World Bank Administrative Tribunal

2017

Decision No. 576

DP (No. 2),
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

World Bank Administrative Tribunal
Office of the Executive Secretary

DP (No. 2),
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, and composed of Judges Mónica Pinto (Vice-President), Ahmed El-Kosheri, Mahnoush Arsanjani, and Andrew Burgess.

2. The Application was received on 23 May 2017. The Applicant was represented by Jozsef Kobli. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency.

3. Invoking Article XIII of the Tribunal's Statute, the Applicant seeks revision of *DP*, Decision No. 547 [2016].

4. On 17 July 2017, the Bank submitted a preliminary objection contesting the admissibility of the Application.

FACTUAL BACKGROUND

5. The Applicant joined the Bank in July 1993 as an Advisor to an Executive Director. Following several appointments, in 2010 she was transferred to the Global Facility for Disaster Reduction and Recovery, where she was a Senior Disaster Management Specialist.

6. On 21 November 2014, the Applicant submitted a Request for Review to Peer Review Services (PRS), challenging her 2014 Overall Performance Evaluation (OPE). In its report issued on 4 June 2015, the PRS Panel found that "management provided a reasonable and observable basis for the 2014 OPE and the subsequent performance rating." However, the PRS Panel found that management had not followed the applicable procedures for the OPE process and

recommended the payment of one month's net salary to the Applicant as compensation. The Group Vice President and Special Envoy, Climate Change, accepted the PRS Panel's recommendation.

7. The Applicant was not satisfied with this outcome and filed an application with the Tribunal on 1 October 2015. In her application, the Applicant challenged "her 2014 Overall Performance Evaluation (OPE) and performance rating." The Applicant also sought redress for: (i) harassment and retaliation by Mr. A, her former Track Team Leader, and Mr. B, her Manager; (ii) the failure of the Office of Ethics and Business Conduct (EBC) to investigate her various misconduct complaints against Mr. A and Mr. B; and (iii) EBC's investigation and findings against the Applicant in a case filed by Mr. A.

8. In addition to requesting financial compensation, the Applicant sought the following relief from the Tribunal: (i) removal of the 2014 OPE from her files; (ii) change of her 2014 performance rating from 2 to at least 3; (iii) written guarantee that if she returns to work, she will be given an appropriate position away from the supervision of Mr. A and Mr. B; (iv) removal of all records of EBC Case No. 2014-2542 from her files, including the destruction of the EBC report; and (v) an order for EBC to conduct serious and complete investigations of her complaints against Mr. A and Mr. B.

9. On 4 November 2016, the Tribunal rendered its judgment in *DP*, Decision No. 547 [2016]. The Tribunal concluded that the Applicant's 2014 OPE process was tainted by procedural irregularities and failed to comply with the requirements for a fair procedure. In addition, the Tribunal found that the EBC investigation was flawed and its conclusions were not supported by the evidence. Thus, it ordered the Bank to pay the Applicant three months' salary, net of taxes, for procedural irregularities in the Applicant's 2014 OPE process, and three months' salary, net of taxes, for flaws in connection with EBC Case No. 2014-2542, as compensation, and to remove all records of EBC Case No. 2014-2452 from the Applicant's personnel file. However, the Tribunal found that the Applicant's 2014 OPE and performance rating were not arbitrary, unfair, or unbalanced, that the Applicant had not substantiated her allegations of harassment or made a *prima facie* case that she was the subject of discrimination or retaliation, and that EBC had conducted a proper initial review of the Applicant's complaints and correctly decided to close the case.

10. In her Application of 23 May 2017, the Applicant requested a revision of Decision No. 547 on the grounds of Article XIII(1) of the Tribunal's Statute, namely, that the Bank had engaged in bad faith litigation practices during the proceedings before the Tribunal. She claims that the external feedback on her 2014 OPE was never presented to her or the Tribunal and that the Bank refused to produce the Talent Reviews of 2012 and 2013.

11. On 17 July 2017, the Bank filed a preliminary objection.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Bank's Contentions

The Application does not satisfy the criteria in Article XIII of the Tribunal's Statute

12. The Bank contends that the Applicant has not met the conditions set out in Article XIII(1). According to the Bank, the Applicant's claims "relate to and are based on facts that have been addressed by the Tribunal in its previous Decision No. 547, including the Applicant's 2014 performance rating, and harassment and retaliation claims."

13. The Bank argues that the Applicant seeks to obtain a different result from Decision No. 547, based on the same facts presented in that case, and notes that the annexes to the Application are the same documents that were presented to the Tribunal in Case 15/20, which resulted in Decision No. 547.

14. The Bank also argues that the Applicant does not present any recently discovered facts or evidence that would justify revising Decision No. 547. Rather, the Bank claims that the Applicant repeats most of the arguments already made in Case 15/20, with the additional, new claim of "bad faith litigation practice of the Bank's Legal Department." Therefore, her claims are precluded by the principle of *res judicata*.

15. The Bank notes that the 2012 and 2013 Talent Review documents were part of the evidence on which the Tribunal based its decision and that these documents did not have a decisive influence on the case.

16. The Bank also contends that the Applicant has failed to submit the request for revision within the six-month period required by Article XIII(1) of the Statute. It claims that the decision was dated 4 November 2016 and transmitted to the parties on 18 November 2016 so the Applicant had until 4 or 18 May 2017 to file a request for revision. Instead, the Tribunal received the request for revision on 23 May 2017.

The Applicant's Response

This is a proper Article XIII claim to review Decision No. 547

17. The Applicant states that her intention is not to relitigate Case 15/20, which resulted in a favorable outcome for her. She argues that although the PRS Panel and the Tribunal found due process violations in the OPE process, her performance rating was not set aside or rescinded "due to the bad faith litigation practices of the Respondent."

18. The Applicant argues that these bad faith litigation practices individually and in total constitute "decisive fact[s] to be considered." She cites, as examples of such practices by the Bank:

- Withholding external feedbacks and supplanting them by post hoc statements;
- Withholding Talent Reviews of 2012 and 2013 to cover up the role of the Reviewing Manager in the OPE process;
- Grossly misrepresenting the facts and attempt[ing] to mislead this Tribunal by submitting statements hiding that the authors belonged to the 'Old Boys' club, and claiming that the biased statements were submitted 'verbally' at the time of the OPE meeting, when, in fact, they were not[;]
- Submitting a 'Senior Manager' statement full of false assertions and frivolous charges five months later of the OPE meeting;
- Submitting totally falsified Supervisor's statement post hoc, and claiming that change of Supervisor was right away after [the Applicant] filed a harassment complaint, when, in fact, the replacement never happened;
- Condoning managerial misconduct and vigilante conduct citing false justification for the abuse of managerial authority. Moreover, supporting flagrant violations of the Staff Rules privacy considerations;

- As World Bank Group staff members violated Staff Rule 9.01 and 9.02 not being truthful and disregarding the duty of cooperation.

19. The Applicant contends that she submitted her request for revision in time because it was delivered to and accepted by the Tribunal on 22 May 2017 at 9:54 a.m., which is six months after she received Decision No. 547 by email on 21 November 2016 at 6:10 p.m. Moreover, the Applicant states that the request for revision is dated 19 May 2017 and was posted on the same day. Since the Tribunal's Filing Instructions state that the date of the filing of an application is the date on which an application is posted, not the date on which it is received by the Executive Secretary, the Applicant argues that her filing is timely.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

20. Article XI of the Tribunal's Statute provides: "Judgments shall be final and without appeal." In *van Gent (No. 2)*, Decision No. 13 [1983], para. 21, the Tribunal stated:

> Article XI lays down the general principle of the finality of all judgments of the Tribunal. It explicitly stipulates that judgments shall be "final and without appeal." No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff.

21. The Tribunal has also stated: "This rule of finality of the Tribunal's judgments is essential to the operation of the Bank's internal justice system. Once the Tribunal has spoken, that must end the matter; no one must be allowed to look back to search for grounds for further litigation." *Mpoy-Kamulayi (No. 7)*, Decision No. 477 [2013], para. 27.

22. The sole exception to the principle of finality is in Article XIII(1) of the Statute, which provides:

> A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period

> of six months after that party acquired knowledge of such fact, to revise the judgment.

23. However, the Tribunal has stated that "the powers of revision of a judgment are strictly limited and may be exercised only upon compliance with the conditions set forth in Article XIII." *Skandera*, Decision No. 9 [1982], para. 7. In *Kwakwa (No. 2)*, Decision No. 350 [2006], paras. 18-19, the Tribunal held:

> In this light, the character of Article XIII as a very limited exception should be obvious. Its requirements are not fulfilled unless the Tribunal is satisfied that newly discovered facts are potentially decisive. It is difficult to define in a phrase the nature of factual revelations which might justify the disruption of a *res judicata*; it is a matter to be determined in the particular circumstances of each case. If it were left to any disappointed litigant to assess the relevance and decisiveness of subsequently discovered facts, the ingenuity of pleaders would ensure that few, if any, judgments would ever be final. Unless some restrictive principle fulfills a rigorous screening function, the availability of revision would subvert a fundamental rule of tribunals such as this one: namely that its judgments are definitive. To ensure that Article XIII does not wreak havoc with the rule of finality, enshrined in Article XI, the former must be recognized as available only in exceptional circumstances. The "new fact" must shake the very foundations of the Tribunal's persuasion; "if we had known that," the judges must say, "we might have reached the opposite result."

24. Where an applicant raises claims that are related to and based on facts that have been addressed by the Tribunal in a previous judgment in the applicant's case, it is clear that such claims are not receivable under the principle of *res judicata*. *See DH*, Decision No. 531 [2016], para. 67.

25. The present Application must be viewed in light of these fundamental statutory rules and related jurisprudence.

WHETHER THE APPLICANT HAS MET THE CRITERIA SET OUT IN ARTICLE XIII

26. The Tribunal will now assess whether the Applicant has satisfied the criteria for revision set out in Article XIII of the Tribunal's Statute.

27. Article XIII(2) provides that a request for revision must "contain the information necessary to show that the conditions laid down in paragraph 1 of this Article have been complied with." The requisite conditions laid down in paragraph 1 are:

a. Discovery of a fact which was unknown to both the Tribunal and the party seeking revision at the time the judgment was delivered;

b. The fact must be such that it "might have had a decisive influence on the judgment of the Tribunal"; and

c. The request for revision must be submitted within a period of six months after discovery of said fact.

28. In support of her contentions, the Applicant submits that the Bank engaged in bad faith litigation practices during the proceedings before the Tribunal in Case 15/20, including withholding documentation regarding the external feedback on her 2014 OPE and Talent Reviews from 2012 and 2013.

29. The record indicates that the Bank produced the 2012 and 2013 Talent Reviews to the Tribunal and they were reviewed by the Tribunal *in camera*. *See DP*, para. 7. Hence, these documents do not constitute facts that were unknown to the Tribunal at the time the judgment was delivered. As well, the Tribunal recognized in its judgment that "the feedback from external providers about [the Applicant's] performance on these tasks was positive" and that "feedback providers also recognized her commitment to her work and her timely delivery, notwithstanding personal issues." *See DP*, para. 76. When examining whether the Applicant's 2014 OPE was arbitrary, unfair, or unbalanced, the Tribunal accepted that the Applicant had received positive feedback from external providers. *See Id*. The Tribunal finds that neither the 2012 and 2013 Talent Reviews nor the external feedback constitutes new facts under Article XIII(1).

30. The Tribunal further finds that the Applicant's examples of the Bank's bad faith litigation practices relate to issues that have been addressed by the Tribunal in its judgment. Specifically, the Tribunal recognized the *post hoc* nature of several feedback providers' comments and held that "the Tribunal may still have regard to their substance in the absence of any suggestion or evidence that they have been falsely created or that there was collusion […]." *DP*, para. 83. The Applicant

challenges the truthfulness and motives of various feedback providers as examples of bad faith litigation that would justify a revision of the judgment. The record, however, shows that the Tribunal had regard to the credibility of the feedback providers and examined the record for contemporaneous or corroborative evidence that supported the Tribunal's finding that the Applicant's OPE was not arbitrary, unfair, or unbalanced. *See DP*, paras. 84 and 88.

31. With respect to the Applicant's allegations of bias of certain feedback providers, she had the opportunity to raise this issue and present evidence in support of her allegations during the proceedings. She did not. The Tribunal noted in its judgment "the absence of any suggestion or evidence that they [i.e., the feedback providers' comments] have been falsely created or that there was collusion […]." *DP*, para. 83. The Tribunal will not entertain any attempt by the Applicant to raise unfounded allegations of bias in a request for revision.

32. Nor does the Tribunal consider the Applicant's allegations of "condoning managerial misconduct and vigilante misconduct […] supporting flagrant violations of the Staff Rules privacy considerations" or "not being truthful and disregarding the duty of cooperation" to constitute new facts that might have had a decisive influence on the judgment of the Tribunal.

33. Having found that the Applicant's submissions do not meet two of the legal bases to warrant a revision under Article XIII, the issue of timeliness is moot. Nevertheless, the Tribunal observes that the six-month deadline to request a revision, set out in Article XIII(1), refers to "six months after that party acquired knowledge of such fact." The fact must also have been unknown to the Tribunal and the requesting party at the time the judgment was delivered. In the Applicant's Reply of 25 July 2016, the Applicant admits that she was aware that the annexes to the Respondent's Answer included the Talent Reviews of 2012 and 2013, and that they had been produced to the Tribunal for the Tribunal's *in camera* review. She also requested explicitly, in the Reply, to review these Talent Reviews and reiterated her request for the external feedback on her 2014 OPE. Both of these requests were considered by the Tribunal and rejected, which would have been known to the Applicant by 20 October 2016, when her case was listed. Hence, the Tribunal finds that the Applicant cannot refer to the Bank's litigation practices as a basis for requesting

revision of a judgment, when such practices would have been known to the Applicant, prior to the delivery of the judgment.

DECISION

The Application is dismissed.

/S/ Mónica Pinto
Mónica Pinto
Vice-President

/S/Zakir Hafez
Zakir Hafez
Acting Executive Secretary

At Washington, D.C., 25 October 2017