

Decision No. 355

**G (No. 2),
Applicant**

v.

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

1. The present judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña, Judges. The application in this case was received on 10 May 2006.

2. The Applicant claims that the Bank violated Principles 2.1 and 9.1 of the Principles of Staff Employment by: (i) refusing to reimburse her for the legal fees that she incurred in the course of an INT investigation which exonerated her; and (ii) failing to compensate her adequately for damage to her personal and professional reputation as a result of being falsely accused and investigated by INT. The Bank objects that the Tribunal lacks jurisdiction over the Applicant's claims. The present judgment deals with the jurisdictional objection only. The antecedents of the grievance are recounted in G, Decision No. 340 [2005].

Relevant Facts

3. In October 2003, the Department of Institutional Integrity (INT) commenced an investigation of the Applicant, who was a staff member in the Loan Department (LOA). INT notified her that it was conducting an investigation under Staff Rule 8.01 into allegations that in the course of her assignment in Afghanistan she had:

(i) placed herself in a conflict of interest by recommending the engagement of a consultant with whom she had "an intimate personal relationship";

(ii) exceeded her authority by recommending Citibank to the Afghan government in preference to another bank recommended by those who were actually authorized to do so;

(iii) abused her authority by taking a business trip to Dubai; and

(iv) misrepresented the purpose of her mission to Dubai.

4. On 22 October 2003, the Applicant was placed on administrative leave with pay for six months, pending the outcome of the investigation. This leave was subsequently extended for an additional three months, until 21 July 2004. The Applicant challenged the decision to place her on administrative leave. In G, the Tribunal dismissed that application.

5. INT concluded its investigation in July 2004. Its Final Report was issued on 9 July 2004, vindicating the Applicant with respect to the most serious allegations. (An allegation of excess of authority was deemed apparently founded, but immaterial in effect and at any rate mitigated by the Applicant's good work.)

6. On 20 July 2004, the then Managing Director of the Bank informed the Applicant by letter about his decision, based on INT's Final Report. He stated that "I have determined that you were not in violation of the World Bank Group's Principles of Staff Employment nor Staff Rules. Please consider this case closed." The last paragraph of his letter, however, noted:

Please also be advised that, in reviewing the evidence, I note that you exercised poor judgment in the extent to which you were involved in the selection of, preparation of the contract for, and payment to a

Bank-financed consultant with whom you had previously worked at the Bank. I hope that in the future you will exercise a greater sensitivity to the perception of conflicts of interest in such situations.

7. On 22 July 2004, counsel for the Applicant wrote a letter to the then Vice President of Human Resources Services (HRSVP) raising concerns about the last paragraph of the Managing Director's letter, and requesting that the Bank take the following actions to repair the harm allegedly done to the Applicant because of the investigation:

(i) the HRSVP should send a clearance letter to all witnesses informing them that the Applicant had been cleared of all allegations of misconduct, and the Bank's Vice President and Controller (Controller) should send a similar letter to all staff in LOA and to certain other staff members;

(ii) the Controller should send a letter of regret to the Applicant;

(iii) strict observance of confidentiality should be maintained by the Bank regarding investigation-related information;

(iv) the Applicant's Division Manager and the Director of LOA should inform the LOA staff that the Applicant had been cleared of any misconduct;

(v) the Bank should pay for the damage to the Applicant's reputation and to her career, and reimburse all of the legal fees she incurred during the investigation;

(vi) the Applicant's Salary Review Increase (SRI) for 2004 should be 5.2%; and

(vii) Human Resources (HR) should transfer the Applicant from the Controller's Vice Presidency to a new position with promotion opportunities.

8. On 19 August 2004, the Chief Counsel, Corporate Administration Unit of the Legal Department, replied as follows:

(i) the Managing Director would meet with the Applicant and explain the content of his letter;

(ii) management had been working with the Applicant on the clearance letter, but neither the Applicant nor her counsel could dictate the exact content of the letter;

(iii) the documents relating to the investigation would not be made part of the Applicant's personnel file, and while the Bank would keep a copy of these documents in its files, their disclosure would be strictly dictated by the Bank's confidentiality rules;

(iv) in an LOA division meeting, management had already informed staff that the Applicant had been cleared of the allegations of misconduct;

(v) the Bank would not satisfy the Applicant's request for legal fees because it is not the Bank's practice to reimburse such fees when incurred by staff in the course of an investigation; and

(vi) the Applicant's SRI, promotion and reassignment are internal HR matters governed by HR policies and would be reviewed internally.

9. On 25 August 2004, the Applicant met with the Managing Director. The following day, the Applicant sent an e-mail to the Managing Director's Assistant, seeking help with the following: (i) providing notice to witnesses; (ii) reviewing of the Applicant's SRI; (iii) obtaining a new letter from the Managing Director that deleted the last paragraph of the 20 July 2004 letter; (iv) reassignment and promotion; (v) obtaining compensation for damage to her personal and professional reputation; (vi) obtaining legal fees and costs; (vii) expediting the harassment case filed by the Applicant; and (viii) obtaining a letter of regret from the Controller.

10. On 1 September 2004, the Assistant sent an e-mail to the Applicant stating that the Managing Director had decided that he would retain the last paragraph as written in his letter of 20 July; the Bank would not pay any damages to the Applicant; and the Managing Director would not ask the Controller to send a letter of regret to the Applicant.

11. On 17 November 2004, the Applicant filed her Statement of Appeal with the Appeals Committee, complaining about the following:

- (i) the decision of the Managing Director expressed in the letter of 20 July 2004, wherein he “reprimanded” her for exercising “poor judgment”;
- (ii) the INT investigation, which allegedly violated her due process rights;
- (iii) the letter of 19 August 2004 from the Bank’s Chief Counsel, wherein he refused to compensate her for legal fees which she had incurred during the investigation, or to modify a letter to witnesses informing them that she had been exonerated; and
- (iv) the 1 September 2004 decision of the Managing Director to refuse her compensation for the emotional distress and damage to her professional and personal reputation allegedly caused by the investigation.

12. Following a jurisdictional challenge by the Bank, the Appeals Committee concluded on 28 March 2005 that while all four claims were timely, it had jurisdiction over only two claims, namely those with respect to the Managing Director’s decision of 20 July 2004, and to the due process violations allegedly committed during the investigation. The Committee decided that the other two claims did not involve an administrative decision affecting the Applicant’s rights.

13. After a full hearing, the Appeals Committee issued its Report on 17 November 2005, concluding that the Managing Director’s admonishment of the Applicant for exercising “poor judgment” (in his letter of 20 July 2004) was arbitrary. The Appeals Committee recommended that:

- (i) the Managing Director’s letter of 20 July 2004 should be withdrawn and reissued without the last paragraph;
- (ii) the letter that the Bank would send to the witnesses should omit the disputed last paragraph in the Managing Director’s letter of 20 July 2004;
- (iii) the Applicant should be reassigned to another Regular position, at the same grade and with upward potential;
- (iv) the Applicant should be reimbursed for certain medical expenses;
- (v) the Applicant should be reimbursed \$5,000 for her legal expenses in accordance with the Appeals Committee’s policy, and should be further reimbursed for the remaining balance of attorney’s fees incurred in the pursuit of her current Appeal, upon presentation of such legal fees; and
- (vi) the Applicant should receive \$10,000 in additional compensation for intangible damages.

14. On 10 January 2006, the Vice President, Financial Sector, informed the Applicant by letter that he agreed with all of the recommendations of the Appeals Committee. The Bank subsequently implemented these recommendations.

15. The present application was filed on 10 May 2006, challenging two of the decisions of which the Applicant had been notified by the 10 January 2006 letter, relating in particular to the Bank’s failure to compensate the Applicant for legal fees and costs, and to the amount of compensation awarded to the Applicant for the damage caused to her professional and personal reputation, and for her emotional suffering. The Applicant invokes

Principles 2.1 and 9.1 of the Principles of Staff Employment, which read in relevant part as follows:

Principle 2.1: The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members.

Principle 9.1: Staff members have the right to fair treatment in matters relating to their employment.

The Challenge to Jurisdiction

The First Ground: Absence of Claims Relating to an Administrative Decision Adversely Affecting the Applicant's Contract or Terms of Appointment

16. According to the Bank, under Article II(1) of the Tribunal's Statute, the Tribunal may exercise jurisdiction over an application only if the claim is one of non-observance of a staff member's contract of employment or terms of appointment, and is brought against an administrative decision that directly affects the staff member's employment rights in an adverse manner. The application avers that the contested decision is the letter of 10 January 2006, which conveyed the Bank's decision on the recommendations of the Appeals Committee. Since the Bank accepted and implemented the recommendations of the Appeals Committee, the application essentially appeals the recommendations of the Appeals Committee. Such a request for appellate review by the Tribunal is impermissible and inadmissible.

17. In any event, so argues the Bank, the Applicant's contract of employment and terms of appointment do not include any right to attorney's fees or compensation for damages in connection with the INT investigation. The Applicant's claims do not implicate her contract of employment or terms of appointment. Her invocation of Principles 2.1 and 9.1 of the Principles of Staff Employment, which guarantee fair treatment by the Bank, is alleged to be a "red herring." The Applicant cannot invoke the Tribunal's jurisdiction merely by alleging non-observance of her contract of employment; otherwise, the requirement of Article II(1) would be nugatory.

18. Finally, the Bank argues that the Tribunal decided in *G* that the Applicant had no justifiable claim regarding the INT investigation, and she cannot revive her moribund claims by speciously arguing in the current application that the Bank violated Principles 2.1 and 9.1 by not paying her attorney's fees and adequate compensation in connection with the INT investigation.

The Applicant's Response

19. The Applicant insists that her claims relating to attorney's fees and compensation for damages in connection with the INT investigation clearly implicate the Bank's obligations under Principles of Staff Employment 2.1 and 9.1. The Bank's decision not to compensate her for the legal fees she incurred in defending herself against the false charges made in the INT investigation had the effect of unjustifiably reducing her compensation and standard of living for the foreseeable future in violation of all standards of fair treatment and thus of Principles 2.1 and 9.1. The same Principles were also violated when the Bank refused to compensate the Applicant fairly for the emotional and reputational damages she suffered as a result of the INT investigation. The Applicant observes that the Tribunal has reviewed this type of claim for damages before. She invokes *Koudogbo*, Decision No. 246 [2001], paras. 56, 59, and *Lysy*, Decision No. 211 [1999], paras. 72-80. In addition, the INT investigation caused the Applicant considerable emotional suffering and reputational damage, and these injuries altered the terms and conditions of her employment.

20. The Applicant reasons that the Tribunal does not endorse a narrow conception of its jurisdiction. In *I*, Decision No. 343 [2005], a former staff member claimed that the investigation of another staff member (in fact the current Applicant) had been conducted to his prejudice. The Bank challenged the Tribunal's jurisdiction on the ground that the Bank had not made any administrative decision affecting the former staff member. Rejecting the Bank's argument, the Tribunal stated that it "does not accept a narrow conception of its jurisdiction which leaves a former staff member incapable of bringing a case based on an alleged violation of his rights." (See *I*, para. 18.) A narrow reading of jurisdiction would allow the Bank to escape review of its actions simply by asserting that they were not covered by an applicant's terms of employment, or that there had

been no administrative decision affecting the applicant's rights.

21. Under the Tribunal's precedents, the Applicant continues, all that an applicant needs to do to establish jurisdiction is to be a staff member and to present an application alleging non-observance of his or her contract of employment (citing *Naab*, Decision No. 160 [1997], para. 26). Moreover, the question of whether or not the Bank's decisions have affected the Applicant's conditions of employment is one that goes to the merits of the case. The Bank's jurisdictional challenge requires the Tribunal to decide whether or not the Bank's decisions unfairly affected the conditions of the Applicant's employment and were therefore contrary to Principles 2.1 and 9.1. At the heart of the Applicant's claim lies precisely that issue, and the Tribunal cannot decide the alleged jurisdictional issues without also taking a decision on the merits. The Tribunal has held that where jurisdictional and substantive issues are intertwined, as here, the case should be heard on the merits.

22. Finally, the Applicant points out that in *G*, the Applicant did not challenge the INT investigation, but rather only the decision to place her on administrative leave.

The Second Ground: The Applicant Failed to File Her Application in a Timely Manner and Failed to Exhaust Internal Remedies

23. Even if the Tribunal were to decide that the Bank made administrative decisions affecting the Applicant's rights, the Bank asserts that the application should still be dismissed for untimeliness, and because the Applicant failed to exhaust internal remedies.

24. Regarding the Applicant's claim for attorney's fees, the Applicant requested reimbursement on 22 July 2004. This was denied by the Bank in a letter dated 19 August 2004. The Applicant appealed this denial before the Appeals Committee on 17 November 2004, and the Committee's decision to decline jurisdiction over this claim was conveyed to the Applicant by a letter of 28 March 2005. The Bank contends that there are thus two possible dates on which the "clock started ticking" for any challenge to the decision not to grant the Applicant attorney's fees: 19 August 2004 and 28 March 2005. The application is time-barred in either case, however, because the Applicant did not challenge the non-payment of attorney's fees before the Tribunal until 10 May 2006. The Applicant cannot plausibly argue that the "clock started ticking" on 10 January 2006, because the Bank's letter of 10 January did not present a new decision generating a new time limit within which the Applicant could challenge either the Bank's denial of attorney's fees on 19 August 2004, or the Appeals Committee's denial of jurisdiction regarding this claim on 28 March 2005.

25. The adequacy of the Applicant's compensation for the damages she allegedly sustained was never a claim before the Appeals Committee. In her Statement of Appeal, the Applicant admittedly stated that she was appealing the 1 September 2004 decision of the Bank not to compensate her, but she did not request any specific amount in this respect from the Appeals Committee. The Applicant's new claim about the adequacy of her compensation has been raised for the first time before the Tribunal, and must, according to the Bank, be dismissed as being inadmissible for failure to exhaust internal remedies.

The Applicant's Response

26. The Applicant counters that she did raise the issue of attorney's fees before the Appeals Committee. Although the Committee declined jurisdiction over the decision expressed in the Bank's letter of 19 August 2004, it nevertheless stated that it would evaluate the Applicant's claim for attorney's fees when assessing her claims for relief.

27. The Applicant insists that she also raised her claim for compensation for emotional and reputational injuries before the Appeals Committee. The Committee, on its own initiative, declined jurisdiction to review the Managing Director's decision of 1 September 2004 refusing compensation for the Applicant's emotional distress and the damage done to her professional and personal reputation. The Committee concluded, however, that it would consider this claim as a form of relief because the Applicant had presented it in this manner. The Tribunal should thus reject the Bank's argument that for the Applicant to have exhausted internal remedies with

respect to this claim, she ought to have sought a specific amount of damages before the Appeals Committee.

28. Finally, the Applicant argues that she was not required to appeal the Appeals Committee's jurisdictional decision before it reached a decision on the merits with respect to the admitted claims. Such a requirement would delay the appeals process, cause endless confusion for applicants, and multiply the number of cases before the Tribunal. She therefore requests that the Tribunal reject the Bank's jurisdictional challenge and award her costs in the amount of \$10,168.23 for the jurisdictional phase.

The Tribunal's Analysis

29. The Tribunal does not function as an appellate body reviewing the proceedings, findings and recommendations of the Appeals Committee. Its task is to review the decisions and conduct of the Bank. Recommendations by the Appeals Committee are not decisions or measures attributable to the Bank. The Bank's liability, if any, derives from its actions in response to such recommendations. The Bank's own determination may be more or less favorable to the Applicant than the Appeals Committee's recommendations. The Bank's freedom of action in this respect is not constrained by the Appeals Committee's jurisdictional determinations.

30. True, the Applicant literally states that she is appealing the Bank's 10 January 2006 decision to accept the Appeals Committee's recommendations. Such an appeal could not be entertained by the Tribunal. But her grievance plainly does not complain of *that* decision, but rather of the Bank's refusal in August-September 2004 to accept her initial demands. These refusals she has contested ever since, in timely fashion. It is the duty of every international tribunal to identify the object of the claim without being bound by incidental characterizations made by a party. (See *Prescott*, Decision No. 234 [2000], para. 22; *McNeill*, Decision No. 157 [1997], paras. 24-26.) The Applicant raised the two claims of this application in July 2004 and August 2004. They were rejected on 19 August 2004 and 1 September 2004, and the Statement of Appeal was filed on 17 November 2004. There was no failure of timeliness. Indeed, the Appeals Committee accepted that they were timely. It rather concluded, however, that these two claims did not involve administrative decisions affecting the Applicant's rights, as the Bank also now argues before the Tribunal.

31. In this respect, what the Bank's argument comes down to is that the Applicant's complaint cannot arise under the Staff Rules because they do not contain any provision under which the Applicant would be entitled to the remedies she seeks. But this is a substantive contention. The Bank may well assert that the claim is legally hopeless. In certain jurisdictions, a party taking such a position would file a motion of the type known in England as a strike-out application, and in the U.S. as a motion to dismiss for failure to state a cause of action. Even if such a contention were well-founded, however, it would not imply that the court or tribunal had no jurisdiction. When decision-makers summarily reject ill-conceived claims, they are plainly *asserting* their jurisdiction, *not declining it*.

32. The Applicant claims a violation of the Staff Rules. She is a staff member entitled to seek redress before the Tribunal, subject to a precondition – exhaustion of internal remedies – which she has fulfilled. The Bank evidently believes that her claim is irremediably weak. But that must be proved; the Bank may not simply disregard it. To assert a lack of jurisdiction on this basis is wrong in principle.

33. The question that thus remains on the merits is whether there is a line beyond which the “right to fair treatment” is infringed. If the present Applicant's case is meritless, that is either because no such line is to be drawn, or because it is not transgressed in the circumstances of this case. Such an inquiry cannot be avoided by a peremptory dismissal of this complaint. Given that the Applicant has already explained her position on the merits, the pleading schedule will proceed on the basis that it next falls to the Bank to answer.

34. Given that the Bank has erected wholly unjustified obstacles to the Applicant's exercise of her right to bring her grievance before this Tribunal, there is no reason not to grant the entirety of her request for costs, which the Tribunal deems to be reasonable in amount.

Decision

For the reasons stated above, the Tribunal decides that:

- (i) the Bank's jurisdictional objection is rejected;
- (ii) the Applicant is awarded costs in connection with the jurisdictional phase of these proceedings in the amount of \$10,168.23; and
- (iii) the dates for further pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Paris, France, 28 September 2006