

Decision No. 293

Ismet Zerin Khan,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on August 20, 2002, by Ismet Zerin Khan against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Bola A. Ajibola (a Vice President of the Tribunal) as President, Elizabeth Evatt (a Vice President of the Tribunal) and Robert A. Gorman, Judges. The usual exchange of pleadings took place. The case was listed on March 5, 2003.

2. The Applicant challenges the decision not to confirm her probationary appointment, on the grounds of abuse of discretion and failure to apply the Staff Rules. She also challenges actions related to the appointment of her predecessor in her position. She claims as relief: withdrawal of the notice of non-confirmation of May 3, 2001; retrospective reinstatement; revocation of the unfair and adverse OPE; compensation for lost income/pension and damage to her reputation; and costs of approximately \$15,000.

History

3. The Applicant began her employment with the Bank on January 16, 2000 as the External Affairs Officer (EAO), in the South Asia Region, External Affairs (SAREX) Dhaka, Bangladesh office. She was employed under an Open-Ended contract, at grade 22, subject to a probationary period of up to two years. She had had many years of experience in the media, and had been with the UNDP as an Advocacy, Information and Program Officer.

4. The Applicant's joint supervisors were the Bank's Country Director in Dhaka and the SAREX Manager at Headquarters. A new SAREX Manager took over on March 1, 2000. Both these Managers visited Dhaka in March 2000, together with a Communications Associate from SAREX Headquarters. The Applicant's team in Dhaka included the Librarian and a Team Assistant, both of whom had been at the Bank for some years, and had worked closely with the Applicant's predecessor in the position of EAO.

5. The Applicant's work as EAO required that she take the lead in establishing and maintaining effective communications between the Bank, the media and other relevant local institutions, which included media monitoring and outreach activities. She was given two major tasks after taking up her position. One of these was the Country Assistance Strategy (CAS), a consultation process. The Applicant's work on the CAS was considered satisfactory, as she was complimented for her contributions and received a Spot Award in June 2000.

6. The Applicant's other major task was the Communications for Reform Initiative (CRI), which was launched in March 2000. That project was intended to mobilize public opinion in favor of reform. A Concept Note for the project had to be written, to be followed by five Issues Briefs covering each of the Bank's sectors, all of which had to be written up in a form easily accessible to a wider audience.

7. In early August 2000, the Applicant's then current Manager, noting that her first Manager and the Communications Associate at Headquarters had expressed satisfaction with her initial work, and that she herself found the Applicant's work satisfactory, awarded her a 5% salary increase described as a "confidence

increase.” She also told the Applicant that she was doing “wonderful work.”

The CRI Project

8. The CRI project was affected by delays in securing material from the sectors and in making progress with the Concept Note. In August 2000, the Manager proposed sending the Applicant’s predecessor, who was then based in Washington, to Dhaka to assist the Applicant with the CRI project. The Country Director did not at first support this proposal, but the predecessor nevertheless went to Dhaka in August 2000. The Manager told the Applicant that he, the Applicant’s predecessor, was a “gift of support rather than a veiled vote of no confidence.”

9. There is disagreement as to who was responsible for finalizing the Concept Note for the CRI project. The Applicant claims that it was the Manager’s responsibility as Task Leader; she observes that an early draft of the Concept Note had been prepared at Headquarters by her first Manager. The Respondent submits, however, that it was up to the Applicant to produce the final Concept Note, and that the Manager was responsible only in a managerial sense. The Applicant prepared an outline for the Concept Note on August 6, 2000 which was considered by the Country Director to be an excellent start. The Bank claims, however, that the Applicant left the finalization of the draft to her predecessor, who submitted it on August 31, 2000. The Applicant says that she had done most of the work on the Concept Note before her predecessor’s arrival in Dhaka.

10. At about this time, the Applicant proposed a particular resource partner for the CRI project. Her predecessor did not agree with her choice because of some concerns about the reputation of the person in question. The Applicant’s Manager agreed with her predecessor, and informed the Applicant accordingly. The Manager later rescinded the contract which the Applicant had made with an organization run by the person in question.

11. When the Applicant’s predecessor returned to Headquarters, the Bank says that he reported to the Manager that relationships between the Bank and the media in Dhaka had deteriorated. He is reported to have said that some journalists had told him about their lack of access to the Applicant and that she had not gone to critical meetings with journalists. He was on familiar terms with the journalists because some of them had been his students at an earlier time. He is said to have told the Manager that there were interpersonal conflicts within the Applicant’s team and that the Team Assistant and the Librarian were discontented because the Applicant was heavy-handed with them, and required them to address her formally. He had not raised these issues with the Applicant, though he had known her for some time, nor did the Manager inform the Applicant of the matters he had raised, deferring to his wishes that his account of his trip remain confidential. The Bank says that the Manager did, however, take subsequent opportunities to stress to the Applicant the issues raised regarding media relations.

12. The Applicant states that from the beginning, and in particular on August 7, 2000, the Country Director had asked for the appointment of a peer reviewer. Between August 2000 and March 2001, the Applicant had, on different occasions, asked the Manager to arrange for a peer reviewer for the CRI project in order to provide an independent assessment. The Country Director supported the need for this, as it was a requirement for the project. The Manager considered this in March 2001, but did not make a provision for a peer reviewer, stating instead that they had to wait for a decision on the Applicant’s OPE.

13. The Applicant’s Manager says that in mid-October 2000 she spoke to the Applicant by telephone about the five Issues Briefs for the CRI project and told her that she should establish a matrix to identify specific events and their purposes in giving effect to the project, since the Manager did not want to approve the budget until activities were scheduled and a detailed matrix of events prepared. The Applicant’s view was that the plan would evolve on its own. The Manager sent the Applicant a detailed, point-by-point response to the Applicant’s proposals concerning the project on November 3, 2000, stressing the need for a coherent plan to present the Bank’s message. This e-mail exchange shows that the Manager and the Applicant had different approaches to the management of the project.

14. In late October 2000, negative stories about the Bank which were published in the local media caused concern to the Vice President for the South Asia Region (VPSAR) who had been visiting the Region. It appeared that information had been leaked from the Bank. The VPSAR raised her concerns with the Manager, suggesting that more should be done to counteract such reports. The VPSAR suggested that the Applicant's predecessor be asked to give some time to getting things back on track, when he took up a position in the education team in Dhaka in the following year. The Manager sent an e-mail to the Applicant asking her to think strategically about how to counter the media reports. On several occasions in this period, the Manager stressed to the Applicant the importance of her contacts with the media and suggested that the Applicant adopt a positive approach rather than a confrontational one. In November 2000, the Manager suggested that the Applicant invite the media to visit Bank projects as a way to develop good personal relationships.

15. A Communications Associate from Headquarters was sent by the Manager to Dhaka in November 2000 to help with the CRI project. She is reported to have told the Manager on her return that the Applicant did not think the briefs for the CRI project were necessary, and that there were serious interpersonal problems in the team. The Applicant was not informed about this.

16. In an exchange of e-mails in late November 2000, the Manager invited the Team Assistant to inform her about his concerns relating to the Applicant. The Team Assistant sent a lengthy e-mail to the Manager on December 3, 2000 complaining about many aspects of the Applicant's behavior and performance. This exchange was not disclosed to the Applicant. On December 5, 2000, the Manager told the Team Assistant and the Librarian at Dhaka, as well as the Communications Associate at Headquarters, that she would visit Dhaka as soon as possible. The Applicant was not informed of the proposed visit at that time. The Manager discussed the issues concerning the Applicant with the HR Officer at Headquarters. On December 5, 2000, the Manager sent an e-mail encouraging the Applicant to develop close relationships with the media, and to carry out an audit of her media relationships for strengths and weaknesses; in particular, she advised the Applicant how to deal with bad press.

17. In November 2000, the Country Director, at the request of the VPSAR, told the Applicant that it was essential to get to the source and stop the stories about the Bank which had been leaked earlier in October. In late December 2000, the Applicant e-mailed the Country Director about further media reports resulting from the leaked information. She informed him of her efforts to speak to editors about publishing rejoinders. She said that it appeared that the leak was from an inside source and that it "seems to be impossible to get journalists to disclose their sources." On December 27, 2000, the Manager contacted the Country Director, strongly disagreeing with any attempt to get the media to reveal the source of the leak. She expressed concern about the Applicant's note, describing her tone as imperious. The Manager's view was that rather than rejoinders, there should be an attempt to build better relationships with the media. The Applicant was not sent a copy of this message.

18. On January 2, 2001, the Manager informed the Applicant and the other members of her team that she would be coming to Dhaka. The principal focus of the visit was to see "how our little team . . . is working together. What's right, what's not." A second focus would be the work program and CRI. She wanted to meet with the key partners and she wanted the Applicant to be with her at all times, as it was critical that the Applicant be identified with the program.

Visit of the Manager, January 2001

19. When the Manager arrived in Dhaka on January 11, 2001, she received a note from the Team Assistant saying that the Applicant was refusing to talk to him because she had learned of his complaints about her. The Bank says that when confronted with this information, the Applicant asked for the Team Assistant to be fired. The Applicant claims, however, that she had asked for him to be replaced, and that she had been warned about him by her first Manager. The Applicant told the Manager that she was unaware of any team problems; she was, however, very critical of the Team Assistant. The Applicant later sent an e-mail to the team strongly critical of them. She also sought to isolate the Team Assistant by asking the Librarian to do his work. The Team Assistant reacted angrily in an e-mail of January 14, 2001.

20. During her visit to Dhaka, the Manager met with the Applicant's colleagues and observed the Applicant's work. In the absence of the Applicant, the Manager met with reporters who, according to the Manager, expressed dissatisfaction with the current situation and stated that they felt alienated from the Bank and missed the Applicant's predecessor. The Manager says that during her visit, she formed the view that there were serious problems with the performance of the Applicant.

21. On January 17, 2001, while still in Dhaka, the Manager sent an e-mail to the Human Resources Officer (HRO) at Headquarters and the Country Director, setting out a detailed list of the performance and behavioral failures of the Applicant which she had identified during her visit. She said that her observations confirmed the matters which the Team Assistant had raised with her. Her view was that the Applicant was "sweet," but lacked substance. She also expressed the view that "we need to terminate her [as soon as possible]" and asked the HRO how quickly they could move to the two months' severance, and "how soon can we safely get [the Applicant] out of the office?"

22. Later the same day, the Manager sent an e-mail to the Country Director and to the HRO, reporting on the frustrations expressed to her by journalists she had met that day regarding their access to the Bank. The Manager said that she had discussed issues relating to the team with the Applicant, whose "solution was to move [the Team Assistant]." The Manager also said that she had not raised the big performance issues with the Applicant, and asked for advice on whether to present her opinion to the Applicant as a *fait accompli* or as something to be negotiated.

23. The Manager met with the Country Director on January 17, 2001 to discuss the Applicant's situation. After their discussion, the Country Director agreed that the Applicant had not demonstrated the necessary professional competence for the position. On January 18, 2001, the Country Director informed the VPSAR by e-mail that he and the Manager intended not to confirm the Applicant. He stated that he was disappointed with the Applicant's lack of strategic vision. He also stated that the Manager was trying to arrange for the Applicant's predecessor to return to Dhaka earlier than planned to take over the Applicant's responsibilities.

24. On January 18, 2001, the Manager met with the Applicant in the evening to discuss the Applicant's OPE. The Manager informed her that her skills did not match the job, and that she would recommend non-confirmation, on the basis of behavior and performance. She told the Applicant that she had poor judgment, that she needed too much supervision, that the journalists were not happy with her performance and that her approach was confrontational rather than pro-active. The Applicant asked for reconsideration and offered to do whatever the Manager asked her to do. The Manager said that she would think about the matter before making a final recommendation in the OPE. Before leaving Dhaka, the Manager told the Team Assistant and the Librarian that the problems of the team would be resolved in due course.

25. The Applicant then contacted a journalist who had spoken to the Manager in order to quiz him about their conversation. The Manager later told her by e-mail on January 23, 2001 in very strong terms not to do this because it was harmful to the Bank's reputation. The Applicant responded by e-mail on the same date, justifying her action and mentioning how stressful she had found the situation, and that she had never felt that there were any complaints about her.

26. On January 23, 2001, the Manager informed the Applicant by e-mail that her recommendation would be finalized in the OPE. The Manager later consulted the HRO and the Bank's legal counsel about the situation, as she prepared the draft OPE.

The OPE, March 11, 2001

27. The Manager sent the draft interim OPE to the Applicant on March 11, 2001 covering the period of January 16, 2000 to March 31, 2001. This was the first OPE the Applicant had received. The Manager gave her one "fully successful" rating (the CAS project), 3 "partially successful" ratings, and 5 "unsuccessful" ratings. According to the Manager's comments, the Applicant had succeeded in tasks which were organizational and

administrative, but had demonstrated an inability to prepare coherent briefs for the CRI partners. She had failed to monitor country developments, had poor networking with the media and had failed to provide pro-active and strategic advice. There was also a negative behavioral assessment relating mainly to the Applicant's poor relationships within the team. The general comments of the Manager referred to a "disappointing and unsatisfactory year [S]he has not met the performance standards." The conclusion was that the Applicant's performance did not justify confirmation and that the second year of probation was not recommended as there was a mismatch between performance and expectations.

28. The Applicant met with the Country Director about her OPE on March 16, 2001. The Country Director informed her that her performance was not satisfactory because: (i) she had poor relations with the media; (ii) she had not provided strategic advice on external relations in Bangladesh; (iii) her political analysis lacked depth; and (iv) her team was not functioning well. The Country Director then encouraged her to resign. The Applicant provided a detailed written response to the OPE on April 4, 2001 claiming that she had never been told that she had not met expectations.

29. On March 19, 2001, an e-mail was sent in the name of the Applicant and her two team members to the Manager and the Country Director to inform them that all the team problems had been sorted out with the help of a counselor.

Non-Confirmation Decision, April-May 2001

30. On April 24, 2001, the Applicant was informed by the Manager by telephone and by the Country Director in person that her appointment would not be confirmed. She was given another opportunity to resign. The Manager told her that there would be no discussion of her detailed response to the OPE.

31. A Notice of Termination was sent from the Country Director to the Applicant on May 3, 2001. This notice confirmed that, with the concurrence of the HR Manager, her Manager and the VPSAR, it had been determined, as discussed previously on April 24, 2001, not to confirm her. Her employment would terminate in 60 days, on July 2, 2001, and she would receive a severance payment in accordance with the Staff Rules. The termination was for performance reasons. The Applicant challenged the decision to the HR Manager and sent e-mails to the VPSAR, the Vice President, Human Resources, and the Ombudsman.

32. When the Applicant ceased employment on July 2, 2001, her predecessor took up employment in Dhaka in the Education sector. He was also assigned to provide limited EXT (External Affairs) support. Later, he took up the Applicant's position on a full-time basis.

Appeals Committee

33. On May 31, 2001, the Applicant filed a Statement of Appeal with the Appeals Committee against the decision not to confirm her in her appointment. On July 9, 2001, she filed a further Statement of Appeal in respect of the decision to replace her temporarily with her predecessor. The Appeals Committee rejected her claim for provisional relief, and denied jurisdiction in respect of the second claim, but incorporated the issues in the original appeal.

34. The Appeals Committee found that the Applicant had had sufficient guidance, numerous warnings from August 2000 onwards, and an adequate opportunity to improve her performance, to develop close relationships with the media, and to address the deficiencies from January 18, 2001. It recommended that all of the Applicant's claims be denied. The Applicant was notified of this on April 18, 2002.

35. On August 20, 2002, the Applicant filed an application with the Tribunal.

Considerations

36. The Applicant claims that the non-confirmation of her contract and the termination of her employment were

arbitrary, unjustified and not in accordance with due process. She claims that the Bank failed to provide her with supervision and training, and that it failed to provide her with an opportunity to discuss and to improve her performance before the decision of non-confirmation was made. She claims that she was denied a fair evaluation of her performance and that the decision not to confirm her appointment was tainted by unethical conduct and malice.

37. The Bank submits that a probationary staff member has no right to tenure, and that any failure on its part to follow the prescribed procedures does not extinguish its right to exercise its discretion in deciding whether or not the Applicant was suitable for permanent appointment. The Bank submits that the Applicant was provided appropriate guidance and supervision, and that she was given adequate feedback and a reasonable opportunity to improve her performance. It submits that there were substantial grounds on which it was reasonable to conclude that the Applicant did not meet the standards required for her position.

Rules and General Principles

38. The Tribunal accepts that a staff member on probation has no right to confirmation, and that under the Staff Rules the Bank has considerable discretion in deciding whether or not to confirm the appointment (*Buranavanichkit*, Decision No. 7 [1982], paras. 26-27; *McNeill*, Decision No. 157 [1997], paras. 30, 44). The Tribunal will not review the merits of the decision and will not interfere with the decision unless there has been an abuse of discretion, in that it was arbitrary, discriminatory or carried out in violation of a fair and transparent procedure. (*Saberi*, Decision No. 5 [1981], para. 24.)

39. In assessing whether there has been an abuse of discretion, the Tribunal will review whether the Bank has extended to the probationer the procedural guarantees of due process and the right to have a fair opportunity to prove her ability. (*McNeill*, Decision No. 157 [1997], para. 44.) In *Salle*, Decision No. 10 [1982], para. 50, the Tribunal stated that the Bank's discretion at the end of the probationary period makes it imperative that the procedural guarantees for fair treatment be respected.

40. The general obligations of the Bank in regard to probationary staff are set out in Staff Rule 4.02. Paragraph 2.02 of that Rule provides that:

During the probationary period, the Manager or Designated Supervisor shall: (a) as soon as practicable, meet with the staff member to establish the staff member's work program; (b) at the end of the first six months of the probationary period, or earlier, share with the staff member a written assessment of the staff member's suitability and progress based on achievement of the work program, technical qualifications and professional behaviors; and (c) at the end of the probationary period, complete a performance review in accordance with the provisions of Rule 5.03, "Performance Management."

Under Staff Rule 5.03, paragraph 2.01, a staff member on probation shall be provided by the designated supervisor with an interim review at the end of every six months of the probationary period, conducted in accordance with the requirements of Rule 4.02.

Written Assessment

41. The Applicant submits that her supervisors failed to provide her with an interim OPE or a six-month written evaluation. This is not disputed. The Bank claims, however, that the failure to conduct a six-month review was because the Applicant's Manager needed more time to assess her performance, and that the Bank's failure to apply the Rule does not extinguish its right to find the Applicant unsuitable for appointment.

42. The Tribunal notes that the Applicant had submitted an interim OPE in July 2000, but did not receive a response until March 2001. No written assessment or interim review was provided to the Applicant until that date. In the case of a probationer, this does not necessarily invalidate the final decision not to confirm the appointment. (*Salle*, Decision No. 10 [1982], para. 46.) In cases of this kind, the Tribunal looks at whether the substantive purpose of the Rules has been fulfilled. The purpose of the Rule in question is to ensure that adequate supervision and guidance are given to a probationary employee, and that any matters of concern are

drawn to the attention of the employee so that there is an opportunity to correct any deficiencies. Due process for probationary employees requires the following elements to be respected:

First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself. (*Samuel-Thambiah*, Decision No. 133 [1993], para. 32; quoted in *Singh*, Decision No. 188 [1998], para. 21; *Zwaga*, Decision No. 225 [2000], para. 37.)

43. The Applicant claims that she did not receive support, assistance or training, that she did not get on-the-job coaching as required by the *Country Office Handbook*, and that she had no proper feedback. The Respondent says that the Manager gave the Applicant the guidance and supervision which was appropriate for an experienced professional and that she was provided with adequate feedback.

44. The Tribunal notes that the Applicant was unable to take up a training program at Headquarters as had been planned because of the death of her father in April 2000. The Applicant's Manager was based at Headquarters, and they communicated frequently by e-mail. There were also phone calls between the Applicant and her Manager, of which accounts are given. The Applicant often sought advice, and the Manager gave detailed views, sometimes asking for different action to be taken from that proposed by the Applicant. The Tribunal considers that these day-to-day contacts, taken as a whole, were sufficient to meet the minimum standards of guidance and instruction.

Warning and Opportunity

45. Although the Applicant received guidance and instruction, she claims that she was given no warning about any alleged deficiencies on her part and no opportunity to defend herself or to improve her performance. She claims that during the whole period of her employment by the Bank she received positive feedback in relation to her work, and that the Bank did not draw to her attention any deficiencies in her performance until January 2001, at the time she was told that she would be terminated. She claims that the decision to terminate her had already been made before she was told of any problems in her performance.

46. In response, the Bank points to several instances which, it says, should have alerted the Applicant to the fact that the Manager was not satisfied with her performance well before January 2001. These include the fact that her predecessor was sent to Dhaka to help in regard to the Concept Note and that the Communications Associate was sent in November to move things along. The Bank also relies on e-mail messages in which the Manager emphasized the importance of a positive and pro-active approach to establishing good relationships with the media.

47. The Tribunal notes that the Applicant received a number of positive comments on her work throughout the year 2000 and that she received both a salary increase and a Spot Award. The Manager's decision to send her predecessor to Dhaka was not presented to her as a result of any dissatisfaction, but rather quite the reverse. Much of the advice which the Manager gave to the Applicant about her work could have been seen by the Applicant as part of the guidance and supervision which she was entitled to expect, and was in fact relied on as such by the Bank.

48. The Tribunal notes also that more explicit concerns were expressed by the Manager towards the end of 2000, particularly in December, when differences between the Applicant and her Manager about the matrix were clearly set out. Even then, however, it appears that the Applicant did not understand that her performance was seriously in question. It is also clear that the Manager had not herself identified performance issues as being of major significance at that time. Her message announcing her visit to Dhaka indicated that the main agenda was to see how the team was operating.

49. The Applicant had no knowledge that the Manager had received complaints made about her by the Team Assistant until just before the Manager arrived in Dhaka. She reacted angrily. A week later, while the Manager was still in Dhaka, the Applicant was suddenly made aware that dissatisfaction with her performance would

probably result in her non-confirmation. She had no advance notice of this. The Manager herself may not have expected this result, as she has said that it was only when she was in Dhaka that she became fully aware that there were performance issues regarding the Applicant which needed to be dealt with. The Manager also conceded that the Applicant had not been aware that there might be a problem, commenting on January 17, 2001 that "I don't think she sees this train coming." The Tribunal notes, also, that the Country Director did not express concerns about the Applicant's performance or behavior before January 2001.

50. The Tribunal concludes that the Applicant was not made aware of the concerns about her relationships with the team or of the Manager's dissatisfaction with her performance until January 2001, one year after taking up her position. When the Manager and the Country Director first expressed their view that the Applicant should not be confirmed, she had been given no prior warning and no written assessment of her performance. She did not in fact receive a written assessment until March 11, 2001, when she was given her OPE recommending non-confirmation and termination of her employment. This is not compatible with the guarantees of due process to which probationary employees are entitled and which have been quoted earlier. If there were performance issues, the Applicant ought to have been adequately informed of the problems and given an opportunity to deal with them.

51. Under the Staff Rules, the designated supervisor should meet with the staff member at least once in a twelve-month period to discuss the staff member's performance, achievements, strengths, areas for improvement and future development needs. (Rule 5.03, paragraph 2.02, which applies to probation, by virtue of paragraph 2.02(c) of Rule 4.02.) These provisions operate to ensure that the probationer has a fair opportunity to prove his or her suitability to perform the required work and is accorded due process in this regard (*Zwaga*, Decision No. 225 [2000], para. 36).

52. The Staff Rules call for a performance review at the end of the probationary period (and at least once in twelve months). In *Zwaga*, Decision No. 225 [2000], the Tribunal leaned towards the view that the Rules require a formal performance review at the time a probationary staff member is given an early notice of non-confirmation. Due process requires this, and also that there be an opportunity to respond or explain. This implies that there should be a reasonable time available to the probationer before a final decision is taken on confirmation or non-confirmation.

53. The Applicant claims that she had no real opportunity to respond to the concerns raised with her on January 18, 2001 by the Manager, as those concerns and the decision not to recommend confirmation were delivered to her at the same time. She offered to "do what was asked," but asserts that the Bank did nothing to assist her to rectify the problems it had perceived, nor did it take any action in regard to the problems of the team. She claims, too, that her response to the OPE was not considered by the Bank.

54. The Bank submits that the decision not to confirm the Applicant's appointment was not made until the notification of termination was issued by the Country Director on May 3, 2001, and that the Applicant had an opportunity in the period between January and May of 2001 to "fully express her views and attempt to demonstrate improvement." The determination had been notified to the Applicant orally on April 24, 2001.

55. The Tribunal observes that the Manager appears to have virtually decided to recommend non-confirmation and termination of the Applicant during the Manager's week in Dhaka. Her e-mail of January 17, 2001 to the HRO and the Country Director is clearly to that effect. The Country Director expressed the same intention the next day after speaking to the Manager, in his e-mail to the VPSAR of January 18, 2001.

56. Although the Manager agreed to the Applicant's request to consider the matter before making her final recommendation in the OPE, there was little time for the Applicant to demonstrate that she could meet the standards expected of her or to turn the negative view already formed into a positive one. The Manager was away on leave most of February 2001. The Manager later stated that the Applicant appeared to try quite hard to improve, but that some of her efforts were misplaced and that the Applicant did nothing to assure the Manager that she had suddenly matured in her judgment of how to deliver her work. Her efforts to improve were too late. The Manager also stated that the Applicant continued to meet criticism by denying fault, or by

asking for more instructions.

57. The Tribunal considers that whatever the technicalities, the realities appear to be that the matter was effectively settled in January 2001 and confirmed by the OPE in March 2001. In these circumstances, the Tribunal is unable to conclude that the Bank fulfilled its obligations towards the Applicant as a probationary employee. In failing to provide the Applicant with adequate warning about problems in her performance which it had identified, and with an opportunity to deal with them, the Bank did not act with the “fairness and impartiality” which is called for in the Principles of Staff Employment. The failure of the Bank to inform the Applicant of complaints made by her team about her also amounted to a failure to act with fairness and impartiality in circumstances where these complaints would be taken into account in relation to a decision of non-confirmation.

The Non-Confirmation

58. The next question is whether the Bank’s decision not to confirm the Applicant was itself an abuse of discretion because of the failure of the Bank to apply its Rules, to act fairly towards the Applicant, or for other reasons. As mentioned earlier, a probationer has no right to confirmation, and the Bank has a considerable discretion in deciding whether or not to confirm a probationary appointment. (*Buranavanichkit*, Decision No. 7 [1982], paras. 26-27.) The Tribunal has said that the position of a probationer is essentially provisional and the assessment of her suitability is a matter of managerial discretion. The issue is whether the probationer has proven her suitability to the specific requirements of the Bank. (*McNeill*, Decision No. 157 [1997], paras. 30 and 34, referring to *Salle*, Decision No. 10 [1983].)

59. Under Staff Rule 4.02, paras. 3.01 and 3.02, a decision not to confirm a probationary appointment can be made at any point during the probationary period. The decision is made on the recommendation of the Manager, who first assesses “the staff member’s achievement of the work program, technical qualifications and professional behaviors.” The Bank may take into account the staff member’s “character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members.” (*Buranavanichkit*, Decision No. 7 [1982], para. 26; followed in *Matta*, Decision No. 12 [1982], para. 47.) The evaluation may be subject to changes during the period of probation. (*Salle*, Decision No. 10 [1982], para. 28.)

60. As mentioned earlier by the Tribunal, the Tribunal will not interfere with the exercise of discretion by the Respondent or substitute its own judgment for that of the Respondent on the Applicant’s suitability to be confirmed in her position in the absence of bias, arbitrariness or improper motivation on the part of the Applicant’s managers.

61. The Applicant denies any flaws in her performance and casts blame on others for any deficiencies. Her submissions point to numerous activities which she undertook and to many instances where her performance was acknowledged positively. She insists that her relationships with the media were good, and that the Manager had formed an adverse view about her, based on discussions with a biased group of journalists. She points out that she was awarded a salary increase and a Spot Award. She claims that her Manager failed to appoint a peer reviewer for the CRI project, even though this was a requirement and would have provided an assessment of her work. Further, she complains that she was denied the Research Assistant which her Manager had originally agreed to provide.

62. The Applicant claims, further, that the decision not to confirm her appointment was improperly motivated, that there was malice towards her and a “conspiracy” to reinstate her predecessor. Her Team Assistant, she claims, acted with malice towards her in making his complaints to the Manager. Her predecessor allegedly incited disaffection among her team and tried to turn her Manager against her. She also claims that her Manager was vindictive towards her and was influenced by her predecessor, and that their goal was to put him back in her job. The Manager, she alleges, poisoned the mind of the Country Director against her, and both the Manager and the Country Director acted in bad faith in predetermining her termination.

63. The Respondent submits that it was reasonable to assess the Applicant as unsuitable for appointment as EAO on the basis of the Bank's concern for the proper conduct of External Affairs activities. The EAO is a critical position, and the Bank was entitled to ensure that its needs in an important Country Office were met. The position required that the incumbent should develop media strategies, exercise a high degree of autonomy and demonstrate an ability to act without supervision. The position also required effective co-ordination with SAREX at Headquarters.

64. The Bank argues that although the Country Director and the Applicant's first Manager were satisfied with her performance at first, over time it became clear that she was unsuitable, as she did not act with autonomy and sound judgment, and required considerable instruction from the Country Director. The Applicant could do the administrative work and logistics, but did not make a contribution to substantive policy or deliver strategic external relations advice. She did not react adequately to negative stories about the Bank with pro-active strategies, but rather was reactive and required a great deal of micro-management. The Bank argues that the Applicant's plea that she was willing to do whatever was asked of her confirmed the view that she was not sufficiently autonomous and needed too much supervision. In addition, she failed to develop good relationships with the media, and was confrontational rather than positive. The Bank also argued that the Applicant showed poor teamwork, and had alienated her team by her manner.

65. The Applicant's OPE prepared by the Manager made a series of criticisms of the Applicant's performance: (i) she had not been able to gather substantive input from the five sectoral areas and fashion it into a coherent set of briefs for the CRI partners; (ii) she had appointed a CRI partner against the Manager's instructions; (iii) she did not personally review news summaries; and (iv) she reacted to leaks in the media by pressuring editors to reveal their sources. The Manager commented that the Applicant did not have the background to understand and communicate the substance of the subjects being addressed. Her skills were organizational and administrative, but she did not have the necessary strategic or analytical skills.

66. The Country Director, who had not criticized the Applicant before January 2001, gave his assessment of her performance in her OPE. He acknowledged that the Applicant had successfully organized a number of events in relation to the CAS. But in his view, she had not provided pro-active strategic advice on the management of external relations, which had led to image problems. He observed: "She has tended to wait for me to identify problems and to seek my advice about how to deal with them . . . [She] has not demonstrated good skills at absorbing the substance of our work and communicating it clearly in a manner tailored to external audiences . . . I concur with [the Manager] that she has not demonstrated professional skills and abilities on the level necessary to develop and implement the kind of effective external relations strategy we need in Bangladesh's challenging environment."

67. The Bank submits that there is nothing to support the Applicant's allegations of bad faith, stating in particular that on his return to Dhaka the Applicant's predecessor gave only 20% of his time to EXT until a new person was hired.

68. The Applicant has responded in great detail to all the allegations made against her by the Bank, including the assessments of her performance in her OPE and the Manager's lengthy submission to the Appeals Committee.

Conclusion

69. The Tribunal does not consider that the Applicant has made out her claims of malice or bad faith. Nevertheless, it does not accept the Bank's argument that the Applicant's propensity to see conspiracy indicates that she is unsuitable for a senior position where she has to exercise tact. The Applicant was shocked to learn that several of her supposed colleagues and her team had gone behind her back to management without anything being said to her. She reacted very strongly to this, perhaps to the point of over-reaction. The willingness of the Manager to receive, even to invite, complaints from the Applicant's team, and the fact, as the Applicant asserts, that her predecessor was later appointed to her position, contributed to her suspicions. But her claims of malice and conspiracy are not substantiated.

70. The Tribunal observes that the criticisms leveled at the Applicant vary from minor matters to more significant matters which require the exercise of professional judgment. Some of the criticisms are unsubstantiated. The Applicant did not advocate pressing the editor for the source of the leak to be revealed, as alleged. There are also contradictions in the approach of the Bank, as the Applicant is described on the one hand as rather “sweet and sincere,” while on the other hand she is described as being “imperious at times.”

71. Cutting through the many claims and counter-claims in this case, its essence concerns a probationer who tried to perform to the best of her ability, but who did not satisfy the expectations of her supervisors. In this, she may have suffered by comparison with her predecessor, who was experienced in the Bank, whereas she was a newcomer. An unfortunate aspect of the case is that the deficiencies identified by the Bank did not reveal themselves until a late stage, and rather suddenly, at least from the Applicant's point of view.

72. It may be that given other circumstances, the Applicant would have been better able to meet the expectations of the Manager and the Country Director. Nevertheless, management has a very broad discretion to determine the suitability of a probationary employee, and it is not for the Tribunal to determine whether too much was expected of the Applicant. The requirements of developing communications strategies and of having analytical as well as managerial skills were in her job description. In all these circumstances, the non-confirmation and termination of the Applicant are not considered as abusive.

73. In regard to the Applicant's other claims, the Tribunal does not consider the decision to put her on administrative leave after notice of termination was given to her to have been an abuse of discretion or a disciplinary measure. The announcement regarding the arrival of her predecessor, pending her appeal, did not amount to a violation of her rights.

74. Nevertheless, the Tribunal's view is that the Applicant was denied fair procedures by the Bank. The Staff Rules were not followed in her case, and she was not given the opportunities for assessment and improvement which are required for a probationary appointment. The failure to provide her with feedback on her performance or to explain how she could better meet the Bank's expectations was of particular significance in the case of a staff member in a Country Office who had no face-to-face contact with her Manager and no “ready access to the services and facilities available at headquarters to protect [her] interests.” (*Mustafa*, Decision No. 207 [1999], para. 35.) The treatment of the Applicant fell short of appropriate standards of procedural justice and this has effectively caused her harm for which she is entitled to be compensated.

Decision

For the above reasons, the Tribunal decides that:

- (i) the Respondent shall pay to the Applicant compensation assessed in the amount of one year's net salary;
- (ii) the Respondent shall pay to the Applicant costs in the amount of \$10,000; and
- (iii) all other claims shall be dismissed.

/S/ Bola A. Ajibola

Bola A. Ajibola
President

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

At London, England, May 20, 2003