

Decision No. 375**H (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 Jan Paulsson, President, and Judges Sarah Christie, Florentino P. Feliciano and Francis M. Ssekandi. The Applicant's first application filed on 28 February 2005 was dismissed by the Tribunal in *H*, Decision No. 342 [2005]. In the present case, the Tribunal is requested to consider two additional and distinct applications. The second and third applications were received on 27 April 2007 and 14 May 2007, respectively, and the Applicant's request for anonymity in respect of both cases was granted on 4 May and 20 August 2007.
2. The Bank submitted a consolidated Jurisdictional Challenge with the approval of the Tribunal. This judgment disposes of that challenge.

Background Facts and Procedural History

3. The Applicant joined the Bank in 1985. In 2000 his position of Principal Financial Economist was declared redundant. He then negotiated with the Bank to replace his redundancy with a Mutually Agreed Separation (MAS). The MAS, which the parties entered into on 28 February 2001, provided for a limited additional period of employment, principally to enable the Applicant to search for other employment within the Bank. The MAS provided that his new termination date would be 31 August 2001. At the Applicant's request, the termination date was extended first to 31 August 2002 and later, also at the Applicant's request, to 30 November 2002.
4. In the meantime, in October 2002 the Applicant received an offer for the position of Senior Advisor from the office of Executive Director (ED) for Saudi Arabia. Because Senior Advisors in ED offices are not Bank staff, the Applicant needed to resign from the Bank in order to accept the position. The Applicant therefore requested from the Bank a re-entry guarantee and, considering that he still had some time left under the extended termination date of his MAS, the Bank granted him a ten-week re-entry guarantee at the end of his service with the ED's office. In exchange for this re-entry guarantee, the Applicant agreed to retire from the Bank without severance benefits if he were not able to find a job within the Bank at the end of the ten-week period. The Applicant joined the Saudi ED's office on 16 October 2002.
5. In late 2002 and early 2003, while he was working with the Saudi ED's office, the Applicant contacted the Bank's Human Resources (HR) office several times requesting nullification of his MAS, claiming that a record of an MAS in his personnel file was making it difficult for him to secure a Regular position within the Bank. The Bank ultimately agreed to remove the MAS from his personnel file, while retaining unchanged the substance of that agreement between the Applicant and the Bank.
6. The Applicant's position in the Saudi ED's office ended in June 2004. He then secured a developmental assignment within the Bank and worked on that assignment from 21 June 2004 to 19 November 2004. Between October 2002 and November 2004, the Applicant applied for 12 positions within the Bank. He was not successful, and on 1 December 2004 he retired from the Bank.

7. On 28 February 2005, the Applicant filed his first application with the Tribunal. With regard to that application, the Tribunal in *H*, Decision No. 342 [2005], para. 19, identified the following three claims of the Applicant:

First, he claim[ed] that the Bank abused its discretion by continuing to insist upon the validity and continuation of the terms of the 2001 MAS and its amendments; among the principal reasons he [gave were] that he [had been] coerced into agreeing to the MAS and that his Bank employment [had been] altogether severed when he began to work with the Saudi Arabian ED in October 2002.

Second, he claim[ed] that the Bank abused its discretion by limiting his re-entry guarantee to ten weeks upon the conclusion of his work with the Saudi Arabian ED. ...

Third, the Applicant contend[ed] that the administration of his MAS, and particularly its use to create “noise” about his work record and to interfere with his employment opportunities, [had] been a product of arbitrary and indeed invidious conduct on the part of several persons working within HR.

8. The Tribunal dismissed all the above-three claims after considering the contentions of the parties. *H*, Decision No. 342 [2005], paras. 20-49.

9. His second application filed with the Tribunal on 27 April 2007 seeks a revision of the Tribunal's judgment in Decision No. 342 under Article XIII of the Tribunal's Statute. The Applicant claims that “the Bank misled the Tribunal about the secret files it holds about [him].” In his own words, the basis of this application is as follows:

On September 14, 2006, months after the Tribunal had issued its judgment [*H*, Decision No. 342 [2005]], [the Bank's Chief Counsel] admitted under oath at an Appeals Committee hearing in a different case, Appeal 1372, of having at least two letters concerning me in a confidential file. These two letters, dated July 24, 2003 and April 30, 2004, were from ... a lawyer who represents my ex-wife with whom I have been involved in a protracted dispute on divorce related issues. Both letters were in the possession of the Bank at exactly the same time it wrote to the Tribunal on May 2, 2005 [in its answer to the first application] denying any knowledge of any confidential files concerning me.

10. According to the Applicant, this new evidence, i.e., the existence of two letters in the Bank's file (i) raises doubts about the credibility of the Bank's submissions before the Tribunal with respect to his first application; (ii) indicates that some managers created a confidential or secret file as an obstacle to his job search; and (iii) raises the question of what else the Bank has represented to the Tribunal in his case that is false or inaccurate.

11. The Applicant filed his third application on 14 May 2007, approximately two weeks after he had filed his second application. In this third application, the Applicant challenges “the Bank's decision – not to disclose the letters from [his] ex-wife's attorney.” In the Applicant's view, this is the “real crux” of the 14 May 2007 application.

*The Bank's Challenge to the Timeliness
of the Application of 27 April 2007*

12. According to the Bank, the application of 27 April 2007 is untimely under Article XIII of the Tribunal's Statute. The Bank explains that the Chief Counsel of the Legal Department's Corporate Administration Unit received two letters from the attorney for the Applicant's former wife: one dated 24 July 2003, and the second dated 30 April 2004. In his Statement of Appeal filed with the Appeals Committee on 25 July 2005 (Appeal No. 1372), the Applicant challenged the Bank's decision not to disclose these communications to him. During the proceedings of this Appeal, the Applicant asked the Bank to produce communications between the Bank and his former wife's attorney. In response to this document request, the Director, Operations, HR wrote a memorandum to the Appeals Committee dated 25 April 2006 stating that the Bank had received correspondence from the attorney for the Applicant's former wife but would produce the correspondence only for *in camera* review by the Appeals Committee. According to the Bank, the Applicant received a copy of the memorandum of 25 April 2006 either in late April or early May 2006.

13. In the memorandum of 25 April 2006, the HR Director wrote as follows:

While conducting a search in response to this document request, the Respondent discovered correspondence from [the attorney for the Applicant's former wife] to [the Chief Counsel, Legal Department]. The general substance of that correspondence was discussed in an email from Mr. Bowyer [of HR] to the [Applicant], dated May 19, 2004. The email is attached.... The correspondence received by [the Chief Counsel] from [the attorney] is not being produced by the Respondent because the Bank does not divulge communications between the institution and spouses of staff members, or their representatives, without the spouse's permission. As the Respondent has stated in its Answer, this policy is reasonable in that it protects the spouse's need for privacy without an adverse affect on the staff member. Staff members enjoy similar protection in that the Bank does not divulge its communications with a staff member to a spouse unless explicitly authorized to do so by the staff member. If the Appeals Committee would find it helpful, however, the Respondent would be willing to produce the correspondence received by [the Chief Counsel] from [the attorney] for an *in camera* inspection by the Panel only.

14. The Bank adds that in the 19 May 2004 e-mail to the Applicant, Mr. Mark Bowyer, former manager of the HR Service Center, explained to the Applicant that the Bank had been contacted by the attorney for the Applicant's former wife. In that e-mail, Mr. Bowyer told the Applicant that

[t]he Bank has been notified by [your former wife's attorney] that you filed a motion with the Circuit Court in ... Maryland, to dismiss divorce proceedings that were initiated there by [your wife] in June 2003. At issue was whether your divorce was already granted under the laws of [your home country]. We understand that on April 26, 2004, the Court, after reviewing the pleadings submitted by both parties and hearing oral arguments, ruled that it would not dismiss the proceedings, which are still ongoing. [The attorney's] position is that the divorce is not final, and that [your wife] should be considered the spouse for purposes of Bank Group benefits, principally coverage under the Medical Insurance Plan.

The Bank is not taking a decision at this time on whether the laws of [the home country] or Maryland would apply to determine your family status. However, in light of the vital importance of health insurance coverage and visa status, and the existence of a good faith legal dispute as to current marriage status, the Bank has decided to continue treating [your wife] as the spouse pending further developments.

15. According to the Bank, the Applicant was clearly aware of the substance of the correspondence from his ex-wife's attorney as early as of 19 May 2004, and the existence of the correspondence was confirmed to the Applicant in a memorandum of 25 April 2006. Although it is not clear when exactly the Applicant received the memorandum of 25 April, from the record it is evident that he must have received it in late April or at the latest in early May 2006. This is so evident because in response to the Bank's memorandum of 25 April 2006, on 23 May 2006, the Applicant wrote a memorandum to the Appeals Committee objecting to the position taken by the Bank on 25 April 2006, and he again requested the Appeals Committee to order the Bank to provide the Applicant with the actual copies of correspondence from the attorney of his former wife. On 9 June 2006, the Appeals Committee decided that the letters should be produced for *in camera* review by the Panel of the Appeals Committee. The Bank furnished the letters to the Appeals Committee under a cover of a memorandum dated 14 June 2006. The Applicant was provided with a copy of that memorandum, which described the letters in general terms.

16. According to the Bank, the record clearly shows that the Applicant did not learn about the letters for the first time, as he claims, during the Appeals Committee hearing on 14 September 2006, since their disclosure had been a matter of protracted dispute between the parties during April and June 2006 in connection with the Appeals Committee proceedings in respect of Appeal No. 1372. He certainly was made aware of the existence of the letters on 25 April 2006 and had already been apprised of the contents as early as 19 May 2004. On the basis of Article XIII of the Statute of the Tribunal, if the Applicant indeed believed that the existence of these letters called for revision of Decision No. 342, he should have requested revision of the Decision within the six-month time limit, by 25 October 2006. The Applicant requested the Tribunal for an extension of time on 15 March 2007, and filed his application on 27 April 2007. The application was clearly time-barred.

The Applicant's Response to the Bank's Jurisdictional Challenge

17. According to the Applicant, the six-month period to file his application should have begun running on 14 September 2006. It was only on that date at the Appeals Committee hearing that the Applicant was explicitly informed for the first time about the existence of the two specific letters from the attorney for his former wife, and that the only available copy of these letters was in the secret files in the Legal Department.

18. Mr. Bowyer's e-mail of 19 May 2004 does not describe in full the letters in question; it only informs that the Bank "has been notified" by his ex-wife's lawyer about his divorce proceedings and the e-mail focuses on the implications for spousal benefits, which was the main reason Mr. Bowyer wrote to the Applicant. In addition, the connection between the 19 May 2004 e-mail and 25 April 2006 memorandum is not obvious. The e-mail of 19 May 2004 does not acknowledge that Mr. Bowyer had received or had seen any letter from the attorney, that the letter existed, or who kept it. Moreover, the e-mail does not make any mention of the correspondence with the Chief Counsel of the Legal Department. Thus, the connection between the e-mail of 19 May 2004 and the subsequent memorandum of 25 April 2006 informing the Applicant for the first time of the existence of the correspondence between the attorney and the Chief Counsel is not obvious. The Applicant believed that in the 25 April 2006 memorandum, the HR Director was referring to correspondence about spousal benefits, not to the specific letters in question.

19. The Applicant adds that the Bank finally decided on 10 October 2007 to share with the Applicant the letters from his former wife's attorney. An examination of these letters and their attachments show that the e-mail of 19 May 2004 and the memorandum of 25 April 2006 did not come close to accurately describing either the issues or the true nature and seriousness of the complaints against the Applicant that were raised in the letters. If the e-mail of 19 May and the memorandum of 25 April hinted that the correspondence from the attorney included the existence of letters and documents containing such adverse information about the Applicant held in secret files, the Applicant would have moved immediately to submit a request to have access to the record to correct it, and also to request revision of Decision No. 342.

20. In sum, according to the Applicant, only on 14 September 2006 did he come to know about the existence of two specific letters from the attorney, and about the secret file on him. Thus, time should not have started running before 14 September 2006.

The Bank's Jurisdictional Challenge to the Application of 14 May 2007

21. According to the Bank, in his application of 14 May 2007, the Applicant has raised the following five claims, all of which should be rejected on jurisdictional grounds except one.

22. In the First Claim, the Applicant alleges that HR subjected him to unfair treatment in 2000 when his employment was declared redundant and it continued until November 2004. In support of this claim the Applicant argues that the Bank maintained secret files about him and used information in those files to interfere with his job search efforts. The Bank contends that this First Claim should be dismissed on the ground of *res judicata*, the underlying allegations have been addressed by the Tribunal, and rejected in Decision No. 342.

23. In the Second Claim, the Applicant alleges that the Legal Department collaborated with HR in the unfair treatment of him, and maintained secret files about him along with HR. The Bank contends that the Second Claim should be rejected on the ground that the Applicant has not exhausted internal remedies.

24. The Applicant's Third Claim focuses on the Bank's decision not to disclose to the Applicant the letters from the attorney for the Applicant's former wife. The Bank admits that this claim is properly before the Tribunal.

25. As for the Fourth Claim, the Applicant alleges that the Legal Department improperly shared information related to spousal pension issues in the context of his divorce litigation with his former wife's attorney. The Bank contends that this claim should be rejected because the Applicant has failed to exhaust internal remedies.

26. Finally, in the Fifth Claim, the Applicant alleges that the Bank expressed a bias towards him and his home country because of its description of the Applicant's divorce under the law of his home country. The Bank

contends that this claim too should be rejected for failure to exhaust internal remedies.

The Applicant's Response to the Bank's Jurisdictional Challenge

27. The Applicant responds that by dividing this application into five separate claims the Bank has attempted to create confusion. In his application of 14 May 2007, he is only challenging "the Bank's decision not to disclose to [him] the letters written to the Bank by [his] ex-wife's attorney." The Bank acknowledges that this challenge is properly before the Tribunal and thus there is no jurisdictional dispute with respect to the application of 14 May 2007.

Considerations

The Application of 27 April 2007

28. With respect to this application, the Applicant's claim that his cause of action arose on 14 September 2006 is not supported by the facts. The 19 May 2004 e-mail from Mr. Bowyer to the Applicant should already have put the Applicant on notice of the existence of communications from his former spouse to the Bank as well as of their subject matter. Whether the Bank had received particular letters or other forms of later communications, whether oral or written, was immaterial; the e-mail itself created a record. At any rate, the Bank's cover memorandum to the Appeals Committee dated 14 June 2006, referred to in Paragraph 15 above, by which it provided the letters for *in camera* review while describing them in general terms, was copied to the Applicant. Rereading the 19 May e-mail in light of that memorandum and the 25 April 2006 memorandum, the Applicant would have realized that the letters produced by the Bank for *in camera* review pertained to his divorce proceedings, the finality of similar proceedings in his home country, and contentions as to the pending proceedings. This was sufficient to trigger his awareness of the alleged new facts which he claims entitle him to a revision. The record shows that the evidence tendered before the Appeals Committee on 14 September 2006 only confirmed what in essence he already knew by 14 June 2006 at the latest. The Tribunal concludes that the application was therefore due six months from that date, namely 14 June 2006, on 14 December 2006. He failed to meet that deadline, having requested an extension of time on 15 March 2007 and having filed his application on 27 April 2007, both of which are dates outside the six-month limit.

29. Having reached this conclusion, the Tribunal need go no further. Still, it merits mention that in any event the application was entirely implausible in the light of the exacting standard of Article XIII of the Statute of the Tribunal. The Applicant must show first that there is "new fact" and second, that the "new fact" is of such a nature that the Tribunal must be able to say with confidence that, had it been known, a different conclusion might have been reached on the merits. (*Kwakwa (No. 2)*, Decision No. 350 [2006], paras. 17-25.) In this case, the Applicant must show that the existence and the contents of the letters from his former wife's attorney, and their being held in the supposedly "secret file," "might have had a decisive influence on the judgment of the Tribunal." The letters and the Applicant's comments on the letters are now part of the record. The letters' existence is not a "new fact" and their contents in any event would not, to quote the language of *Kwakwa (No. 2)*, para. 19, "shake the very foundations of the tribunal's persuasion" in Decision No. 342.

The Application of 14 May 2007

30. The basis of the Bank's jurisdictional objection with respect to this application is recounted in Paragraphs 21-26 of this judgment. According to the Applicant, the Bank's jurisdictional objection lacks substance because his challenge relates only to "the Bank's decision not to disclose to the Applicant the letters written to the Bank by [his] ex-wife's attorney." Thus, the Bank's assertion that his application is divisible into five separate claims is both unnecessary and is designed merely to create confusion and obfuscate the central issue in contention. The Applicant asserts that

[i]t is the Respondent's position that the "Third Claim," regarding the decision not to disclose to the Applicant the letters written to the Bank by my ex-wife's attorney, is properly before the Tribunal.

Accordingly, there is no need to dispute that my [application] against the Bank's decision – not to disclose

the letters from my ex-wife's attorney – is properly before the Tribunal. This is the real crux of [my application of 14 May 2007]. In other words there is no jurisdictional issue concerning my [application of 14 May 2007].

Thus, on the Applicant's own characterization of his claim the only issue before the Tribunal is the Bank's decision not to disclose to the Applicant the letters written to the Bank by his ex-wife's attorney. The Bank has acknowledged that this challenge is properly before the Tribunal and there is therefore no challenge to the Tribunal's jurisdiction to consider this single claim.

Decision

For the above reasons, the Tribunal decides as follows:

- (i) the application of 27 April 2007 is dismissed;
- (ii) with respect to the application of 14 May 2007, the Tribunal has jurisdiction to consider the merits of the Applicant's claim arising from the Bank's decision not to disclose to the Applicant the letters written to the Bank by his ex-wife's attorney. The dates for the filing of pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties; and
- (iii) all other pleas, including the request for costs, are dismissed.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Zakir Hafez
Zakir Hafez
Counsel

At Washington, DC, 14 December 2007