

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 107
(19 August 2016)

Ms. G (No. 2)
v.
Asian Development Bank

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

1. The Applicant claims that she was subjected to harassment by her Supervisor, who allegedly created an intimidating working environment for her. She further alleges that the investigation of her harassment complaint did not follow proper process and involved an abuse of discretion and discrimination. She seeks reversal of the decision to affirm the dismissal of her harassment complaint, or in the alternative, its reinvestigation, in addition to an order for a transfer to another department, compensation and costs.

I. FACTS

Background

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.

3. The Applicant is Associate Project Officer (Local Staff) in Division X of Department Y of the Asian Development Bank (“ADB” or the “Bank”), where she has worked for many years. Her employment is regular and she is designated as Administrative Staff. The Applicant’s Supervisor, the Unit Head in the Division X, is designated as (professional) International Staff.

Harassment Complaint

4. On 3 April 2014, the Applicant sent a memo to the Director General of Budget, Personnel and Management Systems Department (“DG, BPMSD”) that reported verbal

harassment by her Supervisor, in addition to requesting administrative review of her 2013 performance review [PR]. The Applicant alleged:

“Whenever [my Supervisor] intends to yell at me, he would call me to his office, before I could sit down, he would tell me to close the door. I have handled these harassments passively because I concentrated on my deliverables with the hope that he would eventually change the way he treats me. These shouting incidents happened several times in the past year and several times this year when he could not explain the assessment he made in my PR [performance review]. Last 28 March 2014, we were discussing my work plan and he was uncontrollably yelling and shouting when I disagreed to delete the remarks I wanted to put in my work plan. I was forced to delete the comment in the work plan. This kind of treatment is causing me so much anguish and tension that every time he calls me to his office it’s like entering a torture room.”

With reference to Administrative Order (“AO”) 2.11 on Prevention of Harassment and AO 2.06 on Administrative Review and Appeal Procedures, the Applicant then sought to “*be relieved from this situation as it is causing me so much pain and trauma.*” She also asked for rectification of her 2013 performance assessment. The Tribunal denied this relief for lack of a basis in *Ms G*, ADBAT Decision No. 106 of 23 September 2015.

Supervisor’s Response

5. On 12 May 2014, the Director General of BPMSD sent the Supervisor, as the alleged harasser, a copy of the Applicant’s complaint. The Supervisor responded in a memo of 19 May 2014 to BPMSD by “*vehemently*” denying the complaint and protesting that “*[s]houting and yelling are not in my nature and I have never needed to do so at anyone either professionally nor socially... I have imbibed the region’s norms and culture including never having to raise one’s voice or adopt a confrontational position.*” The supervisor explained that he requested those sitting with him for a discussion “*to generally close the door. The intention is to ensure that external disturbances ... do not make it more difficult to talk to one another. ... I have never closed my door, or asked my colleagues to do so, with the intention of shouting or yelling at them.*”

6. The Supervisor’s memo countered that the Applicant “*does not take feedback or critique of her work or performance constructively...she gets agitated and shows signs of anger.*” He noted that if, as claimed, the shouting and yelling had been going on for two years, “*it is very odd that she did not request conciliatory assistance at the outset rather than wait so long and raise it against the backdrop of a PR where she disagrees with my*

assessment.” He stated, “[t]here was never any instance of shouting or yelling during these [PR] discussions.” Citing an earlier occasion, the Supervisor alleged that “shouting and yelling accusations are randomly used by [the Applicant] as relief mechanisms when explanations are being sought.” He concluded by denying the accusations and requesting that the Applicant be “counseled appropriately.”

Investigation

(i) Terms of Reference

7. On 22 May 2014, DG, BPMSD designated a professional staff member from another unit and a Senior Administrative Services Officer, from a third unit, as investigators “to assist in [his] evaluation of the attached complaint of harassment.” In the designation memo, copied to the Applicant and Supervisor, the DG, BPMSD set out the Terms of Reference (“TOR”) for the investigation, including a reference to AO 2.11. These terms of reference defined the purpose of the investigation as “to determine what evidence would be available to DG, BPMSD to support his action in response to the complaint of harassment.” The report was also to include “an opinion as to whether there is a prima facie case of harassment”. The investigators were instructed to provide findings of fact within 15 working days from 26 May 2014, with the possibility of an extension from the Human Resources (“HR”) focal point for issues relating to prevention of harassment, a Senior Human Resource Specialist in the HR Policy and Program Division within BPMSD.

8. The terms of reference provided that, in addition to interviewing the complainant and respondent, and speaking with potential witnesses,

“10. The investigators may interview any other persons that may provide information considered relevant to the complaint. The complainants and the respondent may provide names of witnesses or other persons that they believe the investigators should interview.

11. The investigators should be able to talk to potential witnesses to determine whether they have anything relevant to offer, and whether they would be available as witnesses.

...

12. If in the interests of timeliness it may not be possible to interview all persons who may have information relevant to the complaint or other circumstances may prevent interviews. Such limitations and their impacts should be reported in the investigator's reports."

9. The investigators interviewed five staff members: the Applicant as the complainant, the Supervisor as the alleged harasser, his assistant (Colleague A), a specialist (Colleague B), and an associate project analyst (Colleague C) in the same Division.

(ii) Interview with the Applicant

10. According to the Investigators' Report, the Applicant mentioned that the Supervisor's shouting had been an everyday occurrence for the past three years. In relation to the alleged shouting during the 28 March 2014 work plan discussion, the Applicant stated that Colleague C, who was seated outside the Supervisor's office, had heard his voice on 28 March 2014 and had asked her about the incident.

11. In the interview, the Applicant cited three other examples of alleged harassment:

- (i) Her Supervisor's editing of her faxes when he "*always shouts*" while pointing out minor errors,
- (ii) The Supervisor blaming and shouting at the Applicant "when his TA was cancelled", making the Applicant feel "threatened by [her Supervisor's] overpowering attitude", and
- (iii) Her Supervisor blaming, shouting at and threatening her when "the desired rating was not met due to the implementation of an alternate system". In particular the Applicant felt her Supervisor "treats her differently from" the other project analysts in the Division.

12. She also told the investigators that the Supervisor cuts her by saying "*don't be emotional*" or "*don't take it personally.*" She said that when she strongly requested him to stop shouting at her in December 2013, he challenged her by saying "*Why? Will you go to BPMSD?*" She mentioned that Colleague B had confided to her that the Supervisor also shouted at that colleague when he edited her work.

13. The Applicant named six other staff who “*may have knowledge and/or experienced harassment*” by the Supervisor. In addition to Colleagues B and C, only one of those six (Colleague A) was interviewed by the investigators.

(iii) Interview with the Supervisor

14. According to the Investigators’ Report, the Supervisor strongly denied shouting at the Applicant at any stage, although he admitted “*that the tone of his voice could rise and become louder when highlighting points for work improvement. This is his normal style.*” He conceded that he made “*remarks like ‘don’t be emotional or too personal’*” during his various discussions with the Applicant. However, he did not recall her requesting a discussion about his behaviour. He denied challenging her on elevating the incidents to BPMSD. The Supervisor contended that the Applicant’s complaint was an offshoot of the PR exercise and her desire to move to another division, which had been unsuccessful. He suggested the investigators talk to his Operations Assistant (Colleague A). He stated that to maintain a good working environment in the division, he was willing to “*compromise on improving his working relationship with both IS [international staff] and LS [local staff], and apologise to the Applicant. In addition he can opt to leave his door open when discussing with staff.*”

(iv) Interviews with Colleagues

15. The Investigators’ Report provided summaries of the interviews with three colleagues. Upon the suggestion of both the Applicant and the Supervisor, Colleague A, the Supervisor’s assistant, was interviewed. The witness stated that she had not heard any shouting incident between him and any staff in the division during their work together over the past two years. She reported, however, that at times he “*airs his disappointment about the quality of outputs by his colleagues*”.

16. Colleague B, a specialist employed in the same division as the Applicant and the Supervisor, mentioned that she was not aware of any shouting incident between the two of them, “*as all discussions are held in [the Supervisor’s] room with door closed.*” However she mentioned that his “*tone of voice normally rises and becomes louder particularly when pointing out revisions to her own work documents*”, and that she felt his edits were unnecessary and did not add value to her work.

17. Colleague C, the associate project analyst, did not recall any particular shouting incident between the Applicant and the Supervisor. But she stated that the Supervisor's speaking voice *"can become loud at times and tends to become even louder when he is stressing revisions to work documents. [His] voice can normally be heard outside his office even when talking over the telephone."* She described a difference in working style between herself and the Supervisor, and that this could be the same with him and the Applicant.

Conclusions of the Investigators' Report

18. The investigators' three-page report was dated 29 July 2014. While the Investigators' Report found that the Supervisor *"may be insensitive about [the Applicant's] feelings during their various discussions..."*, it concluded that based on the interviews conducted, they saw *"no evidence of harassment"*. They attributed the incidents to *"poor communication and poor working relationship"* between the Applicant and the Supervisor.

Notification of the Investigators' Report and Opposition by the Applicant

19. On 1 August 2014, the DG, BPMSD addressed a memo containing the Investigators' Report to the Applicant and the Respondent, inviting their possible responses. On 13 August 2014 the Applicant submitted a memo to the DG, BPMSD signifying her opposition to the Investigators' Report. She reaffirmed that she had been harassed and humiliated and requested that she be transferred to another division. She noted that AO 2.11, para 4.1 defines harassment as occurring when *"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."*

20. She observed that the *"investigators did not interview other suggested staff that can establish the fact that there is a problem."* She added that those interviewed had bolstered her case by confirming that the Supervisor's voice *"can become loud at times and can be even louder when he is stressing revisions."* She also argued that the witnesses' non-recollection of any yelling incident of 28 March did not negate the occurrence of it or of previous incidents.

21. She also noted, for the first time, that she had acted on the incidents before she formally filed the complaint by mentioning it in a memo to the Director of the Division. She mentioned emails attached to her memo, which had referred to the Ombudsman.

Dismissal of Complaint by DG, BPMSD

22. On 28 October 2014 the DG, BPMSD issued a memo dismissing the harassment complaint and, in view of that, denying the Applicant's request for transfer for lack of a basis. DG, BPMSD referred to AO 2.11, para. 6.2.2(e), which states that "*where the investigation shows that there is a preponderance of evidence to indicate that the alleged harasser has engaged in harassment, the disciplinary procedures under AO 2.04 applies [sic]. Otherwise, Director General, BPMSD will dismiss the complaint or may decide to orally counsel the alleged harasser.*" Having reviewed her objections to the Investigators' Report and her request, the DG, BPMSD agreed with the report's conclusions of no evidence of harassment committed against her. He found that "*the investigation was conducted in accordance with the procedure provided in AO 2.11.*"

Request for Compulsory Conciliation

23. On 12 December 2014 the Applicant requested compulsory conciliation on the decision of DG, BPMSD in relation to her harassment complaint against her Supervisor. After repeating statements made in her objections to the Report, she made allegations of abuse of discretion, discrimination and abuse of process. The conciliation process ended without settlement on 26 January 2015, as noted in a memo the following day from the Director, BPHP (the Human Resources Business Partners Division of BPMSD) to the Applicant and the DG, BPMSD. The conciliator's statement to this effect was received by the Applicant on 2 February 2015.

Request to BPMSD for Administrative Review

24. On 6 February 2015 the Applicant requested administrative review over the dismissal of her harassment complaint and reiterated her request to be transferred. In her memo to the DG, BPMSD, she again set out the arguments and conclusions she had put forward in her request for compulsory conciliation and at earlier stages.

Confirmation of Dismissal of Complaint

25. On 4 March 2015, the DG, BPMSD confirmed his dismissal of the harassment complaint and the denial of the Applicant's request for transfer for lack of basis. He also confirmed his conclusion that the investigation had been completed in a manner consistent with the procedure in AO 2.11. He denied the relief requested. Referring to AO 2.03, para. 3.1 relating to transfers, the DG, BPMSD, noted that “[c]onsidering that it has not been determined that your transfer is warranted by ‘ADB’s interests’ or your ‘developmental needs’, there is no reason to grant your request.” He pointed out that she could apply to any other position in the ADB.

Appeal to the Appeals Committee

26. On 13 March 2015, the Applicant filed an appeal with the Appeals Committee against the DG, BPMSD's 4 March 2015 decision. The Respondent submitted its statement on 23 April 2015. The Applicant submitted a Counterstatement on 11 May 2015. The Respondent then submitted a Reply to the Applicant's Counterstatement.

27. In her statement of appeal, the Applicant challenged the “*conclusion of DG, BPMSD through his memo dated 4 March 2015 ..., finding no merit in my harassment report ... and denying my relief for transfer.*” Referring to AO 2.06, Section 7, AO 2.11, para. 4.1 as well as points and arguments she had made in earlier submissions, she maintained that the decision was an abuse of discretion, discriminatory and an abuse of process. She contended that the harassment complaint and the complaint regarding her performance review were “*integral and necessary actions to address the harassment I had been suffering*”.

28. The Applicant further submitted that the conclusion confirmed by BPMSD was based on presumptions that she had merely misunderstood the Supervisor's actions or was not tolerant enough to accept the loudness of his voice. She failed to see how his speaking loudly to her on 28 March 2014 and during all the previous incidents could be considered as other than yelling at her, “*or otherwise discounted as ‘normal’*”. She questioned how Colleague C, sitting in such close proximity to the Supervisor, could consider such yelling to be “*just stressing a point*”.

29. Asserting that the Investigators' Report was discriminatory, biased, and not justified by the facts, the Applicant submitted that:

- (i) The persons interviewed had confirmed that the conversations between her and the Supervisor took place in his office behind a closed door. These individuals' non-recollection of yelling did not imply that there was no harassment.
- (ii) The investigation, led by an alleged ally of the Supervisor, did not include staff she had suggested for interviews, while interviewing the staff suggested by the Supervisor.
- (iii) The decision of DG, BPMSD protected the interest of an international staff at the expense of a national staff, and
- (iv) The Supervisor's willingness to improve his working relationship "*was tantamount to admitting*" that he was guilty of harassing her and other staff.

30. The Respondent contended that the Applicant had no basis to conclude that discretion had been abused in the denial of the request for a transfer, or in determining that there had been no evidence of harassment, given that the investigation of the complaint had been conducted in accordance with the procedure foreseen by AO 2.11. The Respondent submitted that it had followed proper procedures, did not commit an abuse of discretion and did not discriminate against the Applicant. Accordingly, the Respondent argued that her plea for a transfer to another sector division was without any basis, referring to AO 2.03, para. 3.1 regarding lateral transfer.

Appeals Committee Report

31. In Appeal No. 1 of 2015, the Appeals Committee concluded in its Report of 10 September 2015 that there was:

- (i) no abuse of discretion in the decision by the Respondent and its application of the definition of 'harassment' as stated in AO 2.11 para. 4.1;
- (ii) no discriminatory element in the Investigators' Report;
- (iii) no indication of an abuse of the 2013 performance review process, "*in line with the conclusion reached for Case 01/2015*" [the Applicant's earlier appeal to the Appeals Committee in relation to that process]; and that proper procedures had been duly followed.

32. In its Findings, the Appeals Committee referred to the various documents from the earlier stages of the matter. The Appeals Committee recalled the Investigators' Findings regarding the situation, the complainant and the alleged harasser, and the Committee's conclusion that there was no evidence of harassment, but rather of poor communication and a poor working relationship between the two staff members.

33. After summarizing the Applicant's arguments, the Appeals Committee found that the ADB's relevant policies and procedures had been correctly applied, and that *"there was no evidence which could be clearly considered as an abuse of discretion, arbitrariness, discrimination, improper motivation or as a violation of fair and reasonable procedures."*

34. Although neither party had raised the issue directly, the Appeals Committee also stated that it found AO 2.11, AO 2.04, para. 8.1 to be *"open to interpretation"* on whether it is only staff of BPHP (as BPHR, the Human Resources division of BPMSD, is now known) who must investigate allegations of misconduct involving a claim of harassment or whether BPHP could delegate that function. It found that Appendix 2 of AO 2.04 and AO 2.11 made *"circular arguments"*. The Appeals Committee thus recommended that AO 2.04, along with its related Appendix 2, and AO 2.11 *"be clarified to improve the procedural transparency"*. This statement appeared at the end of its report, but not in its covering memo to the President, which recommended rejection of all of the claims and the relief sought as being without merit.

President's Affirmation of the Appeals Committee Recommendation

35. On 27 October 2015, the President affirmed the recommended rejection of the appeal, without comment. His decision was communicated to the Applicant through a memo dated 5 November 2015 from the Vice President (Administration and Corporate Management) along with a copy of the Appeals Committee report and recommendations.

Request for Administrative Review by the Tribunal

36. This Application was filed with the Administrative Tribunal on 29 January 2016. It contests the decision of 27 October 2015 of the President.

37. The Applicant seeks to have the Tribunal

- (i) Reverse the Bank's decision to dismiss the complaint alleging harassment by her Supervisor, and to find that he did commit acts of harassment, or in the alternative, order a reinvestigation of the harassment complaint;
- (ii) Order the transfer of the Applicant to another department;
- (iii) Grant compensation equivalent to three times the Applicant's annual salary for the emotional distress, mental anguish and anxiety allegedly experienced;
- (iv) Grant reasonable costs for those incurred by the Applicant; and
- (v) Grant "other reliefs, just and equitable under the premises."

II. SUMMARY OF THE PARTIES' CONTENTIONS

38. In sum, the Applicant contends that proper procedures were not followed in the investigation of her harassment complaint, as the appointed investigators did not have the authority and jurisdiction to investigate. She maintains that only BPHP could do this. She also argues that the facts were not accurately gathered, since the investigators failed to interview several individuals whom she alleged had material information to support her harassment claim. The Applicant claims that the acts committed by the Supervisor created a hostile work environment for her, and that the findings of the Investigators' Report were "*contrary to the facts, and to the rules and policies of the Bank.*"

39. She argues that the violation of procedure constituted non-observance of her contract of employment and terms of appointment, as well as an abuse of discretion. The Applicant maintains that the decision represented an abuse of discretion because the "*testimonies and admissions contained [in the Investigators' report] as well as the contradictions to be found when compared to [the Supervisor's] Response to the Complaint, show [a] a preponderance of evidence that weighs heavily in favour of the Applicant.*"

40. The Applicant argues that her Supervisor's actions constituted unwarranted and unwelcome behaviour and that he cannot be said to have set 'the highest exemplary standards of behavior and conduct' as required of managers by AO 2.11, para. 5.1. She also claims discrimination in that the Investigators' Report "*made light of claims of the Applicant while giving great weight*" to the Supervisor's statements.

41. The Respondent has consistently denied that harassment of the Applicant by the Supervisor occurred. It has also maintained that it followed the proper procedures in dismissing the harassment complaint and that it has not abused its discretion by acting discriminatorily. It has therefore argued that the Applicant's claims are without merit and that she is not entitled to any of the relief requested.

Contentions Regarding Authority of the Investigators and Their Conduct of the Investigation

42. The Applicant cites that AO 2.04 para. 8.1(b) which stipulates that “[a]llegations of misconduct involving a claim of harassment, as defined in AO 2.11 (Prevention of Harassment), shall be investigated by BPHR” (which is now known as BPHP). She also notes that AO 2.11, para. 6.2.2 (c) stipulates that an investigation “is to be conducted by BPHR...” The Applicant argues that this role “cannot be delegated by the DG, BPMSD to other departments and personnel such as [those designated to investigate her complaint].”

43. The Respondent contends that it followed the procedures set out in AO 2.11, para. 6.2.2 when it considered the Applicant's complaint of harassment, as follows:

- Consistent with para. 6.2.2 (a) the alleged harasser was given a copy of the Applicant's complaint.
- Consistent with para. 6.2.2 (b) the alleged harasser was given the opportunity to respond to the allegations and submitted a written response.
- Consistent with para. 6.2.2 (c) the Respondent designated two staff to investigate the Applicant's complaint and thereafter notified the Applicant and the accused of such selection.
- Consistent with the procedure provided in Attachment 2 to AO 2.04, the two designated investigators conducted the investigation. They interviewed the alleged harasser, the alleged harassed person, and three other staff members who the investigators judged could have been witnesses to the shouting and yelling incidents alleged by the Applicant or provide useful information. The conclusion of the Investigator's Report was that the “investigators did not see any evidence of harassment”....
- Consistent with para. 6.2.2 (d), the Applicant was informed of the results of the investigation and given an opportunity to respond.
- Consistent with para. 6.2.2 (e), taking into account the Applicant's response and considering the Investigators' Report's conclusion that there is no evidence of harassment, the DG, BPMSD dismissed the Applicant's harassment complaint.

44. The Respondent also notes that *“the Applicant has not contested the independence of the two investigators, nor has she argued that any investigator was conflicted.”* It claims that *“the fact that the two investigators were not staff of BPHP (which was consistent with the standard practice of the Respondent and other governmental and non-governmental organizations around the world) had no impact on the investigation and on the finding that there was no evidence of harassment.”*

45. The Respondent interprets AO 2.04, para. 8.1(b) and AO 2.11, para. 6.2.2 to mean that the investigation is undertaken *“under the supervision of BPMSD, but [this] does not prevent BPMSD from delegating the actual conduct of the investigation to staff who are not staff of BPHP.”* The Respondent recalls that the Appeals Committee itself had stated that the provisions were open to interpretation.

46. The Respondent argues that using non-BPHP staff to undertake investigations *“is designed to separate the performance of the investigative function from the performance of the decision-making function with respect to those phases of the process for harassment cases.”* As an example, the Respondent relies on *Mr Y (supra)* which relied on the fact that the investigators were not assigned from the Human Resources Division at the time of their designation to dismiss the Applicant’s claims that the Bank had abused its power in its designation because the investigators would be influenced by their prior connection with that Division.

47. In her Reply, the Applicant refutes the Respondent’s arguments that the investigation could have been properly conducted where the investigators had not been mandated by the rules to do so. She reiterates that the provisions are unequivocal and unambiguous, and that the authority lies with BPHP not BPMSD. Moreover, *“the BPMSD, or in this case the Director General, BPMSD, cannot delegate authority it does not have.”* She adds that AO 2.04 makes some provisions for the BPHP to delegate its investigatory power but it does so explicitly and only in other ways.

48. Recalling the *“clear language of the rule”* in question, she counters the Respondent’s reliance on *Mr Y (supra)*, by arguing that this case is not on point and is not controlling. She also maintains that there was *“no overriding need to deviate from the plain text of AO 2.04,”* as there *“was already a clear divide between the investigatory and adjudicatory functions”*.

The disciplinary authority is vested in the President, she points out (AO 2.04, para. 7.1), rather than in the DG, BPMSD.

49. In its Rejoinder, the Respondent states that it has consistently interpreted and applied AO 2.04 para. 8.1(b) as requiring BPHP to supervise the harassment investigation, but not to carry out the investigation work itself. It argues that the Applicant's argument is an "*overly restrictive interpretation*". The Respondent argues that the "*DG, BPMSD, who is responsible for the interpretation and application of AO 2.04 pursuant to para. 12 of AO 2.04, may appoint non-BPHP staff to carry out the investigation of allegations of harassment complaints.*" It notes that decisions taken by the President with respect to professional staff are taken "*upon receipt of the recommendation of DG, BPMSD as provided in para. 10.2 of AO 2.04.*" The Respondent argues that it is "*a consistent tenet of administrative law that certain administrative powers may be delegated... [and that in] this case, the investigative function is in the nature of fact-finding, and no decision-making was delegated.*"

Contentions Regarding the Conduct of Interviews

50. The Applicant further maintains that since the Respondent's determination of no harassment was based solely on the findings of unauthorized investigators, this represented an abuse of discretion. She argues that she gave the investigators the names of eight persons who may have had knowledge of the harassment perpetrated by the Supervisor against the Applicant, but the investigators only interviewed three of them (Colleagues A, B and C). In contrast, the Supervisor gave only one name, his operations assistant (Colleague A), and this person was interviewed. Failing to take statements of several individuals who may have had material information regarding the matter meant in the Applicant's view that the inquiry could not be a "*thorough investigation of the facts*" (AO 2.04, para. 1.2). The Applicant argues that the conduct of the investigation was instead arbitrary and haphazard. The Applicant thus maintains that in addition to the investigation being "*irregular and improper,*" its findings were "*contrary to the facts, and to the rules and policies of the Bank.*"

51. The Applicant also maintains that the decision represented an abuse of discretion because the "*testimonies and admissions contained [within the Investigators' Report] as well as the contradictions to be found when compared to [the Supervisor's] Response to the*

Complaint, show ...[a] preponderance of evidence [that] weighs heavily in favour of the Applicant.”

52. The Applicant argues that even the facts that were gathered from the improper investigation showed harassment. She notes that all three colleagues interviewed stated that her Supervisor had a habit of raising his voice when discussing revisions to work with subordinates. The Applicant contends that these admissions, along with the “*almost assured restraint in the statements of these witnesses*” demonstrated that he “*shouts at his subordinates on a regular basis*”. Citing *Mr E*, ADBAT Decision No 103 (12 February 2014), she suggests that this behaviour is contrary to the Tribunal’s standard of polite, courteous and considerate conduct required of supervisors, in line with AO 2.11. The Applicant also notes that “*local, if not global, cultural precepts dictate respectful treatment towards one’s elders, especially those of the fairer sex. The consistent tongue lashing for errors, real or imagined, made by a man, to an elder female subordinate, does not exemplify the practice or image*” that should be upheld.

53. The Applicant also points to alleged contradictions in the Supervisor’s testimony to cast “*grave doubts as to the genuineness of [his] submissions.*” She questions why he would offer to apologise if there had been no basis for an apology.

54. The Applicant argues that the Supervisor’s unwarranted and unwelcome actions created an intimidating work environment for her. She notes that AO 2.11, para. 4.4 stipulates that mildly offensive behaviour can be considered as harassment where it is repeated, and claims that she was repeatedly the victim of her Supervisor’s unwarranted and unwelcome behaviour. The Applicant also frames the question as to how the behaviour made her feel rather than how the interviewed colleagues had felt, as they are situated differently from the Applicant.

55. The Applicant argues that the Investigators’ Report erroneously adopted the Supervisor’s “*unsubstantiated speculation that the Applicant’s harassment complaint was a mere ‘offshoot of the PR exercise’*”. The Applicant reiterates that the incident precipitating the filing of the complaint was the “*shouting incident*” on 28 March 2014.

56. The Respondent, on the other hand, maintains that the “*investigators took into account all the relevant facts, not only the fact that no shouting incidents had been heard by the three*

witnesses, but also the statements of the colleagues of the Applicant that *[the Supervisor's] voice can become louder at certain times.*" Yet they *"did not find that the simple fact of raising one's voice or airing disappointment about the quality of a work product rises to the level of harassment."* The Respondent argues that there was no abuse of discretion in dismissing the complaint, as when there is no "preponderance of evidence" as provided by AO 2.11, para. 6.2.2(e), the DG, BPMSD must either dismiss the complaint or orally counsel the "alleged harasser". Here, the investigation had concluded there was no evidence of harassment, so the DG, BPMSD's decision to dismiss the complaint was in the Respondent's view appropriate and not an abuse of discretion.

57. The Respondent argues that the investigators' conclusion of no evidence of harassment was reasonable and consistent with the facts gathered in their investigation, in particular the absence of corroboration of the Applicant's statement about the meeting on 28 March 2014. Furthermore, the Respondent notes that the Investigators' Report contained no information to suggest that the statements made by the Applicant's three colleagues were anything other than truthful.

58. The Respondent contends that the investigation was undertaken in accordance with the relevant procedures and the terms of reference set by DG, BPMSD. It also notes that the terms of reference specified that the investigators could interview *"any other persons that may provide information considered relevant"* and avers that the investigators complied with those terms.

59. In its Rejoinder the Respondent also argues that the Supervisor did not make contradictory statements. It further maintains that the Supervisor's willingness to apologise *"does not imply that he recognized that he had yelled or shouted at the Applicant or that any harassment had happened. It was simply a proposal to improve his relationship with the Applicant in order to maintain a good working environment"*.

60. Regarding the refusal of a transfer for the Applicant, the Respondent notes that AO 2.03, para. 3.1 provides that a staff member may be reassigned on a lateral basis *"if the interests of ADB or the staff's developmental needs so warrant...."* It argues that because it has not been determined that the Applicant's transfer was warranted by *"ADB's interests"* or

Applicant's "*developmental needs*", the Respondent did not abuse its discretion in denying the Applicant's request for transfer.

Alleged Discrimination and Lack of Objectivity

61. The Applicant also claims discrimination in that she maintained that the decision was discriminatory "*as it is inclined to protect [the Supervisor] being an international staff of ADB and ignore the pleadings of local staff like me*". She contends that the Investigators' report "*made light of the claims of the Applicant while giving great weight to [the Supervisor's]*". In support, the Applicant maintains that the investigators casually discarded the readily available testimonies about the Supervisor raising his voice as inconsequential, and ignored the alleged admissions and contradictory statements he had made. She had also raised the question of the disparate number of witnesses interviewed, that is three of eight proposed by her and one of one proposed by the Supervisor.

62. The Respondent does not directly address the discrimination complaint in its Answer. In its statement to the Appeals Committee it had however argued that the Respondent did not discriminate against the Applicant when it took cognizance of her harassment complaint and ensured that an investigation was conducted in a manner consistent with the procedure in AO 2.11.

63. Additionally, the Applicant, while noting that "*the objectivity and independence of the investigators are not at issue,*" mentions in her Reply that one of the investigators was now subordinate to the Supervisor, and that this "*may cast doubt upon the integrity of the investigative process...*".

64. In its Rejoinder, the Respondent "*strongly refutes these allegations*" as gratuitous and unfounded. It explains that the Investigator did not become a subordinate of the Supervisor until more than 18 months after the investigation was completed. The Respondent argues that "*the Applicant's suggestions concerning [his] impartiality are baseless*" and should be rejected by the Tribunal.

III. CLARIFICATION OF THE ISSUES

Scope of Review by the Tribunal

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.

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).

67. In light of the above, the Applicant's assertions and the Bank's responses, the two key legal issues are:

1. Whether the AOs and procedures were properly followed in relation to the authority to conduct the investigation, the conduct of the investigation itself, the dismissal of the Applicant's harassment complaint and the denial of her request for a transfer.
2. Whether in this context the Respondent abused its discretionary power by making the decision in a way that was arbitrary, discriminatory or improperly motivated.

IV. FINDINGS

68. The Tribunal found that this application warranted a hearing *en banc* (Article V para. 5 of the ADBAT Statute).

The Merits

Authority to Conduct the Investigation

69. The Agreement establishing the Asian Development Bank provides in Article 34, para. 5, that “[t]he President shall be chief of the staff of the Bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank.” Under international administrative law, this power carries with it the implied authority to delegate functions to subordinate units, which the AO 2.04 has suggested here by making BPMSD “responsible for the interpretation and the application of this AO” (AO 2.04, para. 12). In *Zaidi*, Decision No. 17 [1996] II ADBAT Reports 92, para. 47, the Tribunal found that the BPMSD had “implied authority” to issue a show cause notice in relation to alleged misconduct, even though the relevant Administrative Order did not mention the practice. In that case, the Tribunal also concluded that a commission of inquiry had been properly constituted to investigate a claim, although it was not specifically contemplated by the relevant rules (*ibid*, para. 56). Both international administrative law and the Tribunal’s jurisprudence recognise that the President has implied powers.

70. The Bank has stated in the present case that the application of AO 2.04 has often involved the appointment of investigators from units other than those specifically designated in its para. 8 as described below. This would have been an exercise of the power granted under para. 12 of AO 2.04 to BPMSD, and by it to BPHP, formerly known as BPHR. Without the issue having been raised as a matter for decision, the practice of referral to investigators other than those named in the AO has occurred in at least two cases that have come before this Tribunal: *Mr. Y (supra)* and *Mr. E (supra)*. In *Mr. E*, the Tribunal found the investigation by staff outside of BPHR to have “followed all procedural proprieties” (*Mr. E*, para. 78). While this is insufficient evidence to amount to a consistent practice, an international organization may invoke practice to demonstrate its interpretation of a rule, as long as the practice serves legitimate aims. The Tribunal finds this to be the case here, since the goal - to have the investigation carried out independently - was a legitimate objective

which could be reached through the means chosen here by the Bank. For the purpose of assisting BPMSD in evaluating the harassment complaint, the BPMSD exercised its authority to interpret and apply the AO in question by assigning the investigation of the claim of harassment to persons outside BPHP/BPHR. This was a practice which the Bank had opted to follow in line with its reading of earlier Tribunal decisions (see *Lindsey (supra)* and *Zaidi (supra)*).

71. Both parties relied on AO 2.04, para. 8.1(b), which provides: “[a]llegations of misconduct involving a claim of harassment... shall be investigated by BPHR.” The investigative process to be pursued under AO 2.04 depends on the type of allegation. AO 2.04 specifies several options for delegating investigative authority. Allegations of violations of the Bank’s anticorruption policy are to be investigated by the Office of Anticorruption and Integrity (“OAI”) (AO 2.04, para. 8.1(a)), whereas “allegations other than those stated in paragraph (a)” shall, according to 8.1(b), “be investigated by BPHR.” Allegations of misconduct involving a claim of harassment, as defined in AO 2.11 (Prevention of Harassment), “shall be investigated by BPHR in accordance with Appendix 2 of this AO [2.04] and the special procedures provided in AO 2.11.” (AO 2.04, para. 8.1(b))

72. In addition, the President may appoint a person (or persons) from within or outside the ADB to conduct any investigation of allegation of misconduct which would otherwise be investigated by either the Office of Anticorruption and Integrity, the Office of Administrative Services, the staff member’s Director or Head of Department/Office, or BPHR (AO 2.04, para. 8.1(c)). Furthermore, under “Responsibility,” the AO provides that the DG, BPMSD “is responsible for the interpretation and the application of this AO.” (para. 12).

73. 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”.

74. The Tribunal notes that in the case now before it, the Bank took care to refer the investigators to the provisions of AO 2.04 and its Appendix 2. These set out the general principles and procedures for the investigation of suspected misconduct, including guarantees of confidentiality, objectivity, impartiality, fairness, independence and avoidance of conflicts of interest in investigations (AO 2.04, para. 5). This guidance was buttressed by more specific instructions provided by the “*Terms of Reference – Harassment Investigations*” (“TOR”) given to the investigators by DG, BPMSD. The investigators were instructed to submit a written report to DG, BPMSD (as well as the complainant and respondent) “*containing a finding on the facts of the case, contradicted and uncontradicted, and an opinion as to whether there is a prima facie case of harassment.*” (TOR, paras. 13 and 14). The disposition of this report remained in the hands of DG, BPMSD (AO 2.11, para. 6.2). In the Tribunal’s view, the principles of AO 2.04 and AO 2.11 were respected under the TORs given to the investigators, and the literal terms of para. 8 of AO 2.04 and para. 6.2 of AO 2.11 need to be read in the context of the President’s overall power of delegation.

75. Importantly, the Respondent’s interpretation and application of the AOs did not restrict the Applicant’s rights under the provisions of AO 2.04 and its Appendix 2. She did not allege any conflict of interest at the time of the investigation. The Applicant’s implication concerning one of the investigators, made eighteen months after the investigation, was purely speculative and the Tribunal considers it to be unsubstantiated.

76. 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.

77. Nevertheless, there are other issues of concern. The Tribunal observes a misalignment between the specificity of the units mentioned in the relevant AO provisions and the practice engaged in by the Bank. As provided by AO 2.02, para. 2.1, the Bank is “*guided by fair, impartial and transparent personnel policies and practices in the management of all its staff*”. In *Canlas et al*, Decision No. 56 [2003] VI ADBAT Reports, para. 37, moreover, the Tribunal noted the “*high value*” placed on transparency in personnel decisions. The Tribunal finds that the Bank’s practice and the clear references in AOs 2.04 and 2.11 to “BPHR” need to be re-aligned with the required standard of transparency of applicable procedures. The procedures are worded in a convoluted manner (as shown in para. 67 above) making it difficult for a staff

member to understand how a harassment claim will be addressed. Greater clarity and assurances of quality of an investigation would help close these gaps in transparency and avoid litigation.

Conduct of the Investigation

78. The procedures for formal complaints of harassment stipulate that *“the complaint should identify ... any witnesses to the incident”* (AO 2.11, para. 6.2.1). Under the heading *“Harassment”* in her complaint memo of 3 April 2014, the Applicant referred to several shouting incidents in the current and past years, with only one date specified. Although she mentioned no witnesses in it, the complaint was referred for investigation.

79. The Terms of Reference for the investigators instructed them to interview the complainant and the respondent separately, which they did. In addition, the TOR provided that, *“[t]he investigators may interview any other persons that may provide information considered relevant to the complaint. The complainants and the respondent may provide names of witnesses or other persons that they believe the investigators should interview.”* (TOR, para. 10). The investigators could talk to potential witnesses and “people who provide leads for further investigation”. The TOR noted, *“[i]f in the interest of timeliness it may not be possible to interview all persons who may have information relevant to the complaint or other circumstances may prevent interviews, such limitations and their impacts should be reported in the investigator’s report.”* (TOR, para. 12).

80. When interviewed by the investigators, the Applicant referred to Colleagues B and C in relation to specific alleged incidents. The Investigators’ Report notes that the Applicant named six *“other staff who may have knowledge and/or experienced harassment”* from the Supervisor. Only one of those six was interviewed. In line with their terms of reference, the investigators should have explained why they had considered the other interviews as unnecessary.

81. Furthermore, the investigators concentrated their efforts on determining whether shouting had occurred on 28 March 2014, whereas the Applicant had also alleged other incidents over the previous two years. It was precisely in relation to these other allegations that additional witnesses might have shed light on whether other instances of the alleged

behaviour had taken place or not. To the extent of this limited coverage, the Investigators' Report constructed a partial basis on which the DG, BPMSD, and later the President, took their decisions.

82. The Investigators' Report was to "*include all relevant information gained from interviews, documentation and other sources that supports or does not support the allegations.*" (TOR, para. 13). Without additional interviews, or explanations of why they were not conducted, a doubt remains as to whether the alleged incidents other than those on 28 March 2014 could have been substantiated or not. As an investigation, the process was supposed to be one "*designed to gather and analyze information to examine and determine the veracity of an allegation of misconduct.*" (AO 2.04, Appendix I, para. 9). This was not done in relation to the other alleged instances of improper behaviour.

83. 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.

84. On the other hand, the Applicant herself could, and should, have provided more details at the time of the investigation or in subsequent proceedings as to the possible relevance of each of the six persons' testimony, and more specifically in relation to harassment that she herself had allegedly encountered. Moreover, she has not made it clear how the additional witnesses would have altered the outcome. The Tribunal notes that the Applicant had not acted on any alleged incidents before she formally filed the complaint, and this was not done until after the Applicant's performance assessment. The emails the Applicant mentioned as being attached to her 13 August 2014 memo to the DG, BPMSD (not in fact provided to the Tribunal until requested) showed that she had approached the Ombudsman only regarding her performance review, and not, as alleged, with respect to any shouting or harassment. In these

circumstances, the Tribunal rejects the Applicant's contention that a preponderance of the evidence presented weighed heavily in her favour.

85. 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 granted.

The Alleged Harassment

86. The record before the Tribunal shows an accusation of shouting on 28 March 2014 which the Supervisor denied and the witnesses interviewed failed to confirm. The Supervisor *"admitted that his tone of voice could rise and become louder when highlighting points for work improvement. This is his normal style."* This was corroborated in general terms by Colleague B, although none of the three witnesses confirmed shouting incidents between the Applicant and the Supervisor. *"In order to maintain good working environment in [his Division], [the Supervisor] said that he is willing to compromise on improving his working relationship with both IS and LS, and apologize to [the Applicant]."* This is not proof that he conceded having harassed her.

87. According to AO 2.11, *"ADB will not tolerate any action by any staff member that constitutes harassment."* (para. 2). Harassment is defined as *"unwarranted or unwelcome behaviour, 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...."* (AO 2.11, para. 4.1). *"Mildly offensive comments or behaviour may not alone amount to harassment, but can be considered as harassment if they are repeated. Equally, a single incident can be so severe that it would adversely affect a staff member or the workplace and amount to harassment. It is a question of degree and perception."* (Para. 4.4). Supervisors *"bear added responsibility"* under this AO (para. 5.1). *"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 ... in a reasonable and constructive manner."* (Para. 4.5.2). The alleged harassment in this case occurred in the context of a performance appraisal that the Applicant unsuccessfully contested (*Ms G (supra)*).

88. As a general matter, as noted in *Haider*, Decision No. 43 [1999] V ADBAT Reports, para. 27, the Tribunal has expressed its view that a manager raising his voice in a meeting is not “in any way desirable or justifiable”, but misconduct had not been alleged in that case. Moreover, the “unwanted verbal behaviour” that formed the basis for a finding of misconduct in *Mr Y (supra)* was of a considerably more serious nature than what the Applicant has alleged in the current case. Taking into account the scope of review for the Tribunal as articulated in *Lindsey*, the Tribunal does not find a basis to conclude that the Supervisor raising his voice in the circumstances of the instant case constituted a demonstrated case of harassment within the meaning of AO 2.11. However, the Tribunal reaffirms its view that a supervisor raising his or her voice is not consistent with respectful dealings in the Bank.

The Transfer Request

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]*”.

Alleged Discrimination

90. In addition, the claim of discrimination has been put forward in rather vague terms involving professional and local staff, without further substantiation. The Tribunal concludes that this claim did not set out a prima facie case of discrimination and is not well-founded. The Investigators’ Report belies the Applicant’s contention that the investigators made light of any of the testimony they heard. As regards the Applicant’s further claims of abuse of authority, the Tribunal finds no basis for any such finding.

Conclusion

91. In conclusion, the Tribunal finds that:

1. procedures were followed significantly in relation to the authority to conduct the investigation and in relation to the denial of the Applicant's request for a transfer;
2. procedures were not respected in relation to two matters: the conduct of the investigation, as detailed, and meeting the standard of transparency in the application of relevant rules; and
3. the Respondent's decisions in relation to dismissing the Applicant's harassment complaint and denying her request for transfer were not decisions made in a way that was arbitrary, discriminatory or improperly motivated.

The defects in the application of procedure were not sufficient to warrant rescission of the contested decision.

Relief

92. In view of its conclusions, the Applicant's requests for the remedies of rescission of the contested decision, or specific performance in relation to a transfer, are denied.

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).

DECISION

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.

Lakshmi Swaminathan

/s/

President

Gillian Triggs

Shin-ichi Ago

/s/

Vice President

/s/

Member

Anne Trebilcock

Chris De Cooker

/s/

Member

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

At Asian Development Bank Headquarters, 19 August 2016