



World Bank Administrative Tribunal

2009

No. 407

**BE,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**BE,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, composed of Jan Paulsson, President, and Zia Mody and Francis M. Ssekandi, Judges. The Application was received on 15 May 2009.
2. The Applicant challenges the Bank's decision not to select her for a level GC Program Assistant position.

RELEVANT FACTS

3. The Applicant joined the Bank in 1988 as a Short-Term Temporary. She was appointed to a Regular position as a level 13 Secretary in the West Africa Department in 1990, and promoted to level 14 in 1993. In 1999, the Applicant's Team Assistant position was reclassified as an Information Assistant position, and she was promoted to level 15, which she considers to be equivalent to a current level GC position.
4. In 2000 the Bank declared the Applicant's position redundant. The Applicant successfully challenged the redundancy before the Appeals Committee. In its report of August 2001, the Appeals Committee recommended that the redundancy decision be rescinded; that the Applicant be reinstated immediately into the Office Support Rotational Program ("OSRP") for 36 months at the same level held by her prior to the redundancy with retroactive pay and benefits from the date of her redundancy; that a Human Resources ("HR") Manager or a Senior HR Officer be assigned to supervise the

Applicant's re-entry into the Bank Group and to ensure that HR staff members provide her with appropriate assistance, including periodic follow-ups, in seeking a permanent position; and that the Applicant be paid compensation in the amount of \$10,000, as well as costs.

5. In September 2001 the Bank informed the Applicant that it had accepted the recommendations of the Appeals Committee. The Bank accordingly reinstated the Applicant provisionally for 36 months in OSRP. According to the Applicant, she served as a level GC Information Assistant in OSRP.

6. While serving in OSRP, in February 2002 the Applicant filed an application with the Tribunal asserting that the Bank had not implemented the recommendations of the Appeals Committee. Her principal claim was directed at the fact the Bank had only reinstated her for a fixed period whereas before the redundancy she had held a Regular position. The Applicant sought rescission of the redundancy, enforcement of the Bank's promises to implement the Appeals Committee's recommendations, compensation of \$50,000 for moral damages, and \$10,000 as costs.

7. In August 2002, after the case was listed for the Tribunal's consideration, the Tribunal received a letter from the Bank stating that the Applicant "has been offered and has accepted an open-ended position with the Bank. ... As the gravamen of Applicant's claim is that her tenure with the Bank as a member of the Office Support Rotational Program (OSRP) was unduly limited to 36 months, it would appear that her acceptance of this appointment renders her claim moot."

8. In response, the Applicant acknowledged before the Tribunal that she had been "placed in a suitable regular staff position," and that she "agrees that her primary request

for relief, e.g. that the Tribunal enforce Respondent's decision to rescind her redundancy, is now a moot issue."

9. The Tribunal noted that the core element of the Applicant's claims, namely "that the redundancy decision be rescinded," had been satisfied. The Tribunal thus did not examine the Applicant's "claims for rescission and reinstatement." It did however examine the claims for moral damages and attorney's costs. It found that the Bank had abused its discretion in some minor respects and awarded the Applicant compensation in the amount of \$5,000, and \$2,500 as costs.

10. The Applicant continued working in OSRP while searching, without success, for a level GC Program Assistant position in the Administrative and Client Support ("ACS") Network. Unable to secure a permanent level GC position before the expiry of the 36-month period, the Applicant accepted a level GB position in a unit in the Africa Region.

11. The Applicant subsequently explored the prospects of promotion within that unit. In 2005 the Applicant was short-listed for a level GC position in the Latin America and Caribbean Region. These efforts were all unsuccessful.

12. From February 2006 to January 2008 the Applicant held a developmental assignment in the Africa Region PREM Front Office ("AFTP1"). Her current Application stems mainly from events that occurred while working in AFTP1.

13. On 26 July 2007 the Bank advertised a vacancy for a level GC Program Assistant position in AFTP1. The Applicant applied in August 2007. Steps were taken by HR to get the job posting period extended to give the Applicant, who was on leave at the time, the opportunity to apply for the position. Furthermore, HR encouraged the Sector Manager of AFTP1 ("Manager"), who was also the Applicant's supervisor, to give

serious consideration to the Applicant's candidacy in the selection process, noting that the Applicant had previously held a level GC position at the Bank and that it was in the Bank's interest to help her obtain a position at that level. A short-listing committee established to screen candidates to be interviewed for the position selected six candidates, including the Applicant, for the short-list. All six short-listed candidates were invited for interviews and five of them, including the Applicant, were interviewed by a six-member interview panel on 23 and 24 October 2007.

14. The Manager of AFTP1, who had joined this unit in September 2007, served as chair of the interview panel. By virtue of his position, the Manager was the Applicant's first-level supervisor. At the time the Manager joined AFTP1, the Applicant was under a great deal of stress due to issues in her personal life. The Manager became concerned and believed that she needed help and consulted a Senior HR Officer for guidance. The HR Officer suggested that they consult the Director of the Bank's Health Services Department ("HSD").

15. Sometime in October 2007 the Manager and the Senior HR Officer met with the Director of HSD to discuss the Applicant's situation. The Director advised them that the situation could warrant a fitness for duty assessment. The Director advised the Manager that a request for such an assessment would need to be made in writing and would need to highlight the link between the Applicant's emotional state and her work performance.

16. The Manager drafted an e-mail message addressed to the Director of HSD dated 8 November 2007 requesting a fitness for duty assessment. The Manager met with the Applicant and asked her to review his draft message. At the Applicant's request, a Staff Relations Officer of the Staff Association joined their meeting. During the meeting, the

Staff Relations Officer pointed out to the Manager that a fitness for duty assessment was only appropriate when there was a performance problem. The Manager told the Staff Relations Officer that he did not believe that there was a problem with the Applicant's performance. Accordingly, on the advice of the Staff Relations Officer, the Manager decided not to proceed with a fitness for duty assessment.

17. The Manager promised the Applicant and the Staff Relations Officer that the concerns he raised in his draft e-mail message to the Director of HSD regarding the Applicant would not be held against the Applicant in her ongoing quest for a level GC position in AFTP1.

18. The interview panel prepared a list of the top three candidates and ranked Ms. A as the top candidate. The Applicant did not make the list. The Bank then conducted a reference check of the top three candidates, which the Bank completed in November 2007. After the reference check, the Bank hired Ms. A.

19. On 5 December 2007 the Bank informed the Applicant and the other candidates that they had not been selected for the position. The Applicant believes that the Manager's concerns relating to the ramifications of her personal problems on her professional performance adversely affected her chances for getting the level GC Program Assistant position in AFTP1.

20. On 3 April 2008 the Applicant brought a challenge before the Appeals Committee against the Bank's decision not to select her for the level GC Program Assistant position in AFTP1. The Appeals Committee conducted a hearing and in its report of 19 November 2008 recommended that the Applicant's appeal be denied. By

letter of 18 December 2008 the Vice President of Human Resources advised the Applicant that the Bank had accepted the Committee's recommendation.

21. On 15 May 2009 the Applicant filed her Application with the Tribunal. In the Application she states that she is challenging the Bank's "decision not to select her for a Level GC Program Assistant position in AFTP1." She argues *inter alia* that the Bank's decision is arbitrary because the Manager was biased against her and the Manager did not recuse himself from the interview panel. She requests the following relief from the Tribunal: (a) reasonable assistance from the Bank for her promotion to level GC with upward salary adjustment considering the highest market reference point for her skills and experience; (b) moral damages "fairly calculated at three years' salary"; (c) payment of all legal fees and costs incurred as a result of bringing her appeal to the Appeals Committee and this Application to the Tribunal; (d) "World Bank Debt Forgiveness"; and (e) any other relief deemed fair and appropriate by the Tribunal.

22. In August 2009, after filing her Application with the Tribunal, the Bank informed the Applicant that she had been promoted to a level GC Program Assistant position effective 1 July 2009. On 18 September 2009 the Bank wrote to the Tribunal stating:

We have confirmed with the Human Resources Vice Presidency that Applicant was promoted with effect from July 1, 2009 to the position of Program Assistant, AFT, Level GC. Had we been aware of this at an earlier date, we would have so notified you.

In light of this development and taking into account the basis of Applicant's current appeal, namely, various allegations around not being selected for a level GC position for which she had applied, Respondent asks that the Administrative Tribunal give consideration to mooting Applicant's current appeal.

23. In response, on 21 September 2009 the Applicant wrote to the Tribunal that:

While the fact that Applicant finally has been restored to the GC level (with some, albeit minimal salary increase) may preclude the Tribunal's

ability to order specific relief i.e. “reasonable assistance from Respondent for her promotion to level GC”, it certainly does not render ... her legal claims moot.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

24. The Applicant is challenging the Bank’s decision “not to select her for a Level GC Program Assistant position.” The Bank claims that this challenge is now moot because the Bank has accorded her a level GC Program Assistant position effective 1 July 2009. The Applicant does not agree.

25. The Tribunal, like other judicial bodies, will not review a claim if the claim has become moot. Generally a claim is considered moot when, due to an event or happening, it no longer presents a justiciable controversy and judicial intervention is no longer necessary to grant effective remedy. International courts and tribunals follow a similar practice and refrain from reviewing a claim if the claim no longer has any object. As the International Court of Justice stated in *Nuclear Tests (New Zealand v. France)*, *Judgment, I.C.J. Reports 1974*, at pp. 476-477:

The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the final objective which the Applicant has maintained throughout has been achieved by other means. ...

Thus the Court concludes that, the dispute having disappeared, the claim advanced ... no longer has any object. It follows that any further finding would have no *raison d'être*. ...

Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

26. In reviewing the Applicant's first application, the Tribunal did not address the Applicant's "claims for rescission and reinstatement" because it found that both parties regarded these claims as "moot."

27. In the present Application, however, the Applicant does not agree that her claim of non-selection for a level GC Program Assistant position has become moot even though the Bank has accorded her such a position with effect from 1 July 2009. But she agrees that this new action of the Bank "may preclude the Tribunal's ability to order specific relief i.e. 'reasonable assistance from Respondent for her promotion to level GC.'"

28. The Tribunal finds that the primary object of the Applicant's challenge to the Bank's decision is to obtain a specific order from the Tribunal asking the Bank to promote her to a level GC Program Assistant position. Such an order would have been an effective remedy for any alleged violation of the Applicant's rights with respect to the Bank's decision not to select her for the position. However, by promoting the Applicant to level GC, the Bank has already satisfied the object of her Application. Accordingly, the Tribunal decides that it is not necessary to review alleged violations of the Applicant's rights caused by the Bank's decision not to select her for the advertised level GC position.

29. The Applicant insists that despite her promotion to a level GC Program Assistant position, she should be paid compensation for moral and financial injury. From the Applicant's pleadings it can be inferred that the basis of her claim for compensation is as follows. First, the Applicant's Manager improperly took actions to have her undergo a

fitness for duty assessment causing her “unnecessary personal stress.” Second, the Bank mismanaged her career.

30. The issue thus arises whether the Manager’s actions in this respect were so unreasonable that compensation is warranted. Staff Rule 6.07 (Health Program and Services), paragraph 3.03, states that:

Fitness for duty assessments may be requested when performance problems are believed to be health-related or when a staff member has been on sick leave for periods that are extended and/or recurring. A fitness for duty assessment will determine the presence and extent of any health-related impairment to perform assigned duties. Fitness for duty assessments are conducted by HSD at the request of a staff member’s manager or the Director, Health Services Department. As part of the fitness for duty assessment, HSD may request that an external physician conduct a health assessment of the staff member involved. If requested by a manager, a request for a fitness for duty assessment must be made in writing to the Director, Health Services Department, or a physician designated by him, stating the performance problems clearly, and describing the requirements of the position held by the staff member involved. The manager shall copy the staff member and the Manager, Human Resources Team.

31. Hence the Staff Rules allow a manager to consider proposing a fitness for duty assessment for a staff member. A manager has first-hand knowledge of the particular situation of his or her staff and, generally, is in a better position to determine whether the situation of a staff member warrants a fitness for duty assessment. A decision by a manager to request a fitness for duty assessment is important and must not be taken lightly. The Tribunal will overrule such a decision by the manager if it can be shown that the decision lacked a reasonable basis. *See Desthuis-Francis*, Decision No. 315 [2004].

32. It is undisputed that the Applicant’s Manager only explored the possibility of submitting her to a fitness for duty assessment. Ultimately the Manager decided against it. The question then is whether he had a reasonable basis for exploring the possibility of such an assessment for the Applicant.

33. The record demonstrates that he did. It is not necessary to recount the details here. In summary, the Manager became the Applicant's supervisor in September 2007 and observed that the Applicant was under an enormous amount of stress due to her personal issues. On multiple occasions the Applicant broke down in tears and made a number of distressing statements to the Manager and her colleagues. The Manager became concerned and believed that the Bank needed to help the Applicant and that a professional in the Bank should look into her situation. The Manager accordingly sought guidance from HR because he had not handled this type of situation before. The Manager then met with a Senior HR Officer who told the Manager that the Applicant had had similar emotional incidents at work in the past. The Senior HR Officer was concerned that the situation was serious and recommended that they consult the Director of HSD.

34. The Manager and the Senior HR Officer met with the Director of HSD, who advised them that the situation could warrant a fitness for duty assessment. The Director advised the Manager that a request for such an assessment would need to be made in writing and would need to highlight the link between the Applicant's emotional state and her work performance.

35. With the help of HR, the Manager drafted an e-mail message addressed to the Director of HSD dated 8 November 2007 requesting a fitness for duty assessment. In the draft message he wrote *inter alia* that: "I think the Bank needs to take very strong notice of the messages that [the Applicant] is giving us and make sure that the institution can support her and care for her well-being to the extent possible."

36. The Manager decided to share the draft of 8 November with the Applicant before sending it to the Director of HSD. The Manager met with the Applicant and asked her to review his draft message. At the Applicant's request, a Staff Relations Officer of the Staff Association joined their meeting. During the meeting the Staff Relations Officer pointed out to the Manager that a fitness for duty assessment was only appropriate when there was a performance problem. The Manager told the Staff Relations Officer that he did not believe that there was a problem with the Applicant's performance. Accordingly, on the advice of the Staff Relations Officer, the Manager decided not to proceed with a fitness for duty assessment.

37. After hearing the testimony of the Staff Relations Officer, the Senior HR Officer, and the Manager, the Appeals Committee found that the Manager "acted in good faith when he consulted HR and [the Director of HSD] regarding [the Applicant]."

38. Based on the record before it, the Tribunal concludes that the Manager had a *bona fide* and indeed sympathetic reason for taking an initiative, and that exploring such an assessment was not an act that merits criticism. Accordingly no compensation is warranted.

39. The Applicant further alleges that the Bank mismanaged her career. The Applicant submits that the Bank caused her financial injury resulting in her borrowing money from the Bank itself. In this regard, the Applicant explains her claim in the Application as follows:

Beginning with its improper redundancy of Applicant in 2000 from her level GC position, Respondent's inappropriate assistance to bring Applicant's career back on track following her redundancy, resulting in Applicant having to accept a level GB position just to protect her G4 visa status, and Respondent's continuous failure to address Applicant's career stagnation at that level (resulting in tremendous financial and personal

hardship), there can be no doubt that Respondent has mismanaged Applicant's career.

40. The Tribunal finds that the Applicant's complaints in this respect are directly related to the Bank's redundancy decision. The redundancy matters have already been addressed by the Tribunal in reviewing the Applicant's first application. The Applicant cannot litigate them again.

DECISION

For the reasons given above, the Tribunal dismisses all of the Applicant's claims.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 7 October 2009