

Decision No. 152

Helen Lewin,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R. A. Gorman and F. Orrego Vicuña, Vice Presidents and P. Weil, A.K. Abul Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on June 23, 1995, by Helen Lewin, against the International Bank for Reconstruction and Development. Although the Staff Association made no previous request it was permitted by the President of the Tribunal to file briefs as an amicus curiae in this case. The usual exchange of pleadings took place. The case was listed on June 18, 1996.

2. The Applicant, a computer system specialist with the Bank since 1973, requests the rescission of the decision of March 24, 1995 by which the Vice President, Management and Personnel Services, rejected the recommendations of the Appeals Committee concerning the appeals she had filed with the Committee against her performance review for the period March 1992 to February 1993 and against the Bank's decision of June 10, 1994 to terminate her employment on grounds of unsatisfactory performance. She also requests the rescission of the previous decisions which had led to the decision to terminate her employment, namely:

- the performance review for the period March 1992 to February 1993 (hereafter called: the 1993 PPR) and the consequent below norm merit increase for 1993;
- the Management Review of May 6, 1993 concluding that in view of her less than satisfactory performance she should be placed on a performance improvement program under Staff Rule 7.01 (as it was then in force);
- the evaluation of her Division Manager dated April 1, 1994 determining that she was "unable to meet the assigned performance objectives during the ten-month probation period" just completed and requesting that she be removed from her job in the Division and, if possible, assigned to another position in the Bank;
- the Respondent's decision of June 10, 1994 to terminate her employment from August 15, 1994 and the consequent below norm merit increase for 1994.

3. Against all these decisions the Applicant has exhausted all internal remedies available and no question of admissibility arises in this respect.

4. The Applicant also requests the rescission of the Respondent's decision, as expressed in various letters, to offer her a mutually agreed separation in lieu of declaring her redundant.

5. The Applicant maintains that the Respondent, in making these decisions, violated her "right to fair, impartial and objective performance reviews". The decision that her performance was unsatisfactory, she argues, was "arbitrary, capricious and motivated by prejudice". The Respondent, she says, violated its obligations "to make fair and transparent decisions concerning staff performance....., to deal fairly with staff and in a non-discriminatory manner... (and) to respect the Applicant's contract of employment which includes the right to have staff rules applied in accordance with their tenor, and in force at the time of the decision taken". The Applicant alleges "abuse of power", "error of fact", "abuse of discretion", "managerial misconduct". She requests specific performance of the obligations which she alleges have been violated; the precise content of the performance asked for is, however, not defined.

6. Under various headings (severance payments based on redundancy; damages for loss of career opportunity; stress and emotional suffering; revision of the merit awards for 1993 and 1994, etc.) the Applicant requests compensation equivalent to three years net salary.

7. Finally, the Applicant requests attorney's costs in the amount of \$23,625; the removal from her file of the 1993 PPR and all the subsequent performance memoranda, actions, etc.; and a letter of apology from the Respondent "for the wrongful and false statements made concerning her performance in 1992-93 and its failure to respond to (her) on her requests for clarification of statements made concerning her".

8. On January 17, 1996 the Staff Association filed an amicus curiae brief requesting the Tribunal to consider under what circumstances the Respondent may reject the recommendations of the Appeals Committee. The Respondent asks the Tribunal to decline to entertain this request.

I. The Applicant's performance review for the periods March 1992 to February 1993

9. In the 1993 PPR, dated April 23, 1993, the Senior Manager of the Division of the Financial Operations Department (FOD) to which she had been assigned during the period under review wrote as follows:

... On the swap pricing exercise, which was aimed at assisting swap officers to evaluate conversion factors between currencies rapidly, she did a thorough and complete job.

With regard to the other activities, including constructing a computer simulation of DRS (Deferred Rate Setting), she worked hard and provided inputs. However, in some cases the resulting model was not user friendly. This mainly arose due to the fact that her preference for programming in FORTRAN (formula translation) meant that the models she constructed could only be easily manipulated by her; no one in FODD3 (FOD, Division 3) uses first generation computer languages any longer. With large models which require interactive changes, senior staff have been unable to easily access the models she created and found it limiting to constantly ask her to modify the model. In some cases, senior staff had to reconstruct the model themselves in order to make the analysis useful and as a result her work had a limited impact.

During this period, as time permitted (Ms. Lewin) also worked with [Mr. S.] on a swap portfolio insurance scheme, which at this time is partly completed....

Overall, Ms. Lewin's performance during this assignment was less than satisfactory given her inflexible approach to programming.

This is the performance review that the Applicant asks the Tribunal to quash on the ground that her supervisor "negligently and recklessly made an evaluation" of her work which resulted in "a false, derogatory and factually incorrect performance review".

10. As the Tribunal has found in a previous decision,

It is an established rule of judicial review by this and other similar tribunals that the reviewing tribunal may not substitute its own judgment for that of the management as to what constitutes satisfactory performance. (Polak, Decision No. 17 [1984], para. 43)

From this it follows, in the words of another decision of the Tribunal, that

[t]he determination whether a staff member's performance is unsatisfactory is a matter within the Respondent's discretion. The Administration's appraisal in this respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure (Saberi, Decision No. 5 [1981], para. 24)

This basic principle has been applied by the Tribunal to the evaluation made in a periodic performance review

(Durrant-Bell, Decision No. 24 [1985], para. 25) as well as to the evaluation made for purposes of salary increases or to an assessment of unsatisfactory performance as a ground for termination (Suntharalingam, Decision No. 6 [1981], para. 27; Buranavanichkit, Decision No. 7 [1982], para. 26; Buyten, Decision No. 72 [1988], para. 44). This principle must be kept in mind when assessing the grievances aired by the Applicant against her 1993 PPR.

11. The Applicant maintains in the first place that the model referred to in her PPR, as resulting from “a computer simulation of DRS”, did not in fact involve any simulation process and was not a model but only a routine request to run some numerical series which was carried out successfully on an existing program in a matter of hours. She speaks of a “phantom” and “unidentified model”, “a fabrication and a virtual figment of her (supervisor’s) imagination”. She also argues that in characterizing the result of her work as “not user friendly” and in criticizing her for programming in FORTRAN and thus producing a work which “could only be easily manipulated by her” because no one in the Division “uses first generation computer languages any longer”, her supervisor had shown that she “lacked sophisticated knowledge of computer programming”. FORTRAN, so she maintains, “is in fact a major scientific programming language generally considered to be third generation and it is far from being outdated”. In complaining that the result was not “user friendly”, the supervisor, so she alleges, “showed that she did not understand, or care even to find out, the meaning of the computer jargon she tried to use to criticize Applicant”. In endorsing this criticism, she adds, the Division Chief, FOD, Division 4 (FODD4), who drafted the Management Review section of the PPR, also “display(ed) his ignorance of computer science”.

12. The Respondent maintains, for its part, that the DRS project was a real project; it consisted in a simulation of how a money pool comprising equal volumes of ten year borrowings in US dollars, Japanese yen and German marks would have behaved between 1970 and 1990 if borrowings were effected in two-monthly, four-monthly or six-monthly intervals compared to monthly sampling. While the Respondent does not dispute that the Applicant “produced the analysis as requested”, it nevertheless maintains that “she would only program the simulation in FORTRAN, a computer language no longer in use at the Bank”, instead of using tools such as EXCEL spreadsheets which are user friendly and of easy access to the other members of the team.

13. Having reviewed the record, the Tribunal is unable to share the Applicant’s views on this matter. The Terms of Reference for the Applicant’s participation in the Division’s work program, dated January 28, 1992, explicitly stated as follows:

You will work as a team member....and interact closely with all FOD staff to ensure the final outputs are user friendly and, whenever possible, designed for an EXCEL spreadsheet.

It is, of course, not for the Tribunal to discuss the respective qualities of FORTRAN and EXCEL. Whatever the Applicant may think of the superiority of FORTRAN over EXCEL, and even assuming she is right, the fact of the matter is that she was instructed to use EXCEL, the Division used EXCEL and many members of the team did not easily have access to FORTRAN. The fact, noted in the PPR, that in some cases senior staff had to reconstruct the model in order to make it understandable to the team speaks for itself.

14. In addition, the Applicant’s propensity for working according to her own preferences rather than as a team player appears to have been a pattern of behavior dating back to a number of years before the contested PPR of 1993. It was already noted in her PPRs for 1981-1982 and 1986-1987. In his testimony before the Appeals Committee the Senior Adviser to whom she had been seconded from June 1987 to August 1991, and with whom she worked again for some time at the end of 1992, i.e., during the very period reviewed in the 1993 PPR, stated, according to the Committee’s Report, that, although “he was fully satisfied with (Ms. Lewin’s) work and had recommended her promotion to Level 23”, he nevertheless

...was aware of Ms. Lewin’s difficulties in working productively with others and alluded to her frequent ‘intense negative interactions’ with other staff. He stated that he would not have given her work that required her to be a team player. In his opinion, she worked best on her own complicated topics. The work she did for him did not require either that her computer work be user friendly or that she interact with colleagues.

15. In a previous case the Tribunal has ruled that “the ability to work harmoniously and to good effect with supervisors and other staff members” can properly be taken into account when evaluating the performance of a staff member (Buranavanichkit, Decision No. 7 [1987], para. 26). To mention the Applicant’s shortcomings in this respect in her performance evaluation and to regard them, amongst other factors, as a ground for a less than satisfactory rating, certainly cannot be regarded as an arbitrary or improperly motivated assessment, or otherwise as an abuse of power or discretion.

16. Another grievance aired by the Applicant against her 1993 PPR is that it took into account only her work in the Division to which she was then assigned and ignored the work she did for the Senior Advisor to whom she had been “loaned” previously and who thought highly of her. If that work had been taken into account, so she maintains, she would have received a quite different, and certainly positive, evaluation of her performance.

17. The parties disagree on whether the Applicant’s work outside her Division was known, or agreed to, by her Division Chief and to what extent it was relevant to the evaluation of her performance during the period under review. The Tribunal does not deem it necessary to resolve this difference because it appears from the very text of the 1993 PPR that the Applicant’s work with the Senior Advisor was actually referred to in the Applicant’s own assessment of her work in Section I of the PPR and also in the supervisor’s evaluation in Section II thereof. Moreover, the evaluation of the Applicant’s performance as less than satisfactory was based not solely on the simulation model which the Applicant regards as nonexistent but on an overall appraisal of her work, balancing up the positive and negative aspects of her performance. In this respect also, the Tribunal is unable to regard the 1993 PPR as arbitrary or improperly motivated.

18. On the procedural level, the Applicant complains that the 1993 PPR was never discussed with her. This complaint is not borne out by the record. It appears indeed from a memorandum of the Senior Manager dated April 27, 1993 that a memorandum of October 20, 1992, the content of which was to be repeated basically, and almost word for word, in the 1993 PPR, had been discussed with the Applicant on October 26, 1992 and that the Applicant “had no comments or suggestions” to proffer. The Applicant does not dispute this statement; even less does she produce any evidence to the contrary.

19. The Tribunal concludes that the evaluation of the Applicant’s performance in her PPR for 1992-1993 as less than satisfactory did not constitute an abuse of discretion either substantively or procedurally. It was the exercise of managerial discretion for which the Tribunal cannot substitute its own appraisal of the Applicant’s performance. Nor was it manifestly unreasonable so as to be invalid. The Applicant’s plea that her 1993 PPR, dated April 23, 1993, and the subsequent below norm merit increase for 1993 be rescinded is, consequently, dismissed.

II. The Applicant’s placement in a performance improvement program from June 1993 to March 1994

20. On May 6, 1993 the Management Review Group concluded that, “in view of Ms. Lewin’s less than satisfactory performance, we are invoking Section 11.02 of Staff Rule 7.01 from June 1, 1993”. According to this provision, “[w]hen a staff member’s performance is not satisfactory” he shall be notified “that he must improve within a reasonable period and that, otherwise, employment may be terminated” unless “there are good prospects for satisfactory performance elsewhere in the Bank Group”.

21. An Action Plan was prepared for the Applicant, setting out objectives, critical success factors, training needs and a timetable. A monthly report reviewing her performance was to be prepared, and the Unit Chief was to meet with her on a weekly basis to discuss progress and work related issues. Progress reports of the Applicant’s performance were prepared and discussed with her for the months of June, July, September and October 1993. In an evaluation, dated December 7, 1993, of her performance during the six-month probationary period, the Unit Chief noted that the Applicant had been assigned tasks that were fairly simple in nature and that more complex tasks would not be assigned to her until she was able to finish these simple tasks faster.

22. The Applicant's probationary period having been extended by four months until March 31, 1994, the Unit Chief prepared a final progress report. In this report, dated March 31, 1994, the Unit Chief stated that the Applicant had "consistently taken longer to complete her assignments which were fairly simple in most of the cases"; that "the output turnaround time (was) much slower than expected of one at her grade level", due partly to "her lack of experience in the software products used... and her inability to bring her skills to the required level". The Unit Chief also noted that the Applicant had "not met the objective" assigned to her in her Action Plan; that she "could have put more energy and enthusiasm into the project to make it more useful"; and that she had "made no effort to resolve or reconcile her differences with management". The Unit Chief concluded that the Applicant "should find an assignment more suited to her current skills" and recommended "that she be removed from the.... Unit".

23. The Applicant complains both of the decision to place her on a performance improvement program and of the Respondent's evaluation of her performance during that period.

24. The Applicant maintains, first, that the decision to place her in a performance improvement program was taken as a retaliation for having contested her 1993 PPR through requests for administrative review and, thus, amounted to an abuse of power. She cites in this respect the passage quoted above from her final progress report in which her supervisor noted that "she made no effort to resolve or reconcile her differences with management". In these words she sees a "thinly veiled reference to (her) unwillingness to drop her first appeal". "Things might have been different if she had not pursued her appeal", so much so, she maintains, that this "raises the issue of retaliation for exercising her right of appeal".

25. The Tribunal is unable to read such intentions into the supervisor's final progress report. The Applicant's lack of flexibility had in fact been noted earlier on several occasions as one of her main shortcomings, and there is nothing in the record to substantiate any accusation of "misconduct", "abuse of power" or *détournement de pouvoir*. Under Staff Rule 7.01 the placement in a performance improvement program, having regard to the possibility of termination, was mandatory subsequent to the rating of her performance as less than satisfactory in her 1993 PPR. It was, thus, no more than the implementation of the applicable staff rule. No basis exists for concluding that the Applicant was placed in a performance improvement program for any reason other than her unsatisfactory performance.

26. The Applicant also complains that the evaluation of her probationary period was "seriously and materially flawed" because she had not been given assignments at her level, level 23, and, therefore, no proper performance test had in fact been carried out. She maintains that the quality of her work during the probationary period was actually satisfactory or better than satisfactory, the only problem being the time taken to complete some tasks. She argues further that the Respondent "did not see fit to provide (her) with the training that would have helped her to overcome any impediment to greater productivity" and that her Unit Chief evinced prejudice by making remarks to staff members that her employment was being terminated even before the decision to do so was actually taken.

27. The record does not contain any evidence to support these allegations. On the contrary, the Appeals Committee, in its Report, noted that it "was positively impressed with the way (the Unit Chief) handled Ms. Lewin... We have no reason to believe that (her) final assessment was biased or inaccurate. It is evident from the testimony of both (the Unit Chief) and Ms. Lewin that, after November 1993, Ms. Lewin's attitude deteriorated, and she lost her will to learn". In concluding that the Applicant's programming skills during her probationary period had at best attained a level comparable to that of a junior programmer and that her failure to function at a higher level resulted from her lack of interest and initiative, the Respondent exercised its managerial discretion. Absent any evidence of abuse of discretion, the Tribunal cannot substitute its own appraisal of the Applicant's performance improvement program for that of the Respondent.

III. The decision to terminate the employment of the Applicant on grounds of unsatisfactory performance

28. Following the final evaluation of the Applicant's performance improvement program, the decision was made

on April 1, 1994, in accordance with Staff Rule 7.01, to remove her from her position on the ground that she was “unable to meet the assigned performance objectives during the 10-month probation period” and possibly to reassign her elsewhere in the Bank. The Respondent having determined on May 31, 1994 that “there is unfortunately no alternative position to which Ms. Lewin could be assigned with good prospects for satisfactory performance”, a 60-day notice of separation was given to her on June 10, effective August 5.

29. The Applicant maintains that not only was this decision based on the flawed 1993 PPR and on the no less flawed evaluation of her probationary period but that it was taken “for improper reasons not related to performance”. The truth of the matter, she argues, is that her position in the Bank was a “skills mismatch”. She “was a mathematician, highly praised for her brilliance in constructing relatively esoteric mathematical models”. However, since there was no work for a level 23 computer technology specialist with her skills she was actually “overqualified” for the work available. In other words, she was in a “unique position”, which was abolished because her skills were no longer needed. Therefore, she maintains, “the unquestionably correct course of action was a decision that after 21 years of honorable and exceptional service to the Bank she was redundant”. The Bank, however, so she alleges, did not want to proceed on redundancy grounds because it wanted to be released “from liability in the pending appeals against abuses of power by (her) managers”. This would not have been possible, she says, had the decision been one of redundancy, not subject to the settlement and release of grievances. On the other hand, she adds, she was not inclined to accept the mutually agreed separation (MAS) which was offered to her on several occasions, because she was not prepared to accept an agreement which would have provided for a settlement and release of her grievances. This, she argues, would not have been “in the interest of either the World Bank or the staff of the Bank” because it “would have frustrated justice”. In sum, since the Respondent did not want to proceed on redundancy grounds and she, for her part, was unwilling to enter into a MAS agreement, so she concludes, the Respondent felt constrained to utilize performance grounds--which was clearly an abuse of power.

30. Under Section 8.02 of Staff Rule 7.01,

Employment may become redundant when the Bank Group determines... that:

- (a) an entire organizational unit must be abolished;
- (b) a specific position in an organizational unit must be abolished;
- (c) a position description has been revised, or the application of an occupational standard to the job has been changed...; or
- (d) specific types or levels of positions must be reduced in number.

The Bank maintains that none of these grounds existed and that it “did not declare Applicant redundant because there was no basis for doing this”. The Applicant’s employment was terminated, so it argues, quite simply because her performance was less than satisfactory. The Tribunal sees no basis for challenging this view. The history of the Applicant’s employment with the Bank is one of unquestionable technical skills but at the same time of no less unquestionable lack of flexibility and unwillingness to adapt to her working environment. This was the view of the Appeals Committee:

It is clear to this Committee that Ms. Lewin is a highly skilled worker in her field. However, she was unable to adjust to the needs of her Division. The Committee agrees with the Respondent that this is not a redundancy case. Ms. Lewin was unwilling to build her capabilities to match the requirements of the Division. In particular, she made no effort to use the computer programs that her managers requested. She justified her attitude by insisting, even to this Committee, that FORTRAN was a superior program. This illustrated her refusal to acknowledge that she needed to adapt her working procedures to the dictates of her work environment as determined by her managers.

In accepting this assessment of the situation the Tribunal has not failed to take into account the fact that the Applicant had served the Bank for 21 years, most of them without complaint as to her performance. But that

cannot override the compelling fact that the Applicant proved unable to adapt her skills to the changing technological needs of the Bank. The situation was, thus, not one in which the Applicant's position became redundant but one in which her skills became obsolete.

31. The Tribunal concludes that the Respondent's decision to terminate the Applicant's employment was made only on grounds of unsatisfactory performance. In this decision there is no *détournement de procédure* or other abuse of power or discretion.

32. Elsewhere in her pleadings the Applicant puts forward another, and quite different, explanation of what she regards as the real motive for the termination of her employment, namely, age discrimination. The Respondent, so she argues, was looking for ways to remove a staff member whose age and grade represented a higher cost to the Bank than that of younger computer specialists, who could be hired at far lower wages and with far fewer benefits. The Tribunal does not find in the record any more evidence of *détournement de pouvoir* than it did of *détournement de procédure*. The decision to terminate the Applicant's employment was the outcome of a long and consistent assessment of her performance as less than satisfactory. Absent any evidence of abuse of discretion, the Tribunal, once again, cannot substitute its appraisal for that of the competent authorities of the Bank.

33. It is worth noting that the Applicant has attributed to the Respondent many and varying motives as underlying the termination of her employment--overqualification, age discrimination, prejudice, supervisors' ignorance of computer science, etc. None of them has been substantiated. There is no basis in the record for any explanation other than the quite simple and obvious one evidenced in so many documents, namely the Applicant's unsatisfactory performance, in particular regarding her inability to adapt as a team worker to the evolving requirements of a specific work environment. The Applicant's plea that the decision of April 1, 1994 to terminate her employment and the subsequent below norm merit increase for 1994 be rescinded is, therefore, also dismissed.

IV. The Respondent's decision not to accept the recommendations of the Appeals Committee

34. In its Report of March 13, 1995 the Appeals Committee recommended that the Applicant's 1993 PPR be reviewed again and her consequent merit increase for the period 1992-1993 be recalculated accordingly; that the Respondent make diligent efforts to find the Applicant a position more suited to her skills elsewhere within the Bank; and that, if the Respondent were unable to agree with her on such a position, a mutually agreed separation be negotiated between the parties. These recommendations were rejected by the Vice President on March 24, 1995.

35. The Applicant maintains that "[t]here was no showing in the Vice President's letter that there were any valid overriding reasons justifying his decision" and that "it is clear from the Vice President's letter that the denial of relief was a simple case of punishing her for her decision to pursue her remedies instead of capitulating and accepting the proffered MAS". This decision, she maintains, was "intended to warn staff not to seek vindication of their legitimate grievances". "As such", she concludes, "it constitutes an abuse of discretion and arguendo an abuse of power".

36. The very text of the Vice President's letter belies this allegation. In this letter the Vice President noted that he did not "find that the Committee's recommendations follow from its findings and conclusions". He explained to the Applicant at great length, with respect to each of these recommendations, why he did not accept it. He stated that he found no basis for reviewing the Applicant's 1993 PPR and the consequent merit increase. He recalled that the Bank had previously determined that there was no alternative position to which she could be reassigned with good prospects for satisfactory performance, and that in light of the current environment of the Bank he saw no prospect of placing her elsewhere in the Bank. He added that as the Applicant had declined a mutually agreed separation three times previously he was not prepared to make a fourth offer, all the more so in light of two successive evaluations reflecting unsatisfactory performance.

37. Staff Rule 9.03, Section 9.01, provides that:

The Senior Vice President, Management and Personnel Services.... will review the recommendations of the Appeals Committee and make a decision on the appeal.

This does not say that the Bank is under a legal obligation to accept the recommendations of the Appeals Committee. It is free to accept or reject all or part of them. The decision of the Bank is a matter of managerial discretion. The Applicant's allegation that the Respondent's decision in the instant case was based on the improper motive of "punishing her" and "warn(ing) staff" and, thus, constitutes an abuse of discretion, in the Tribunal's view, finds no support at all in the record.

V. The *Amicus curiae* brief of the Staff Association

38. The Staff Association has filed an amicus curiae brief under Rule 23(2) of the Rules of the Tribunal. This Rule provides that:

[t]he Tribunal may permit any person or entity with a substantial interest in the outcome of a case to participate as a friend-of-the court.

The President of the Tribunal authorized this filing even though no request to that effect had been made beforehand by the Staff Association, the request and the brief having been filed at the same time.

39. In its brief the Staff Association draws the attention of the Tribunal to the question of principle which, in its view, is raised by the rejection in this case of the recommendation of the Appeals Committee by the Vice President of the Bank. The Staff Association writes as follows:

The question we believe to be ripe for exploration by the WBAT is that of the circumstances under which the Bank may choose to reject a recommendation of the Appeals Committee. Our view is that the Bank may properly reject a recommendation of the Appeals Committee only where it can demonstrate clearly that the Appeals Committee has been arbitrary, discriminatory, improperly motivated, or where there has been a clear procedural error by the Committee.

According to the Staff Association, there exists an "underlying presumption that the Committee's deliberations are fair and its recommendations well-founded", so that "the burden of proof must rest with the Bank". In the present case, the Staff Association maintains, "this standard was not met", because the Vice President rejected the recommendations of the Appeals Committee "out of hand, substituting his own interpretation of the facts for that of the Appeals Committee" without demonstrating that the recommendations of the Appeals Committee had been arbitrary, discriminatory, improperly motivated or procedurally flawed.

40. The Respondent maintains that "the scope of participation as an amicus curiae is intended to provide assistance to the Tribunal with respect to issues raised by individual staff in a particular case. It is not to seek independent relief, an advisory opinion or a declaratory judgment". The Staff Association, the Respondent argues, "has exceeded the role of an amicus curiae", and its brief "amounts to an application asking the Tribunal to render a declaratory judgment or advisory opinion that does not go to the merits of the underlying case, but rather seeks a relief of a general nature". The Staff Association, therefore, so the Respondent concludes, "should not be permitted to manipulate Rule 23(2) of the Rules of the WBAT in this way", and the Tribunal should decline to accept its request.

41. The Tribunal does not accept this view. It is true that the Staff Association has no standing to file an application with the Tribunal, whether on its own behalf as an institution or on behalf of staff members or as an intervening party (The World Bank Staff Association, Decision No. 40 [1987], paras. 83, 85, 87). It is true also that the Tribunal can "rule only upon past administrative action affecting the rights of specific members of the staff" and has no jurisdiction to give advisory opinions or render declaratory judgments (Agodo, Decision No. 41 [1984], paras. 28 et seq.). On the other hand, Rule 23(2) gives to the Staff Association a role of significance in proceedings before the Tribunal, and this rule cannot be ignored either. Consequently, "[e]ven though the

Staff Association may not appear as an applicant or as an intervenor before the Tribunal and, therefore, cannot submit pleas of its own, the Staff Association can indeed provide assistance to the Tribunal in rendering a full and considered decision of the issues raised....” (The World Bank Staff Association, Decision No. 40 [1987], para. 88).

42. By reason of the Staff Association’s general concern for the well being of the staff, there is no doubt that the Staff Association has “a substantial interest in the outcome of the case” on this particular issue. In drawing the attention of the Tribunal to the importance of the issue and in informing the Tribunal of its views on the matter, the Staff Association has not exceeded the role of an amicus curiae. The Tribunal concludes that the amicus curiae brief filed by the Staff Association is admissible and is to be regarded as part of the proceedings.

43. The Staff Association has argued that the recommendations of the Appeals Committee are to be presumed well-founded and that, absent any abuse of discretion by the Appeals Committee, the Bank abuses its power if it does not endorse them, the burden of proof resting upon the Bank. The Tribunal cannot but note that this view is clearly at variance with the role and mission of both the Appeals Committee and the Tribunal. As with other bodies or authorities entrusted with the task of administrative review, the Appeals Committee is a body whose mission is to assist management--and, in the last resort, the Tribunal--in reaching proper solutions. As the Tribunal has ruled in a previous case,

....the pursuit of internal remedies, in particular the findings and recommendations of the Appeals Committee, greatly assist the Tribunal in promptly and fairly disposing of the cases before it. The Appeals Committee permits a full and expeditious development of the parties’ positions, including the testimony of witnesses, and often results in the announcement of recommendations that are satisfactory to both the Bank and to the aggrieved staff member. (Klaus Berg, Decision No. 51 [1987], para. 30)

The Appeals Committee is not a judicial body. It is part and parcel of the administrative review process, the mission of which is to allow “reconsideration by a higher authority of decisions which a staff member considers adversely to affect his or her interest and rights” (Samuel-Thambiah, Decision No. 133 [1993], para. 37).

44. The Tribunal is not an appellate body reviewing the proceedings, findings and recommendations of the Appeals Committee. Its task is to review the decisions of the Bank; it is not to review the Report of the Appeals Committee. In a previous judgment the Tribunal has stated as follows:

.... the relationship of the Appeals Committee to the Tribunal is not that of an inferior to a superior court. The Tribunal is not a court of appeal from the Appeals Committee and does not review the manner in which the Appeals Committee has dealt with a case before it. The proceedings before the Tribunal are entirely separate and independent despite the fact that recourse to the Appeals Committee is a condition precedent to the commencement of proceedings before the Tribunal. The function of the Appeals Committee is to assist the management of the Bank to determine for itself whether there has been a failure on the part of the Bank. The function of the Appeals Committee ends with its recommendation, which the Bank may or may not accept.... The Tribunal is the only body within the Bank that deals with complaints judicially and it does so only on the basis of the evidence before it. (de Raet, Decision No. 85 [1989], para. 54)

45. If the Bank decides to reject the recommendations of the Appeals Committee, and, thus, to confirm its previous decision which the Applicant had contested before the Committee, this decision has to be reviewed by the Tribunal directly, and on its own merits. The Tribunal’s task is to pass judgment upon whether the Bank has violated the contract of employment or terms of appointment of the Applicant. It is not to pass judgment upon whether the Bank has rightly or wrongly accepted or rejected the recommendations of the Appeals Committee. There is, consequently, nothing wrong per se in the Bank’s decision not to accept the recommendations of the Appeals Committee. As already noted, this decision is to be assessed on its own merits and independently of the findings and recommendations of the Appeals Committee.

Decision:

For the above reasons, the Tribunal unanimously dismisses the application.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, D.C., October 22, 1996