

Decision No. 27

H. Patricia Broemser,  
Applicant  
v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal composed of E. Jiménez de Aréchaga, President, A. K. Abul-Magd and P. Weil, Vice Presidents, and R. A. Gorman, E. Lauterpacht and C. D. Onyeama, Members, has been seized of an application, received August 6, 1984, by H. Patricia Broemser against the International Bank for Reconstruction and Development. The Tribunal decided that oral proceedings for the purpose of hearing witnesses, as requested by the Applicant, were unnecessary and should not be ordered. After the usual exchange of pleadings, the case was listed on March 26, 1985. The Tribunal, after preliminary consideration of the case at its session in August 1985, addressed certain questions to the Respondent and directed that the Applicant should have an opportunity to comment on the Respondent's answers. The Respondent filed its answer on September 20, 1985 and the Applicant filed her comments on October 3, 1985.

The relevant facts:

2. On August 14, 1972 the Applicant commenced employment with the Respondent on a one year's fixed-term appointment as a Research Assistant, Level I, in the Special Projects Department (SPD). Prior to that she had served for a few months as a Consultant in SPD. She received a good interim evaluation and successfully completed her probationary period. However, her Annual Performance Report (APR) for the year ending August 13, 1973 contained both favorable and adverse comments: on the one hand, she was said to be conscientious and to show a responsible attitude, good judgment and knowledge of Bank administrative procedures; on the other hand, on the more mechanical assignments, her work was said to need checking and it was also said that "she will need to discipline herself to achieve a more reliable level of performance". One supervisor went so far as to note "an unfortunate attitude" on her part to some of her colleagues, to advert to one case of "outright vindictiveness which could have disrupted the section's work load" and to conclude that "technical ability notwithstanding, I would find it very difficult to work with (her) on future assignments". Her fixed-term appointment was extended for another year, to mid-August 1974. A further report in November 1973 by her Division Chief expressed reserve about her in-line supervisor's suggestion that she should be given professional responsibility but accepted the other favorable comments on her.

3. In March 1974 the Applicant transferred to the Operations Evaluation Department (OED). In her first Performance Review Report (PRR) in this position her next-in-line supervisor classified her as "fully competent in all respects". The Director of her department was more cautious, stating that "the real test of her long-term future in the Department will come as she gets into the work of performance audits of individual projects". In February, 1975, she expressed unhappiness to a member of the Personnel Management Department (PMD) regarding what she saw as her limited chance of advancement and asked about the possibility of transfer to another position in the Bank. The member of PMD said he would assist her to meet some members of Central Projects Staff (CPS) and Development Policy Staff (DPS) from whom she could get some further information with regard to opportunities in other departments and divisions. Nonetheless, her fixed-term appointment in OED was converted to a regular one effective May 1, 1975.

4. Her in-line supervisor's comment on her PRR for the period August, 1974 to August, 1975 noted that she did not always meet deadlines and that the quality of her coverage of subjects was sometimes good and sometimes weak. He observed, however, that she had worked on audit assignments which made demands beyond the usual level put on research assistants and that her work was improving. He concluded that he

"could not recommend promotion until these improvements appear, though suggesting that her supervisor was "probably a bit too harsh", observed that a continuation of the relationship between the two "will not be the best for either of them" and adverted to the possibility that she might move elsewhere in the Bank "a possibility that we have discussed with her since many months ago". On October 14, 1975 shortly before these reports the Applicant had informed an officer in PMD that she had been told by her Department that "they were not too happy with her work" and she had concluded "that there was not much prospect left for her in the Department". She said she felt frustrated by her assignment in OED.

5. The year following was spent partly in the Agriculture section and later in the Management Policy section of OED. In her Anniversary Evaluation, written in December 1976, the Applicant expressed enjoyment of the work on the procurement study, preferring it to the writing of audits, and said she would enjoy continuing the type of work she was doing. Her supervisor's comments were generally restrained; "generally satisfactory", "acceptable", "good with colleagues", "average". But he still saw her as someone he was prepared to recommend for promotion "on a six-months trial basis". Her next-in-line supervisor spoke of being "both pleased and unsatisfied with her work" but concluded that her promotion should be considered only when the procurement study was completed in the coming year. The views of the new Director of the Department who assumed that position in 1976 were more adverse: her studies "while ... good as far as they go ... are not entirely distinguished for maturity of judgment or intellectual content that one would expect from someone ready for promotion to the professional level ... I do not foresee a promotion for her in this Department in the near future. Perhaps she should be encouraged to seek an opportunity elsewhere in the Bank."

6. Subsequently, in March 1977, the Applicant complained to PMD that the new Director had assumed charge of the Department too late to make a fair evaluation and that the August evaluation should have been made by the former Director. In consequence the former Director was asked to comment and he wrote: "I feel certain that the Bank is a sufficiently responsive employer to give appropriate recognition whenever her performance will be characterized, on a sustained basis and to common agreement, in words much warmer than the "acceptable", "satisfactory" and "average" covering this APR."

7. The next Anniversary Evaluation Report (AER), covering August 1976 to August 1977 and prepared in October 1977, was less favorable to the applicant. Her in-line supervisor stated that quantity was "below expectation". While he assessed quality to be "good", he stated that she needed "careful supervision" and that her work relationships were no more than "acceptable". "The problem is not so much with the quality of her work as with her attitude and approach ... there continues to be scope for more commitment to work, keener sense of responsibility and greater output". Her absences were also criticized. Her Director accepted these comments and stated that even if her output had been more consistent than indicated, he would not consider her suitable for promotion. He noted that he had read his comments to the Applicant. She received a below-norm merit increase for 1977.

8. In August 1978 the Applicant was asked to see her Personnel Officer. He pointed out that a promotion in the immediate future was out of the question and discussed with her assignment out of OED. She said she would look into possibilities and he said that he would keep his eye open for suitable vacancies and add her name to lists of candidates. He alerted her to the possibility that her attendance record could "mitigate (sic) against her possibility of reassignment" and suggested that she should also consider seeking employment outside the Bank.

9. The mixed character of the 1976-77 comments also marked the Applicant's AER for the period August 1977 to July 1978 (prepared in August-September 1978): output varies; attendance has improved markedly; can produce thoughtful and methodical work when her interest is aroused; needs prodding about deadlines; outgoing and cheerful in work relationships; not very content in Department; wants change. All her supervisors were agreed in believing that she urgently needed a change before she would be able consistently to perform well. She once again received a below-norm merit increase.

10. The AER for August 1978-July 1979 (prepared in December 1979-January 1980) recorded some improvement, though her in-line supervisor stressed that "she has to produce consistently and without frequent

prodding if she is to fully satisfy her supervisors". Again she was given a below-norm merit increase for 1979.

11. In February 1980 PMD explained in a meeting with the Applicant the reasons why she had not received a norm increase. Reassignment was also discussed. The Applicant said that she had been informally exploring with colleagues the possibility of reassignment. PMD warned her that in view of documented weaknesses in the file, reassignment would not be easy, but said that it would investigate the possibility of OED financing a trial assignment in another department - a course to which OED subsequently agreed.

12. On May 15, 1980 the Applicant again met her Personnel Officer in the presence of the Acting Director of OED with a view to concluding the arrangements for moving her to the East Africa Projects Department (EAPD). The PMD representative's record of the meeting noted that he had emphasized the importance of the assignment "since we had failed to identify a suitable assignment for her (the Applicant) over the last two years". The Applicant pressed, however, for a postponement of a decision till she had completed the exploration of other alternatives within the Bank. It was subsequently agreed that the Applicant could defer her decision till the end of the first week in June. She was warned incidentally that OED was not prepared to keep her any longer in view of her below par performance reflected in her past two years' merit increases and that the possibility of her parting ways with the Bank might become reality. On May 30, the day after receiving PMD's memorandum of the discussion, the Applicant objected to the terms of the proposed transfer to EAPD and, in particular, to what she regarded as being tantamount to being put on probation for one year. She also said that she had never previously been informed by anyone in OED or PMD that OED was not prepared to keep her any longer.

13. On September 1, 1980 the Applicant was transferred to the Eastern Africa Projects Northern Agricultural Division (EAPNA). The conditions of the transfer were set out in a memorandum from PMD to EAPD of October 8, 1980, a copy of which was sent to the Applicant. There was to be a trial period of six months. The Division would not be required to retain her if at the end of 12 months her performance was judged unsatisfactory. The Division was also to prepare specific terms of reference and a work programme for the Applicant. This took the form of a memorandum from the Chief of EAPNA to the Applicant dated October 22. This memorandum was cleared with the Applicant and a copy was sent to her. The Division Chief welcomed the Applicant and said that all were anxious to make her stay in the Division a success.

14. Her last AER, covering her final period of work in OED from August 1979 to July 1980, was produced in December 1980-January 1981. Her in-line supervisor for the first five months of that period wrote of her "continuing erratic performance". The acting head of the Policy Review Unit, writing of the period January to July 1980, said that she produced very little, was frequently absent and apparently lacked motivation; she appeared unable to apply herself sufficiently to the work given to her. Her Director wrote that her performance "had been consistently inadequate for a number of years". For the year 1980 she once again received a below-norm merit increase.

15. At the end of the Applicant's first six months in her new assignment, the Division Chief of EAPNA reported to PMD (on May 8, 1981) that the Applicant had had to contend with personal problems, lacked self-motivation, had shown evidence of poor timekeeping and left her colleagues feeling that she could be more committed to the tasks on hand. As against this, however, she had been willing to assist in a variety of work, had a good knowledge of projects, a useful editorial capability and an open and friendly nature. A copy of this evaluation was sent to the Applicant.

16. On September 2, 1981 a meeting took place between PMD, the Applicant and her Division Chief at which the Division Chief stated his criticisms of the Applicant and the Applicant gave her replies to those criticisms. As the Division Chief maintained his conclusion that the Applicant was not suitable, it was agreed, after discussing various options, that the Applicant would be kept on EAPNA's budget till the end of 1981, though she would not continue to work in that Division. If after three months an assignment did not materialize, she would be asked to resign since, as noted in the PMD memorandum to files, "sufficient warnings and opportunity have been given to Mrs. Broemser, both in her assignment in OED and Eastern Africa Projects". Copies of this memorandum were sent to, and cleared with, the Applicant and her Division Chief.

17. The meeting was followed on the next day, September 3, 1981, by a memorandum from the Division Chief, EAPNA, to the Applicant setting out in detail the basis on which he had concluded that her "overall performance during the last year has not been satisfactory": output was limited by some lack of commitment; work was not delivered on time; quality was disappointing; time-keeping was poor and there were above-average extended and unexplained absences. Accordingly, the Director asked PMD to assume responsibility for the administration of the Applicant.

18. On September 28, 1981, the Applicant began work in the Monitoring and Evaluation Unit, AGR, as an interim measure. No other assignment for the Applicant having been found by December 31, she was placed on special leave till March 1982 and this was later extended to July 30, 1982.

19. Further discussions took place between the Applicant and her Personnel Officer in December 1981 and January 1982. The Applicant then contacted the Bank's Ombudsman who raised one particular aspect of the matter with PMD and this was satisfactorily resolved. On May 24, 1982, the Applicant was advised that her active service with the Bank had ended on December 31, 1981 and on June 3, 1982 she was given oral notice that her employment with the Bank would terminate effective from close of business on July 30, 1982. Written notice to this effect was given on June 7, 1982.

20. A series of administrative remedies were pursued and exhausted by the Applicant. In response to the Applicant's letter of October 27, 1983 the Director, PMD, informed the Applicant on November 15, 1983 that he saw no reason to reverse the decision to terminate her employment with the Bank. On December 15, 1983 the Applicant filed an appeal with the Appeals Committee against the decision of the Director, PMD. In its Report of May 1, 1984 the Appeals Committee rejected her appeal, finding that the Respondent's decision to terminate the Applicant's employment was not arbitrary or unfair and that she had been given every opportunity to rectify her performance record. By letter of May 7, 1984 the Vice President, Personnel and Administration (PA) informed the Applicant that he accepted the recommendation of the Appeals Committee that the decision to terminate her employment be upheld.

#### The Applicant's main contentions:

21. The Tribunal must determine whether the decision to terminate the Applicant's employment with the Bank was reached in accordance with appropriate standards of justice and was not arbitrary, discriminatory, improperly motivated, carried out in violation of a fair or reasonable procedure or was based on erroneous facts.

22. The evaluations of the Applicant's performance made by the Director, OED, were improperly motivated. From 1972 to 1976 the Applicant received above average or exceptional performance ratings. Within a period of six months after the Director, OED, took up his position as Director her performance rating plummeted. This could be explained only on the basis of bias.

23. The unreasonable delay and the lack of action on the part of PMD in locating acceptable alternative assignments for the Applicant within the Bank constituted irregular procedure in violation of fair and reasonable employment practices and standards, and amounted to a denial of due process. For a period of nearly four years after her transfer from OED was recommended nothing was done to arrange interviews for the Applicant with any other department. Finally, she was given a "take it or leave it" option to transfer to EAPNA to which she objected.

24. The decision not to keep the Applicant in EAPNA, which led to the termination of her employment, was based on improper motivation and erroneous facts and was carried out in violation of fair and reasonable personnel procedures. First, the Division Chief of EAPNA was influenced by the bias which had existed against the Applicant in OED. Second, the Division Chief was not afforded proper written input from the Applicant's in-line supervisors, as required by the Respondent's personnel policy (Personnel Manual Statement (PMS) No. 4.01. Annex B); nor did he use the proper form for the Applicant's evaluation. Third, while problems had been

encountered in regard to the Applicant's performance, she was not put on notice that she would be separated from EAPNA within six months of her penultimate evaluation or that her employment would ultimately be terminated.

25. The Applicant seeks rescission of the decision to terminate her employment and reinstatement in the position of Research Assistant, Level I, in which she was at the time her employment was terminated. She also seeks:

- (a) restitution in the form of back wages due from July 31, 1982 to the present, which amounts approximately to \$80,566.50;
- (b) restitution for amounts to be determined appropriate in connection with the Respondent's contribution to the Applicant's employee pension plan;
- (c) restitution in the amount of \$1,800 representing private medical insurance premiums paid by the Applicant since the termination of her employment;
- (d) additional compensation in the amount of \$10,000 for emotional and mental pain and suffering resulting from the termination of the Applicant's employment and injury to her career;
- (e) costs; and
- (f) expurgation of unfavorable personnel records, including evaluations, recommendations and decisions, found to be flawed by irregular and extraneous motives, procedural irregularity or unreasonable conclusions or to be based on omitted or erroneous facts.

The Respondent's main contentions:

26. The record does not support the Applicant's contention that the Director, OED, was prejudiced against her. Before and after 1976, under several different supervisors, the Applicant's AERs had consistently reflected uneven performance, unreliability and differing perceptions of her capabilities between herself and her managers.

27. There was no "denial of due process" in the alleged lack of action on the part of PMD in locating the Applicant an alternative assignment. Although PMD had a general responsibility for providing assistance in finding new assignments for staff with performance problems, when in PMD's judgment such staff might perform better in new assignments, PMD did not guarantee an alternative position. The Applicant's employment history made reassignment a difficult task. Nevertheless, after PMD and the Applicant tried to find an alternative assignment, by May 1980 PMD was able to arrange a reassignment for the Applicant.

28. The Applicant's complaints that it was unusual and improper for a long-term employee to be given a trial assignment, and that the Division Chief's decision to separate her from EAPNA was improperly motivated, based on erroneous facts and unfair, are not substantiated by the record. Reassignment on a trial basis is normal for a staff member with performance problems. The Division Chief's evaluations of the Applicant were not carried out solely by him but represented the views of others with whom the Applicant worked. The use of a memorandum of evaluation rather than the standard AER was not detrimental to the Applicant, as the substance would have remained the same in either format.

29. With respect to the contention as to lack of notice, the Applicant was on notice as early as June 1980 that lack of success in her new assignment would lead to separation. The Applicant was also notified as early as October 1980 that EAPNA would not be obliged to keep her, if it judged her performance unsatisfactory at the end of the year's trial. The Division Chief's interim evaluation of May 1981 also put her on notice of performance difficulties.

30. There was no evidence of an abuse of discretion by the Respondent as a result of arbitrariness, discrimination, improper motivation or violation of a fair and reasonable procedure in the determination by the Respondent that the Applicant's performance was unsatisfactory. Hence, that determination was proper and cannot be set aside.



### Considerations:

31. The essence of the present case is a challenge by the Applicant to the validity of the decision terminating her employment with the Bank. That the Bank has the power to terminate a staff member's employment for unsatisfactory performance there is no doubt. The exercise of this power is a matter within the Bank's discretion and its appraisal in this respect is final unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. (See Saberi, Decision No. 5 [1981], para. 24; Suntharalingam, Decision No. 6 [1981], para. 27.)

32. The Applicant contends, first, that the evaluations of her performance in December 1976 by the then Director, OED, were improperly motivated. The Applicant produces no direct evidence for the allegation of improper motivation. Instead she maintains that improper bias must be inferred from the fact "that a previously competent and reliable employee would suddenly and inexplicably become a burden to her department after a change of director". However, this inference cannot be substantiated. The Director in question did not become director of her Department until 1976. But even by that time, though the Applicant had achieved some positive comments in her evaluations, she had also accumulated a number of negative ones. Even in her first APR in August 1973 the variations in the level of her performance had been noted, as had the need for self discipline, as well as an episode of vindictiveness. One of her supervisors had gone so far as to say that he would find it very difficult to work with her in future assignments. In November 1974 her Division Chief had indicated some doubt about her performance by stating that the real test was yet to come. Again there are remarks in her PPR for 1975 regarding the unevenness of her performance in terms of both quantity and quality of work. Her in-line supervisor said that he could not recommend promotion until improvements in her performance appeared, while her Director himself referred to the possibility of her transfer. When she saw her Personnel Officer in October 1975, he noted that the Applicant told him that her Department was not too happy with her work". Even the comments of her other supervisors in the AER for 1976 were mixed, leading to the comment by her previous Director, when asked to complete the picture, that in effect he would not have recommended her for promotion until her performance was "characterized, on a sustained basis and to common agreement, in words much warmer than the 'acceptable', 'satisfactory' and 'average' covering this APR".

33. In short, the Tribunal is unable to find support for the Applicant's contention that she was "a previously competent and reliable employee" or that she had "suddenly" become a burden to her department in such a way as to lead to any inference of bias by the Director against her or improper motivation on his part. It is, therefore, not strictly necessary, though it is pertinent, to add that whatever the views of her Director in 1976 may have been, they were by no means the only or the most determinant ones which led to her eventual termination.

34. The Applicant maintains, second, that there was "unreasonable delay and lack of action on the part of the Personnel Department in locating acceptable alternative assignments" for her and that this constitutes "irregular procedure in violation of fair and reasonable employment standards and practices and amounted to a denial of due process". The Tribunal cannot accept this contention. For one thing, there is no absolute duty upon the administration to reassign a staff member (see Saberi, Decision No. 5 [1981], para. 27). For another, the record indicates that certainly in the two years before May 1980 PMD had been watching out for a suitable opening to meet the Applicant's wish for a transfer and had been unable to identify a suitable assignment. Finally, in May 1980 PMD succeeded in finding an opening for the Applicant in EAPD and strongly urged her to take this opportunity on a trial basis.

35. The Applicant contends, third, that the decision of the Division Chief of EAPNA to separate her from that division was based on improper motivation and erroneous facts and was carried out in violation of fair and reasonable personnel procedures. Her first specific complaint is that the Division Chief arranged that her retention in his division be conditioned on a period of twelve months' satisfactory performance. In pressing this argument the Applicant does not take into account the fact that over three months before she took up her assignment in EAPNA the conditions of the move were discussed with her and she accepted them.

36. The Applicant's second complaint in this connection is that her Division Chief evaluated all her work entirely by himself and without the benefit of written input from her in-line supervisor. It is a fact that the Division Chief assumed personal responsibility for the Applicant's progress and that he so informed her near the beginning of her work in EAPNA. He had periodic informal discussion with her about her progress. At their meeting in April 1981, after the Applicant's first six months in the division, he told the Applicant that his comments also took carefully into account the views of others with whom she had been working. Likewise, the Division Chief declared in his final Memorandum to the Applicant of September 3, 1981 that it was written "after careful consideration and consultation with other concerned staff".

37. The Tribunal has thought it right to ask the Bank why the Division Chief's evaluation was prepared in this manner rather than in accordance with the standard procedure in which the staff member's immediate and next-in-line supervisors would also have participated in written form over their signature. The Bank has replied as follows:

.... it is the norm where staff with performance problems undertake a reassignment on a trial basis for detailed and specific terms of reference to be set out in memorandum form at the outset of any such assignment and it is also the norm for evaluations against these terms of reference to be prepared in memorandum form by that person taking principal responsibility for overseeing the staff member's progress. It is further the norm for that person preparing the evaluative memoranda to consult during the course of preparation with others who have worked with the staff member being evaluated. Thus these memoranda generally represent a collective judgment. These procedures are considered more appropriate in situations like Applicant's, where closer and more frequent supervision is required than is generally required for the Anniversary Evaluation Review.

The Applicant's comment on this answer was that it appears to be the Bank's 'norm' "to disregard normal (standard) Bank personnel procedures in situations where it may be of utmost importance in terms of fairness and equity that normal procedural safeguards are observed". The Applicant went on to observe that if, as claimed by the Bank, the memorandum represented a collective judgment, "why not use the standard evaluation form for the purpose for which it was designed, i.e., to have clearly on record written input from all the parties concerned, including the persons on trial?"

38. The Tribunal has also asked the Bank whether there exists any record of any assessments of the Applicant's performance made by the Applicant's immediate and next-in-line supervisors individually for the relevant period. The Bank has replied that the Division Chief "himself directly assumed responsibility for Applicant's progress during the trial assignment" and "functioned as Applicant's immediate supervisor during the trial assignment". According to the Bank's reply, the Division Chief has not been able to trace any written assessment made by him as the Applicant's immediate supervisor to the next-in-line supervisor, but he recalls having had extended discussions with the next-in-line supervisor as well as soliciting orally the views of three other named persons who worked with the Applicant. The Applicant has commented that the reference to two of these three named persons is "mystifying if not misleading," since two of them did not work with her during the period in question. The Applicant accepted that the third person had worked with her, saying that she considered him "to be more her immediate supervisor than the Division Chief."

39. The Tribunal must observe that the Bank is bound to adhere to established procedures and that in the present case the procedure followed by the Bank represents not only a clear deviation from the Staff Evaluation Procedure in PMS 4.01 but is also a form of practice which has not been embodied in any staff rule or otherwise made a matter of public record. There is therefore some justification for the Applicant's complaints. Nonetheless, the question remains whether this formal deviation can be considered as having done the Applicant any material injustice by, for example, leading to an erroneous assessment of the Applicant's performance. The Tribunal considers, having regard to the Applicant's record of performance read as a whole, including her final AER from OED, that the form of the final assessment and the manner in which it was established do not have the effect of vitiating the Respondent's exercise of discretion. Nor does the Tribunal accept that the Applicant can complain that she had not been given sufficient warning of her exposure to the risk of termination for unsatisfactory performance.

40. There have been a number of cases in which the Tribunal, though finding that there has been a procedural irregularity in the Bank's treatment of a staff member, has concluded that rescission of the decision contested or specific performance of the obligation invoked was not a remedy appropriate to the injury done. (See Skandera, Decision No. 2 [1981], para. 29; Buranavanichkit, Decision No. 7 [1982], para. 30; Durrant-Bell, Decision No. 24 [1985], para. 36.) Instead, the Tribunal has ordered the payment to the staff member of compensation for the intangible injury thus suffered. In the circumstances of the present case, the Tribunal will order the payment to the Applicant of compensation equitably assessed at three months' net base salary.

Decision:

For these reasons the Tribunal unanimously decides:

- (1) that the Respondent shall pay the Applicant a sum equal to three months' net base salary; and
- (2) that the application is otherwise rejected.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga  
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe  
Executive Secretary

At Washington, D.C., October 25, 1985