the speed of the Respondent’s action involved undue delay and it rejects the Applicant’s allegation that it did.

78. The Applicant’s complaint was processed by the Respondent and its organs at some length, including the work of the harassment investigators, the decisions of the DG, BPMSD, and the report of the Appeals Committee, which was approved by the President. The Tribunal is not persuaded by every aspect of the Respondent’s reasoning. Two of the Tribunal’s main reservations concern the way in which the Applicant’s letter of 9 May 2011 was handled by the Country Director and the failure of the supervisors to make a note of their meeting with the Applicant in the letter’s immediate aftermath. In addition, as will be explained below, the Tribunal is concerned about the supervisors’ handling of the induction program issue. However, the fact that the Tribunal reaches a different conclusion from the Respondent in those respects, does not mean that the Respondent processed the formal complaint in breach of procedure. The Tribunal is satisfied that the Respondent’s assessment of the evidence overall did not involve an abuse of its discretionary power. Further, the Tribunal is satisfied that the Respondent followed all the procedural proprieties in dealing with the Applicant’s formal complaint.

In not allowing the Applicant to attend the induction program, did the supervisors adhere to proper procedures and otherwise act lawfully?

79. The essential facts were that (a) on 31 May and 18 August 2001 the Applicant was invited to attend induction programs; (b) on both occasions he passed these invitations onto his supervisors by email and requested their advice; (c) they did not reply to his emails; and (d) as a result of the supervisors' lack of support, the Applicant was unable to attend an induction program.

80. According to the emails that the supervisors sent to the DG, BPMSD on 7-9 November 2011, they decided that the Applicant's attendance at an induction course would be deferred in view of his poor performance. Assuming that this decision was made, the critical question was whether it was ever communicated to the Applicant. According to the Respondent, Mr. X verbally told him that he would be able to attend a later program. However, this point was not raised by Mr. X or his supervisor colleagues in their emails of 7-9 November 2011. This is curious because, if the verbal communication occurred, it was an obvious riposte to the Applicant's complaint that his emails had been ignored. In fact, the point was raised for the first time in an email dated 16 September 2013 from Mr. X to ADB Counsel. This was over two years after the Applicant's second and final invitation to the induction program and post-dated the submission of the Application. In these circumstances the Tribunal places little or no evidential weight on Mr. X's email of 16 September 2013.

81. This was not the only late point raised by the Respondent. The Principal Staff Development Specialist stated in effect that, even after the second email dated 18 August 2011 inviting the Applicant to attend an induction program, there would still have been future opportunities to attend the program. The Principal Staff Development Specialist's email was again addressed to ADB Counsel and was dated 28 November 2013. This post-dated the Applicant's Reply, which under the Tribunal's Rules was his final opportunity to plead his case.⁵ The Tribunal disapproves of evidence that is produced so late in the proceedings (see *Mr. Y*, Decision No. 94 (2 March 2011)). It will disregard this email, which anyway was in conflict with the email dated 18 August 2011 that was sent directly to the Applicant from the same Department.

82. The ascertainable facts are therefore as stated above at paragraph 79. The supervisors' failure to respond to the Applicant's two emailed requests was contrary to the notion of polite, courteous and considerate behavior required of supervisors. On the face of it, it was a hostile action and an abuse of supervisory authority. It thus fell, in the circumstances, within the definition of harassment in paragraph 4.1 of AO 2.11. Further, it breached paragraph 5.1 of AO 2.11. This provision emphasizes the responsibility of supervisors to create a work environment free of harassment through "setting the highest

⁵ Rules of the ADBAT, Rule 8.

exemplary standards of behavior and conduct for themselves” and “encouraging a positive working environment of dignity and mutual respect.”

83. In addition, the failure to respond to the Applicant’s emails involved the supervisors in not telling him that they had applied a readiness test for attending the induction programs and that he had currently failed the test. This non-communication was a personnel practice that lacked transparency and was not fair to the Applicant. It was thus a breach of paragraph 2.1 of AO 2.02, which requires ADB to be “guided by fair, impartial, and transparent personnel ... practices in the management of all its staff”.

RELIEF

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.

DECISION

For these reasons, the Tribunal unanimously decides to:

- (a) order the Bank to pay to the Applicant equitable compensation in the sum of US \$6,000;
- (b) dismiss the Applicant's other claims.

