



World Bank Administrative Tribunal

2017

Decision No. 561

**EC,
Applicant**

v.

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

(Preliminary Objection)

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

**EC,
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, Andrew Burgess, and Mahnoush H. Arsanjani.

2. The Application was received on 13 July 2016. The Applicant was represented by Stephen C. Schott of Schott Johnson, LLP. The Bank was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 21 April 2017.

3. The Applicant challenges the failure by the Bank to register her short-term consultant (STC) contract for her G-4 visa with the U.S. State Department.

4. The Bank has raised a preliminary objection to the admissibility of this Application. This judgment addresses that preliminary objection.

FACTUAL BACKGROUND

5. The Applicant was hired by the Bank on an STC contract providing for up to 150 days of work from 1 July 2013 to 30 June 2014. The Applicant worked twelve days under this contract.

6. At the time of hiring, the Applicant was in the U.S. legally as the spouse of a G-4 visa holder. The Bank required the Applicant to obtain a G-4 visa for the purpose of working for the Bank, and she obtained a G-4 visa and work authorization on 10 July 2013, prior to commencing work at the Bank.

7. The Applicant's contract expired on 30 June 2014. The U.S. State Department requires that a staff member ending employment with the World Bank Group either leaves the U.S. or applies for an adjustment of status to a different visa category within thirty days of the end of employment. On 25 August 2014, the Applicant submitted Form I-566 to the U.S. State Department, through the Bank's Visa Office, to request a change of status from her G-4 visa to an F-1 student visa.

8. On 27 August 2014, the U.S. State Department liaison notified the Bank that because the Applicant's application for adjustment of status was not filed within thirty days of the expiration of the Applicant's appointment, the U.S. State Department could not approve the request. This reason was confirmed in writing to the Bank on 2 September 2014, and communicated by the Bank to the Applicant and her immigration representative on 3 September 2014.

9. On 3 October 2014, the Applicant contacted the Office of the Chief of Protocol at the U.S. State Department, which advised her that there was no record of the Bank filing either a DS2004 (notification of appointment of foreign government employee) or a DS2008 (notification of termination of employment) with the Office of the Chief of Protocol on behalf of the Applicant. By email on the same day to the Bank, the Applicant's immigration representative stated that they were informed by the U.S. State Department that the Applicant's application for change of status could not be endorsed because of the Bank's "failure to register her G-4 visa status and her employment status with the [O]ffice of Protocol." The Applicant's representative asked the Bank to make a request to update the Applicant's employment record, as her last employment period had not been recorded. The Bank responded on the same day that it "only report[s] registrations of staff who have a minimum of 90 days on their STC contract" and that the Applicant "had a total of 12 days on her STC contract during fiscal year 2014."

10. On 8 October 2014, the Bank submitted to the U.S. State Department a request for retroactive registration, but it was denied on 16 October 2014.

11. On 21 November 2014, the Applicant approached Mediation Services. She claims that she requested mediation at this time.

12. By email dated 4 December 2014, the Applicant received a Notification of Closing of Mediation from Mediation Services, informing her that Mediation Services had closed her case because “the case was deemed not appropriate for mediation and referred to other channels for resolution.”

13. The Applicant states that she met with the Vice President of Human Resources (HRVP) on 5 January 2015, but this meeting did not result in any action. On that date, a representative from the Bank’s Human Resources Department and a representative from the Office of the Chief of Protocol met “in a final attempt to update [the Applicant’s] record to facilitate the change in status. The result was no update was granted by the State Department Office of Protocol.”

14. According to the Bank, on 15 January 2015, in response to a request from the Applicant and as an accommodation to help the Applicant file for reconsideration with the U.S. State Department, the Bank provided the Applicant with a memorandum summarizing its communications with the U.S. State Department regarding the Applicant’s case and confirming that it had not registered the Applicant when she assumed her duties with the Bank; the final event listed in the chronology in the memorandum was the meeting of 5 January 2015, when the U.S. State Department refused to update the Applicant’s record to facilitate the change in status. The Applicant characterizes this memorandum as the Bank’s admission of its failures and efforts to correct its mistakes.

15. In the meantime, the Applicant inquired of Peer Review Services (PRS) about filing a Request for Review. By email dated 26 May 2015, PRS acknowledged the Applicant’s inquiry about filing a Request for Review regarding the Bank’s failure to register her contract with the U.S. State Department. PRS noted that “it appears that your claim is untimely but you are welcome to file the Request for Review. The Panel Chair will determine the timeliness of your claims.” The Applicant responded by email on the same day, stating that the letter from the Bank addressing the breach of registration was received in 2015 and that she had initiated mediation, which she had not terminated, prior to that letter.

16. On 27 May 2015, the Applicant approached Mediation Services, and a case file was opened. By email dated 15 June 2015, Mediation Services informed the Applicant that “since we have not heard from you, we would like to close your case.” The Applicant replied on the same day, requesting that the case not be closed, and also stated that she had been unwell and had to seek medical treatment. She was advised by Mediation Services to consult with Ombuds Services and the Staff Association and again was informed that her case would be closed but could be reopened “if and when you clarify the Bank representative.”

17. On 4 July 2015, the Applicant emailed Mediation Services to request that her case be kept open and to inform them that she had serious medical issues and had not been informed of any notice period to close the case. Mediation Services responded on 6 July 2015 that the Applicant’s case could be reopened as soon as she identified a staff member to represent the Bank’s management in mediation.

18. According to the Bank, Mediation Services opened a case file for the Applicant on 2 December 2015. The Applicant states that an intake session was held on 6 January 2016.

19. In the meantime, on 16 December 2015, the Applicant filed a Request for Review with PRS regarding the Bank’s alleged failure to register her STC contract in time with the U.S. State Department and to disclose such failure.

20. On 21 January 2016, the Peer Review Chair dismissed the Applicant’s Request for Review, stating:

The record shows that you went to mediation on November 21, 2014, 49 days following receipt of notice of the disputed employment matter. On December 4, 2014, mediation closed unsuccessfully. You had 71 days (the remainder of the 120 calendar-day period) from December 4, 2014 to submit your Request for Review. Your deadline to do so was February 13, 2015. You filed your Request for Review on December 16, 2015, well beyond the February 13, 2015 deadline. Accordingly, your claims are untimely.

The Peer Review Chair considered the Applicant to be on notice of the disputed employment matter as of 3 October 2014, when she claimed to have discovered that the Bank had not registered her contract with the U.S. State Department.

21. A mediation was held on 26 April 2016. The parties could not reach an agreement on the issues, and accordingly, the mediation was closed.

22. On 2 May 2016, the Applicant informed PRS that the mediation was closed and requested PRS to reconsider its previous decision and accept jurisdiction to review her claims. On 10 May 2016, the Peer Review Chair denied the Applicant's request to reconsider the decision of 21 January 2016.

23. On 10 May 2016, the Applicant requested an extension of time to file the Application. The Tribunal granted the Applicant's request for an extension to 8 August 2016.

24. The Applicant filed an Application with the Tribunal on 13 July 2016. She challenges the failure by the Bank to register her STC contract for her G-4 visa with the U.S. State Department. The Applicant seeks an order for the Bank to intervene at the highest levels at the Bank and the U.S. State Department "to correct the error made and assure a legal path for her to visa status allowing her to remain in the U.S.," or in the alternative, with approval from the U.S. State Department, to "be reemployed by the Bank on a G-4 visa to remain in effect until she can legally transition to F-1 visa status, or other appropriate status." She seeks two years' salary "for physical and emotional stress of living in the U.S. in illegal status and the mismanagement of her visa status," moral damages "for mishandling of Applicant's case by Respondent, and for emotional suffering caused by Respondent's negligence," and legal fees and costs in the amount of \$18,931.25. Additionally, and as necessary, the Applicant requests an order that the "Respondent should engage an immigration attorney at its own expense to assist Applicant with managing her visa status and any future visa issues which relate to this visa issue."

25. On 22 August 2016, the Bank filed a preliminary objection to the admissibility of this Application.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Bank's Contentions

26. The Bank contends that the Application should be dismissed because the specific performance that the Applicant seeks is not within the Tribunal's powers to grant and the Applicant's claims were not filed with PRS in time.

27. The Bank contends that neither it nor the Tribunal can influence the U.S. State Department to change its policies, as this is the sole prerogative of the U.S. State Department. The Bank underscores that the U.S. State Department has indicated there is no assistance that can be provided to the Applicant within its existing legal framework so any other attempts by the Bank to intervene would be futile and would put the Bank in a "position of advocating for the State Department to ignore its own policies."

28. In response to the alternative remedy sought by the Applicant, the Bank states that there is no business need for the Applicant's skill set so employing her to allow her to obtain a G-4 visa may amount to visa fraud.

29. On the issue of timeliness, the Bank argues that the Applicant was on notice as of 3 October 2014 that the Bank had not registered her employment with the U.S. State Department and that the alleged consequence of this failure was the denial of her application for a change of status. Therefore, as of this date, the Applicant knew that her application to change her status would not be processed by the U.S. State Department so her claim arose at that time. By filing her Request for Review with PRS on 16 December 2015, the Applicant was eleven months past the deadline.

30. The Bank submits that the Applicant had intake meetings with Mediation Services on 21 November 2014 and 27 May 2015 for consultations, but did not request mediation. Accordingly, the case files were closed on 4 December 2014 and 15 June 2015, respectively. The Bank underscores that the Applicant received a Notice of Closing of Mediation on 4 December 2014, but took no steps to revive the mediation at that time. By the time the Applicant attempted to

engage in mediation in May 2015 or formally requested mediation on 2 December 2015, the deadline to file her Request for Review with PRS had already passed.

31. The Bank also argues that the Applicant's belief that her mediation case remained open is unreasonable. In response to the Applicant's request in June 2015 for her case to remain open, Mediation Services advised her in July 2015 that her case would remain closed and would be reopened as soon as she could identify a representative of management to participate in mediation. She did not take any follow-up steps until December 2015 when she reached out to Mediation Services and "it was not until April, 2016 that the Applicant's lawyer finally contacted Respondent with a request for mediation."

32. The Bank contends that neither the failed mediation in April 2016 nor PRS's denial of the Applicant's request for reconsideration in May 2016 gave rise to the Applicant's claim or restarted the time to challenge the Bank's actions.

33. The Bank argues that the Applicant's actions do not qualify as exceptional circumstances nor did they toll the statute of limitations for purposes of filing a Request for Review.

34. The Bank submits that any health issues that the Applicant had in June-July 2015 were well outside of the deadline to file her Request for Review.

The Applicant's Response

35. The Applicant submits that "the Respondent's failure came to light on August 26, 2014/September 3, 2014" and that the Bank acknowledged its errors on 15 January 2015.

36. The Applicant claims that she requested mediation in November 2014, and although no mediation sessions were scheduled, she "believed mediation was still open because of the correspondence she was having with the Respondent," specifically the exchanges with PRS and Mediation Services between 26 May 2015 and 6 July 2015. According to the Applicant, she requested mediation and it was opened on 2 December 2015 and was closed on 28 April 2016.

37. The Applicant argues that it was only during the mediation on 26 April 2016 that it became clear to her that the Bank could not and would not do anything to correct its error. The Applicant further claims that the Bank “closed all avenues of redress” on 21 June 2016 when it informed her that the U.S. State Department denied its request for a meeting. Therefore, having submitted the Application promptly upon the closure of mediation on 26 April 2016, the Applicant met the deadline of submission within 120 days of the completion of “administrative review.”

38. She further argues that her claims became ripe for consideration by the Tribunal as of 10 May 2016, when the Peer Review Chair denied her request to reconsider the decision of 21 January 2016. The Applicant notes that she had requested an extension of time to file an Application with the Tribunal on 10 May 2016, before she received the Peer Review Chair’s denial. The Applicant states that her submission of the Application on 13 July 2016 was within 75 days of the close of mediation.

39. In response to the Bank’s argument that the relief sought by the Applicant is beyond the Tribunal’s power to grant, the Applicant contends that it is within the Tribunal’s power to order the Bank to intervene with U.S. authorities at the highest level. The Applicant also submits that the other relief requested, in addition to specific performance, are within the Tribunal’s power to grant.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

40. The jurisdictional objection raised by the Bank is based on Article II, paragraph 2 of the Statute of the Tribunal, which provides:

No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

- (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal [...]

41. The Bank argues that the Applicant did not file her claim with PRS within the 120-day filing period and, therefore, failed to exhaust internal remedies.

42. The Applicant contends that the Bank only acknowledged its errors in the memorandum of 15 January 2015, that it only became clear to her when the mediation failed on 26 April 2016 that the Bank could not and would not do anything to correct its error, and that her claims only became ripe for consideration as of 10 May 2016 when the Peer Review Chair denied her request to reconsider its earlier decision of 21 January 2016.

43. The Applicant admits both in her Request for Review and in her Application that on 3 October 2014, she discovered the Bank's failure to register her contract with the U.S. State Department, which is the employment matter in dispute. She also states that "the Respondent's failure came to light on or about August 26, 2014/September 3, 2014. That is the date at which the Applicant could seek redress for the error, since it was the point at which Respondent could recognize its error and seek to correct it with the State Department's [O]ffice of Protocol but it was only on January 15, 2015 that Respondent acknowledged its errors."

44. In light of the record and considering the submissions of the parties, the Tribunal finds that 3 October 2014 is the relevant date from which time runs for the Applicant to submit a Request for Review.

45. The Applicant alleges that she requested mediation. The relevant rule is Staff Rule 9.01, paragraph 4.04, which states:

Pursuant to Staff Rule 9.03, "Peer Review Services," if a staff member requests mediation prior to the expiration of the 120-day deadline for submitting a Request for Review, the term will be temporarily stayed. If the mediation does not solve the matter, the parties shall have the remainder of the original term or 30 calendar days from the closing of the case by Mediation Services, whichever is greater, for submitting the Request for Review.

46. The parties disagree as to whether the Applicant requested mediation on 21 November 2014, or whether she met with Mediation Services for a consultation but did not request mediation.

In any case, a Notice of Closing of Mediation dated 4 December 2014 was sent by Mediation Services to the Applicant. Therefore, the Applicant's belief that mediation "was still open because of the correspondence she was having with the Respondent" is not reasonable in light of the Notice of Closing of Mediation dated 4 December 2014. The Tribunal finds that on 4 December 2014, the Applicant should have been aware that mediation was closed.

47. The Applicant cannot rely on the Bank's memorandum of 15 January 2015 as the relevant date on which she received notice of the disputed employment matter. The Tribunal has affirmed that the subsequent discovery of circumstances surrounding the decision, or in this case, the omission by the Bank, is not the relevant date; the relevant date is the date on which an applicant is notified of the disputed decision. *DU* (Preliminary Objection), Decision No. 539 [2016], para. 21.

48. Even accepting the date of 15 January 2015 as the date of notice, which the Tribunal does not, as discussed above, the Applicant should have filed a Request for Review with PRS by 15 May 2015, but she did not. No "exceptional circumstances" are alleged by the Applicant to justify her delay and to render her Application admissible.

49. The Tribunal has recognized that "a failure to observe time limits for the submission of an internal complaint or appeal is regarded as a failure to comply with the statutory requirement of exhaustion of internal remedies." *Ampah*, Decision No. 522 [2015], para. 57. *See also de Jong*, Decision No. 89 [1990], para. 33; *Setia*, Decision No. 134 [1993], para. 23; *Sharpston*, Decision No. 251 [2001], paras. 25-26; *Peprah*, Decision No. 275 [2002], para. 24; *Islam*, Decision No. 280 [2002], para. 7.

50. The Tribunal has held that the exhaustion of internal remedies is of the utmost importance as it ensures "that the management of the Bank shall be afforded an opportunity to redress any alleged violation by its own action" and "greatly assists the Tribunal in promptly and fairly disposing of the case before it." *Klaus Berg*, Decision No. 51 [1987], para. 30. *See also Vick*, Decision No. 295 [2003], para. 14; and *Prasad*, Decision No. 334 [2005], para. 23.

51. Therefore, the Tribunal concludes that the Peer Review Chair correctly dismissed the Applicant's Request for Review because it was time-barred. This failure to observe the deadline to submit a Request for Review with PRS constitutes a failure to exhaust internal remedies.

52. Having found that the Applicant failed to exhaust internal remedies by filing a late Request for Review with PRS, the Tribunal does not need to consider whether the Application should also be dismissed on the ground that the specific performance sought by the Applicant is not within the Tribunal's power to grant.

CONCLUSION

53. The Tribunal finds that the Applicant failed to file her Request for Review with PRS within the prescribed time period and thereby failed to exhaust internal remedies.

DECISION

The Applicant's claims are inadmissible.

/S/ Mónica Pinto

Mónica Pinto

Vice-President

/S/Zakir Hafez

Zakir Hafez

Acting Executive Secretary

At Washington, D.C., 21 April 2017