

Decision No. 211

Sue C. Lysy,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on August 14, 1998, by Sue C. Lysy 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, composed of Francisco Orrego Vicuña (a Vice President of the Tribunal) as President, Bola A. Ajibola and Elizabeth Evatt, Judges. The usual exchange of pleadings took place. The case was listed on February 17, 1999.

2. On August 14, 1998, the Applicant filed an application with the Tribunal claiming non-observance of her contract of employment or terms of appointment. The Applicant challenges the decision not to confirm her position in the Infrastructure Division of the European and Central Asia Region, Country Department 4 (EC4IN) as permanent, a decision which, she claims, resulted from her unwillingness to produce misleading results for a financially nonviable project. She also challenges the Respondent's subsequent actions which led to her termination from the Bank. These actions include her 1996 performance evaluation (PRR) which, she claims, was not fair and reasonable. She claims that, in addition to procedural irregularities, the Respondent did not observe the Bank's Code of Professional Ethics. She also alleges that there was an abuse of discretion, improper motive and a violation of fair and reasonable procedures.

The Relevant Facts

3. The Applicant joined the Bank in June 1977 as a Research Assistant in the Development Economics Department. Thereafter she held a number of other positions, including that of Management Systems Analyst (levels J to 22), Projects Officer (level 23), Financial Analyst (level 23) and Program and Budget Officer (level 24). In 1995, she held the position of Senior Financial Analyst, level 24, in the "Natural Resources, Water and Environment" Division, in the Middle East and North Africa (MNA), Country Department II.

4. On September 18, 1995, the Applicant was informed that her employment was declared redundant, with effect from November 1, 1995. The reason invoked was that as a result of changes there was no longer a need for a financial analyst of her qualifications in the Division.

5. In late 1995, after discussions with the Division Chief, EC4IN, it was agreed that the Applicant would join that Division for one year as a Senior Financial Analyst, grade 24. The Division Chief, EC4IN, stated at the time that she wanted the Applicant to work in the Division because she had been highly recommended; her position had been declared redundant not because there was a performance issue, but because there was no longer a need for her particular expertise in her former Division.

6. The Applicant started working in EC4IN in January 1996. The terms of a temporary assignment and Mutually Agreed Separation Agreement (MAS) of March 6, 1996 provided that she would remain in regular work and pay status through July 15, 1997, and that she would begin 22.5 months of special leave from July 16, 1997 through May 31, 1999. The agreement would lapse if the assignment in EC4IN became permanent by July 15, 1997 by mutual agreement or if the Applicant took up a new assignment; otherwise, she would separate from the Bank. The Applicant was to be notified no later than December 31, 1996 whether her assignment in EC4IN was to be made permanent.

7. On March 12, 1996, upon the Applicant's request, it was confirmed that if her assignment in EC4IN did not become permanent she was to have six months from January 1 to July 15, 1997 to devote to full-time job-search efforts. The Applicant signed the MAS agreement on March 15, 1996.

8. There is no dispute that the Applicant's work in EC4IN started off well. Her first assignment was as the lead financial analyst for the Ukraine Electricity Market Development Project (EMDP). The Division Chief, EC4IN, praised her work on that Project on February 20, 1996. In the Performance Effectiveness Plan part of the Applicant's 1995 PRR, completed on March 26, 1996, the Division Chief, EC4IN, stated that the Applicant had an excellent start in EC4IN, and that she had been able to tackle in a remarkably short time the complexity of the financial situation of several energy companies in Ukraine.

9. The Applicant claims that problems arose in October 1996, after she drew attention to concerns relating to two Bank projects in Ukraine. She went on mission in Ukraine in October 1996. She reported to the Task Manager for the Krivoy Rog Rehabilitation (KR) Project, to the Division Chief, EC4IN, and to others that the mission had observed governance and financial troubles that raised serious questions about the Bank's operations in that area. In regard to the EMDP in Ukraine, the Applicant states that she was told by local operators that the Electricity Market (Energomarket) was not in fact in operation. She asserts that she was unaware that the Task Manager of the EMDP had made positive statements to the Board on the operation of the electricity market, and contends that when she reported her findings and asked for guidance, the reactions were extremely negative.

10. While the Applicant was on mission in Ukraine, the Principal Operations Officer in the Office of Vice President Europe and Central Asia (ECAVP) briefed the Vice President, ECA, on October 25, 1996 on the status of the KR Project and suggested that he might wish to review whether the Project was sufficiently prepared. His memorandum of October 25, 1996 set out issues and questions to be addressed in a Staff Appraisal Report (SAR) so that the likely sustainability of the borrowing company (Dniproenergo)'s operations could be properly assessed.

11. The Applicant was responsible for preparing the financial chapter of the SAR on the KR Project. She states that she passed along information that top officials from Dniproenergo had expressed serious reservations about the Project design. She herself concluded, after analysis, that the KR Project was not financially viable and should not be presented to the Bank Board of Executive Directors as if it were. She reported to the team that she believed the assumptions used for the fuel prices in the financial analysis of the Project were unreasonably low, and that if the correct higher fuel prices were used the Project would not be "financially viable." The Applicant claims that the Task Manager of the KR Project told her to use a coal price projection which, she states, was about one-half the then market price. The Applicant asserts that she researched other prices around the region and the country, including World Bank commodity projections and the Bank's most recent experience with the same power plant under the EMDP, where the price was \$52 to \$70 per ton. On this basis, she claims that the \$35 per ton she was asked to use by the Task Manager of the KR Project was unrealistic. The Applicant claims that others on the team supported her view.

12. On November 22, 1996, the Applicant sent a memorandum to the Task Manager of the KR Project on behalf of team members, expressing concern that the assumptions on which fuel prices used in the KR and EMD Projects were based were far too low. She outlined the implications of the under-estimated prices (including that the conclusion on viability was wrong) and pointed out that in his memorandum of October 25, 1996 the Principal Operations Officer in ECAVP had also expressed concerns about "implementation problems due to insufficient internal cash generation in the executing agency" and "the likely sustainability of Dniproenergo's operations." She called for a re-evaluation of the Projects. The Applicant claims that she received a hostile response from the Task Manager.

13. On December 5, 1996, the Division Chief, EC4IN, held a meeting with the KR Project Team to discuss, among other things, the issue of the fuel price assumptions. There was intense debate. It appears that the Task Manager of the KR Project strongly disagreed with the Applicant's conclusions that the assumptions used up to

then were too low. In a memorandum of December 10, 1996 to the Task Manager of the KR Project, the Applicant remarked that there had been no decision at the meeting to use \$35 per ton as the projected price, and stated that the Division Chief, EC4IN, had told them that they needed to have discussions and that there should be agreement on all decisions. By memorandum of the same date to the Task Manager of the KR Project, the Power Engineer and Procurement Expert in the KR Project Team also questioned the use of \$35 per ton as the coal price and suggested to use a \$42 per ton price, plus transport costs, and to carry out a sensitivity analysis on coal prices.

14. On December 12, 1996, the Division Chief, EC4IN, sent a memorandum to the Applicant asking for completion of her work, and stated that after debate it had been agreed during the meeting of the KR Project Team to do a base run with the same assumptions as in the EMD Project, and that various other assumptions would be used for a detailed sensitivity analysis. She instructed the Applicant to proceed on that basis. The Division Chief, EC4IN, stated that she wanted the work completed no later than close of business, December 16, 1996.

15. The Applicant sent a revision of her financial chapter for the SAR on the KR Project to the Division Chief, EC4IN, on December 16, 1996. On December 23, 1996, the Division Chief, EC4IN, sent back to the Applicant the draft SAR chapter with a handwritten note saying that the draft was not satisfactory:

This does not foot the bill in terms of clarity and presentation. Please look at a good sample You must give [the Task Manager of the KR Project] a finished product.

She referred to two reports as examples.

16. The Applicant responded to the Division Chief, EC4IN, on the same day, i.e., December 23, 1996, to explain that she had done everything according to the outline of the Task Manager. She claimed that her discussions with the Power Engineer and Procurement Expert in the KR Project Team suggested that the price of coal should be \$40.7 per ton instead of the figure given by the Task Manager. The Applicant said that she would include both projections in the analysis, but pointed out that the final report should not look like that, especially as the two projections led to different conclusions.

17. The Applicant claims that earlier on the same day, December 23, 1996, she reminded the Division Chief, EC4IN, that a decision had to be made on her appointment in the Division. According to the Applicant, the Division Chief, EC4IN, told her that she was expected to continue working in the Division and that the Human Resources Officer would be informed of this.

18. On January 7, 1997, the Division Chief, EC4IN, informed the Applicant that she would not offer her a permanent assignment in EC4IN. The Applicant states that the Division Chief, EC4IN, told her that she was "not suitable to work in the Bank's environment" and had "never learned the system in the Bank." The Applicant claims that this was the first negative feedback she had had from the Division Chief, EC4IN. She states that she accepted the decision and decided to look for another position in the Bank in accordance with the terms of the MAS she had earlier signed.

19. On January 14, 1997, a Principal Financial Analyst in EC4IN made positive comments on a review by the Applicant of the Financial Management System in Electricity Market in Ukraine (FMS Note). This Financial Analyst indicated that the FMS Note helped her to appreciate the difficulties of appraising the financial aspects of the electricity market and thermal power projects. In an e-mail response of January 24, 1997, to a request from the Division Chief, EC4IN, for comments on the Applicant's financial analysis on the KR Project, the same Principal Financial Analyst praised the Applicant's work, saying that she had done an excellent job in unraveling a very complex and difficult situation. Her view was that the fuel prices in the base case were unrealistic and that if more realistic fuel prices were used, the company would be in deficit. In response to a further request from the Division Chief, EC4IN, the Principal Financial Analyst stated on January 27, 1997 that the Applicant's financial chapter for the KR Project was not in a position to be put in a Staff Appraisal Report as the Applicant did not agree with the figures she had been requested to use and therefore could not make a convincing case.

20. On January 28, 1997, the Power Engineer and Procurement Expert of the KR Project Team informed the Task Manager that the Applicant's financial analysis needed to give supporting evidence of realistic prices. He observed, however, that the Applicant's methodology seemed reliable.

21. On January 29, 1997, a Principal Energy Specialist in the ECA/MNA Technical Department commented on the manner in which an SAR should be written as well as on substantive issues regarding the Applicant's chapter for the SAR on the KR Project. The Applicant responded to these comments in detail. It appears that this Energy Specialist was later hired to replace the Applicant as the Financial Analyst for the KR Project.

22. On January 31, 1997, the Principal Operations Officer, ECAVP, offered comments on the Applicant's draft financial chapter for the SAR on the KR Project. He acknowledged that her description of the Ukrainian power sector financial condition and practices was valuable, but was critical of the optimistic assumptions made on tariff and fuel prices in the SAR, commenting that projections on these bases should not be given much credence.

23. The guidelines for the 1996 Performance Management Process went out on January 9, 1997 in a memorandum from the Vice President, ECA, to all managers and staff in the ECA Region. On March 20, 1997, the Division Chief, EC4IN, sent to the Applicant the first version of her assessment of the Applicant's performance which stated in pertinent part:

[T]he task managers she worked with and I did not see her acquire a thorough understanding of more difficult issues such as tariff formulation under power pool arrangements. I also noted to her that her section of the draft appraisal report on the Ukraine-Krivoy Rog Power Rehabilitation Project was not prepared to the standards of the Division, in spite of substantial guidance from me and other colleagues in and outside the division.

In consultation with various colleagues in the Region, in the Department and in the Division, I decided not to offer Ms. Lysy a permanent position in EC4IN, on account that I could not see her operate fully effectively, neither in the immediate future nor in the post-reorganisation environment. I had to 'broker' agreements with key colleagues in order to achieve results. Her inability to resolve conflicts stood in the way of her effectiveness,.... [Emphasis added.]

The Applicant was rated '3,' that is fully satisfactory, for the purposes of her salary review.

24. The draft PRR was sent to the Management Review Team and was later placed in the Applicant's personnel file on August 22, 1997, with an annotation that it was a draft and that the 1996 PRR was incomplete. It remained on file until the Appeals Committee's report was issued. The Applicant states that she found the draft review extremely negative and that she was concerned that the draft had been sent to the Management Review Group for discussion.

25. In a memorandum to the Applicant of April 1, 1997, the Division Chief, EC4IN, said she had informed the Management Review Team that she and the Applicant had had discussions but that the Applicant had not yet seen the draft. The Division Chief indicated that she would make changes to the second paragraph of the PRR so that it would say that she could not see Ms. Lysy "operate fully effectively *in my division.*" (Emphasis added.) On April 3, 1997, the Applicant informed the Division Chief, EC4IN, that she would identify in her comments to the PRR the inconsistencies between the 1996 assessment and the earlier evaluations by the Division Chief, EC4IN, and by other colleagues.

26. On April 11, 1997, the Division Chief, EC4IN, sent to the Applicant still another revision of the PRR, and informed her that mediation was available through Human Resources. On the same date, i.e., April 11, 1997, the Applicant responded with a proposed rewrite of her PRR. She commented that she had expected a much better review, "given the interim assessments and support you had provided during the year, until the Krivoy

Rog incident.” She also referred to earlier support by the Division Chief, EC4IN, for an increase in her salary. The Division Chief, EC4IN, replied on April 14, 1997 stating, inter alia, that she could not ethically accept the Applicant’s proposed rewrite of the PRR as she had a responsibility to present a balanced assessment. She suggested that she would be available for mediation if the Applicant requested this.

27. On April 17, 1997, the Division Chief, EC4IN, signed the PRR and sent it to the Applicant. It was substantially the same as that of April 11, 1997.

28. Also on April 17, 1997, the Applicant informed the Division Chief, EC4IN, that she did not find the evaluation to be objective, that she did not plan to sign it and that she would request administrative review. The Applicant claims that the Division Chief, EC4IN, thereafter took action to ensure her termination from the Bank by, among other things, excluding her from the Network Mapping and the Regional staff re-mapping. The Applicant contends that all Bank staff were supposed to be mapped and that, without this, she could not be considered for any positions in the Bank.

29. On April 21, 1997, the Applicant requested that the Vice President, ECA, undertake an administrative review of the assessment of her performance by the Division Chief, EC4IN. In support of her request, she asserted, among other things, that the Division Chief’s, EC4IN, decision of January 7, 1997 not to offer her a permanent position was made in order to punish her for maintaining her professional integrity. She stated that she had accepted that decision and had offered to complete her assignments. The Applicant further outlined the circumstances leading up to the performance assessment and her concerns about it. She claimed that the negative performance evaluation and the actions taken by the Division Chief, EC4IN, had made her job search difficult. She also asked that the Code of Ethics and Professional Conduct be observed, that the performance assessment be revised, and that her 1997 salary review be consistent with the revised assessment. The Applicant further requested that she be mapped into an appropriate “SMU,” where her skills were needed, and that the 1996 PRR prepared by the Division Chief, EC4IN, be kept out of her personnel file until the issue was resolved.

30. The Vice President, ECA, asked the Human Resources Officer, Human Resources Team 3, to assist him in regard to the Applicant’s request for administrative review. He also suggested involving the Principal Operations Officer in his Office, in preparing the background. The Principal Operations Officer was well informed about the KR Project (paras. 10 and 22 above).

31. On May 12, 1997, the Principal Operations Officer, ECAVP, sent to the Human Resources Officer his comments on the Applicant’s request for review. He reviewed the Hydroelectric Power Rehabilitation Project as well as the EMD and the KR Projects. In doing so, he described the problems the Applicant had faced in respect of these projects and her statements to him that she had been “under pressure not to reveal unpleasant facts about the sector that might delay loan processing” and that she was clearly unhappy in her work environment. His impression was that she focused on the principal financial and governance issues quickly, and he commented that there may have been pressure to do the job quickly rather than well, in order to meet a deadline.

32. The matter was referred to the Ethics Officer but no investigation was opened as the matter was considered to be technical rather than ethical. Thereafter, the head of the Quality Assurance Group (QAG) was asked to conduct an independent assessment of the professional quality of the Applicant’s work in the energy sector in Ukraine during calendar year 1996.

33. In the QAG’s report of May 23, 1997 to the Head, QAG, it was concluded that the Applicant’s technical performance during the period under review had been mixed. It was noted that the Applicant had been involved in one primary project, the financial aspects of appraisal of the KR Project, and two secondary projects, the FMS Note and a review of the energy sector and the Lithuania Power Corporation. The FMS Note was a component of her work in the KR Project. The Applicant’s good work with respect to the secondary projects was acknowledged, but it was also found that the draft financial chapter for the SAR on the KR Project was less than satisfactory. The report noted the difficulties experienced by the Applicant in her work environment

and concluded that pressure on the Applicant to come to closure on her project without a full deliberation of the financial issues she had raised may have contributed to a great extent to the poor quality of her draft financial chapter for the SAR on the KR Project.

34. On June 16, 1997, the Vice President, ECA, responded to the Applicant's request for administrative review of her performance assessment. He based his review on an assessment of the Applicant's performance in the technical/professional sense. In this, he drew on the QAG panel report and on his own findings. He concluded that the World Bank Group Code of Professional Ethics had been observed, that the Applicant's performance in 1996 was mixed, that she had done good financial analytical work on the two secondary projects, but that her work on her primary product (the draft financial chapter for the SAR on the KR Project) was "less than satisfactory." It was his opinion that the 1996 PRR reflected the QAG findings as regards the professional/technical standard of the work and that it was not inaccurate. He found no reason to change it.

35. The Applicant started her special leave on July 16, 1996 pursuant to the MAS. She claims: "Although several units were looking for qualified financial analysts, my reputation had been so severely damaged and managers were told not to hire me."

36. On August 13, 1997, the Applicant filed an appeal with the Appeals Committee contesting the administrative review decision of June 16, 1997. The basis for her appeal was that she had been given a very poor performance review and that her employment had been terminated because of her insistence upon performing an honest appraisal of the KR Project.

37. On January 16, 1998, the Applicant sent two documents to the Vice President, ECA, which she claimed had a direct bearing on her appeal. The first was the memorandum of the Principal Operations Officer, ECAVP, of May 12, 1997. The second was a QAG assessment of the Ukraine EMD and KR Projects of December 1, 1997. This QAG assessment was a discussion draft on the Pre-Approval Quality at Entry Assessment Ukraine – Electricity Market Development Project (EMDP), Ukraine – Krivoy Rog (KR) Thermal Power Rehabilitation Project. It was stated in the assessment that the panel had found the quality at entry of the Ukraine EMD and KR Projects to be unsatisfactory, particularly in the overall approach taken to address the basic problem of the financial instability of the sector. The Applicant alleges that the assessment confirms her position that there had been basic problems in the sector strategy and shows that the KR Project should not have proceeded until more basic issues had been addressed.

38. The Appeals Committee issued its report on May 29, 1998. It found that there was no evidence of retaliatory or improper motive behind the 1996 PRR and that it had not been an abuse of discretion for the Division Chief, EC4IN, to include criticisms in the review. The Committee accepted that to a large extent the tensions among the KR Project Team were attributable to the Task Manager of the Project. It found that the Applicant was not capable of performing in the way that the Division Chief, EC4IN, needed her to perform at that time in that she was distracted by the hostility of the debate and demoralized by having to use figures she believed were wrong. The Applicant, the Committee stated, had not refused to do work, but had been asked to function beyond her area of expertise and under difficult conditions.

39. While the Committee noted that the most recent version of the PRR reflected the positive and negative aspects of the Applicant's performance, it also noted that the April 11, 1997 version of the review differed from the March 20, 1997 version (which was rather damaging) and that the earlier version had been placed in the Applicant's personnel file on August 22, 1997 with a note saying that it was a draft. This was after the end of the job-search period. The Committee concluded that while no harm had resulted to the Applicant, it recommended that the March 20, 1997 version of her PRR be replaced with the April 11 version. All other requests for relief were denied.

40. On June 5, 1998, the Vice President, Human Resources, informed the Applicant of the Committee's recommendations and of her decision to accept them.

41. In her application to the Tribunal, the Applicant seeks specific performance of the Respondent's obligations,

including, she asserts, its obligations to honor the agreement to make her position permanent, to observe the Code of Professional Ethics of the Bank Group and to reinstate her and restore her professional reputation. She also claims compensation and expenses.

42. The Respondent denies any breach of the contract of employment or any abuse of discretion or unfairness in its treatment of the Applicant. The Respondent further submits that the Applicant has failed to exhaust remedies in respect of her claim concerning the failure to make her position permanent.

Considerations

43. In accordance with Article II of the Tribunal's Statute, the Applicant is entitled to challenge actions of the Respondent which amount to a non-observance of her contract of employment or terms of appointment, including all pertinent regulations and rules. She must, ordinarily, have exhausted all remedies available to her within the Bank Group, and must file her application within the time specified in Article II(2), that is, 90 days after the event giving rise to the application or receipt of notice that the relief sought will not be granted.

The Decision of January 7, 1997

44. The first issue to consider is whether the decision of January 7, 1997 not to offer the Applicant further employment, or to make her position permanent, amounted to a non-observance of her contract of employment or terms of appointment. The Respondent submits that the challenge of this decision is not a claim cognizable under Article II(1) of the Statute because there was no duty to offer the Applicant another position under the terms of her contract of employment or terms of appointment, as modified by the MAS, prior to the expiration of the temporary assignment. The Tribunal observes, however, that the Applicant is clearly claiming non-observance of her contract of employment. The question whether there was an obligation under the Applicant's contract of employment to offer her a further assignment can be disposed of only after consideration of the substantive issues. (See Naab, Decision No. 160 [1997], paras. 26 and 27.)

45. However, the Respondent submits, in the alternative, that the Applicant's claim relating to the decision of January 7, 1997 should be dismissed for failure to exhaust internal remedies. It argues that the Applicant neither sought administrative review of that decision, nor appealed the decision to the Appeals Committee.

46. The Applicant claims that she pursued internal remedies, such as mediation, in respect of the January 7 decision. These steps, however, do not constitute a request for administrative review and are not sufficient to meet the requirement that remedies be exhausted. Unless exceptional circumstances can be established, employees aggrieved by a decision are expected to seek administrative review and to approach the Appeals Committee before applying to the Administrative Tribunal.

47. It does not appear that there was any specific reference to the January 7 decision in the discussions between the Applicant and the Division Chief, EC4IN, about the drafts of the Applicant's 1996 PRR. When the Applicant requested administrative review of this PRR, she did not expressly challenge that decision. On the contrary, the record indicates that she accepted the decision and that she knew that her performance was under criticism when the decision of January 7 was made.

48. The Tribunal also notes that the Applicant's request to be mapped into an appropriate "SMU" where her skill was needed, arose from her complaint in the request for administrative review that the Division Chief, EC4IN, had tried to exclude her from the Network Mapping. It did not in itself bring into issue the question whether the decision of January 7 was in violation of her contract of employment.

49. In the Applicant's appeal to the Appeals Committee, her complaint was that the administrative review did not address the issue whether she had been allowed to present her views as a financial professional. She also complained about aspects of the QAG report on her work and asked for revision of her performance assessment, salary adjustment and compensation for loss of job opportunities. Though the Applicant did raise the question of termination, she did not claim that the decision of January 7 violated her contract of

employment. This decision was not an issue in the administrative review and the Appeals Committee did not consider it.

50. A difficulty for the Applicant is that she stated more than once that she accepted the decision of January 7, 1997. In doing so, she must have been aware that the Division Chief, EC4IN, was critical of her performance, though she claims that she thought that she was being punished for refusing to use figures in her chapter for the KR SAR that she thought were too low. She did not take any steps to challenge that decision itself, or to have it reversed. By March 20, the Applicant had more information about the Division Chief's criticisms of her performance and of their possible relationship to the decision. But her efforts thereafter were directed to the adverse performance evaluation, which she described as the reasons for the decision of January 7, and not to the decision itself.

51. In the light of the above, the Tribunal is of the view that the Applicant has not exhausted available remedies in respect of the decision of January 7, 1997. The Applicant has not put forward any special reasons why the Tribunal should consider whether the decision violated her terms of employment, and there do not appear to be any exceptional circumstances which require the Tribunal to consider that claim. The Tribunal will not, therefore, make any findings on that part of the claim. Furthermore, the Tribunal notes, in this connection, that the question whether the decision of January 7 violates the Applicant's contract of employment was not given detailed consideration by the Appeals Committee or in any other process. Nevertheless, on the basis of such material as is available, the Tribunal does not in any event consider that the claim for breach of contract has been substantiated.

Evidence Issues

52. Among the materials annexed to the application are two statements which the Power Engineer and Procurement Expert of the KR Project Team and the Principal Financial Analyst in EC4IN sent to the Appeals Committee by e-mail, to be used if they were not able to give evidence. In fact, both of these staff members gave oral evidence to the Appeals Committee; their e-mail statements were not used by the Appeals Committee and did not form part of its record. The Respondent asks that they be stricken from the record of the Tribunal's proceedings, and submits that they are one-sided statements and are unreliable as they include comments in response to statements of the Applicant which were erroneous.

53. The Tribunal is of the view that the fact that these statements were prepared for the Appeals Committee but not used by that body does not prevent the Tribunal from referring to them, insofar as they may be relevant to the present proceedings. The Tribunal is not a court of appeal from the Appeals Committee. Its proceedings are entirely separate and independent from those of the Committee. 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. (See de Raet, Decision No. 85 [1989], para. 54.)

54. Further, the statements in question were made by persons with appropriate expertise and with knowledge of the Applicant and her work in the Division. Neither of the staff members who submitted the statements has claimed privilege or confidentiality in respect of their statements. The Tribunal is able to decide what weight to attach to the statements, having regard to the issues raised by the parties. The Tribunal determines that these statements are relevant, and that they may remain part of the record.

The Applicant's 1996 PRR

55. Fair treatment of staff is required by the Principles of Staff Employment, which provide that the Organization shall at all times act with fairness and impartiality and shall follow a proper process in its relations with staff members. (See Principle 2.1 of the Principles of Staff Employment.) The question for the Tribunal is whether there was an abuse of discretion, or want of fairness or impartiality, as claimed, in the preparation of the Applicant's 1996 PRR.

The KR Project

56. The Applicant's 1996 PRR makes substantial criticisms of her work for the SAR on the KR Project. The Applicant has challenged these criticisms and has relied on memoranda and reports from a number of her colleagues to support her claim that her work was sound, and that the criticisms were unfair and an abuse of discretion.

57. The Tribunal cannot form its own opinion as to the technical quality or otherwise of the Applicant's contribution to the KR Project SAR. The Tribunal can, however, refer to the views which have been expressed by independent experts on those issues, and it can consider whether there was any unfairness in the assessment amounting to an abuse of discretion.

58. The most significant independent review of the Applicant's work on the KR Project is the report of the QAG, which was prepared at the request of the Vice President, ECA, for the purposes of the Applicant's request for administrative review. The QAG discussion of the KR chapter, though making a series of specific criticisms, acknowledges that the problems relate to synthesis and presentation, and that, from the Applicant's exchange of memoranda with a Principal Energy Specialist in the ECA/MNA Technical Department, there was evidence that the Applicant had done the requisite analysis and could defend her reasoning. Her other work showed that she was capable of good synthesis and presentation of complex financial issues. Because of this, the QAG had concerns "whether factors in her work environment contributed substantively to her substandard SAR chapter." It noted that there had been a hostile (even contemptuous) reaction from some of her seniors to her e-mail of November 22, 1996, in which the Applicant had set out a well-presented analysis of the financial aspects of the problem. It noted that the above-mentioned Principal Energy Specialist had later brought to closure the financial analysis for the KR Project and that he had used fuel assumption costs that came close to those proposed by the Applicant. He had confirmed that the tariff setting mechanism was still not working. His analysis, according to the QAG, appeared to validate the Applicant's concerns. The QAG concluded that the management push on the Applicant "to come to closure on her product without a full deliberation of the financial issues she raised may well have contributed to the poor quality of her draft SAR chapter." It noted that her reactions showed her to be increasingly defensive and distracted by the hostility of the debate.

59. The administrative review by the Vice President, ECA, was based on written material, including the QAG report. It was confined to an assessment of the Applicant's technical and professional performance. The Vice President described the Applicant's performance in 1996 as mixed and referred to the "less than satisfactory" work on the draft financial chapter for the SAR on the KR Project and the weaknesses identified by the QAG. He concluded that the 1996 PRR reflected those findings as regards the professional/technical standards of her work and that it was not inaccurate. He found no reason to change it. The Vice President acknowledged that the Applicant's work environment appeared not to have been as conducive as it should have been for good interpersonal working relations and that the Applicant's management had not been supportive enough; he stated his intention to discuss this with her management.

60. It is of concern to the Tribunal that the administrative review appears to dissociate the great difficulties and hostility the Applicant experienced in her dealings with the Task Manager from the actual work she was required to produce. It does not consider her concerns as professional issues but rather as interpersonal communication problems. The QAG report, and also the various supporting documents from colleagues, show that there were real grounds for the professional concerns expressed by the Applicant and that there was a connection between the Applicant's concerns and her ability to complete her work on the chapter.

61. The administrative review and Appeals Committee processes, and the contemporaneous comments by colleagues of the Applicant, confirm that the Applicant was very concerned about the viability of the KR Project, and, in particular, about the fuel prices which she was told to factor into her analysis. Her concerns appear to have had validity, in view of later reports which showed that there were serious problems with the design of the Project and the assumptions on which it was based. It is clear that there was a great deal of disagreement and tension in the team responsible for producing the SAR. The Applicant's attempts to have the issue resolved were overruled, in a none too pleasant manner. There is general agreement that the Task Manager was very difficult to work with, and that he did not welcome the questions that the Applicant had raised about the viability of the Project. His negative reaction to her concerns put pressure on the Applicant and undoubtedly affected

her ability to produce the draft expected of her.

62. The Applicant's Division Chief was apparently concerned that the continuing disagreements in the team were delaying the completion of the SAR (though it is not clear what the extent of the delay was). The Task Manager was not part of the Division and the Division Chief could not re-form the team. The Division Chief considered that too much of her time had been taken up in trying to resolve the issues. Her objective was to see the work completed. She told the Applicant to complete her work as directed, that is, to use the lower fuel prices for her analysis, and to do a sensitivity analysis using other figures. Had the Applicant done so, there may have been a different outcome for her. But the outcome of the KR Project would have been exactly what it was, namely, that it would prove too problematic to proceed.

63. The Tribunal considers that while there may have been weaknesses in the Applicant's work, there were also management failings in responding to her concerns and in regard to the KR Project itself. That those management failings did contribute to the outcome and to the quality of the Applicant's work was explained by the QAG report. But it is not made clear in the PRR. While the review in the PRR speaks of difficult Task Managers, it does not give any weight to the effect of what the QAG described as the "management's push [on the Applicant] to come to closure on her product without a full deliberation of the financial issues." It does not acknowledge that the issues that concerned the Applicant were genuine and serious. To that extent the performance evaluation lacks balance and is tainted with unfairness.

The FMS Note

64. The 1996 PRR also criticized the FMS Note, a paper which had been prepared by the Applicant on the accounting and financial management issues in the context of the electric power market in Ukraine. The PRR praises the Note but then goes on to say that "the report lacks strategic recommendations and the training proposals are limited." The Applicant claims that she pointed out to the Division Chief, EC4IN, that it was not a strategy note. She says that it had been prepared so that she and her colleagues could understand better the sectoral environment that they were dealing with.

65. The QAG was very positive about the FMS Note, observing that it disentangled a complex web of financial interrelationships in a challenging socialist business setting. In the view of the QAG, the Applicant had, in the FMS Note, demonstrated a mastery of accounting and financial principles, included good analysis, incorporated good synthesis of the issues, and provided a logically structured presentation of the issues. The FMS Note contributed substantially to the ability of the Task Team to complete the financial aspects of the KR appraisal in April 1997. The administrative review made no specific reference to the FMS Note. The Vice President, ECA, said no more than that the Applicant had done good financial work commensurate to her level in regard to her two secondary products.

66. In considering whether the comments were fair and reasonable, the Tribunal has regard to the comments of the QAG and to those of the Applicant's colleagues. It notes that a Principal Financial Analyst in EC4IN had been positive about the paper, noting that it helped her to appreciate the issues. The only criticisms of the Note were those contained in the 1996 PRR, and there is nothing else in the record which substantiates those criticisms.

Interpersonal Skills

67. The Applicant challenges the comments in the 1996 PRR about her interpersonal and communications skills as being unfair and an abuse of discretion. The Tribunal notes that the Applicant had always been rated well in regard to interpersonal skills. She had been in the Bank since 1977 and had a long record of competence and good relationships. Nothing in her previous history suggests that she would become involved in an interpersonal conflict of the kind described in her evaluation without some identifiable cause. In saying that it was mainly her own failings in this area which "impinged on [her] performance," and that the Applicant let her emotions affect her productivity, the evaluation in her 1996 PRR gives no indication of the underlying reasons. It does not report that the Applicant had raised genuine professional concerns about one particular project, or that these had been treated contemptuously and with hostility. The statements in the evaluation seem to the Tribunal in the light of all the circumstances to lack proper balance and to convey an incomplete

picture which was unfair to the Applicant.

Lack of Balance

68. A performance evaluation should deal with all relevant and significant facts, and should balance positive and negative factors in a manner which is fair to the person concerned. Positive aspects need to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable. (See Romain (No. 2), Decision No. 164 [1997], paras. 19-20.)

69. The Applicant's appraisal does mention positive factors. But the overall effect of the evaluation is very negative for her, and does not make clear that the Applicant was upset because her genuine professional concerns were not properly dealt with, that she had tried to get resolution of these problems which were affecting her professional work, or that neither her Team Manager nor her Division Chief gave her support in resolving the issues. The Tribunal notes that the report of the QAG appears to give a more balanced appraisal of the interconnection between the unresolved conflict and the Applicant's work, though its comments were not reflected in the later review process.

70. The Tribunal concludes that the Applicant's 1996 PRR was unbalanced and did not give proper weight to the fact that the Applicant had raised genuine concerns about certain aspects of a project which were not resolved at the time she had to prepare her report and that this had affected her ability to complete the project. The Tribunal further concludes that the Applicant was not given appropriate support by management in resolving the problems she had raised concerning the project.

Motivation in the Preparation of the 1996 PRR

71. The Applicant claims that the criticisms that appear in her performance evaluation were improperly motivated. A finding of improper motivation cannot be made without clear evidence. It is true that the Division Chief, EC4IN, appears to have taken the view that the Applicant should be held responsible for not being able to resolve the problems she had raised and to complete her work on the KR Project. In that regard, the Division Chief may have had unreasonable expectations of the Applicant, since it is widely agreed that the Task Manager for the KR Project was the source of most of the friction and the Division Chief herself did not appear to be able to moderate his approach. It seems from the material that the Division Chief was unhappy that she had to give so much time to the KR Project. The Tribunal considers that there was a degree of inconsistency and mismanagement in her handling of the issues. However, the Tribunal does not consider the lack of balance in the evaluation to have been motivated by a desire to retaliate.

Circulating the Draft Review

72. The Applicant claims that her draft 1996 PRR was put to Management Review without being shown to her or discussed, though the PRR guidelines of January 1997 said that they must be. Further, this draft was placed in her personnel file in August 1997 without her knowledge. This, she claims, violated due process. Although the Appeals Committee directed that the review be removed, and noted that it had not been placed in the file until after the end of the job-search period, the Applicant has pointed out that she would have been able to accept any job offered to her at that time. She claims that the action of the Respondent damaged her reputation, and that this damage continued even after her job-search period had ended.

73. In regard to the performance evaluation, the Division Chief, EC4IN, in a cover note with the draft of March 20, referred to discussions with the Applicant. Although this is denied, the Applicant was given an opportunity to discuss the evaluation and to present her views before it was finalized. However, the draft evaluation of March 20 was sent forward to Management Review before the Applicant had any opportunity to comment. The Tribunal notes that this draft contains comments which were particularly damaging to the Applicant, suggesting that she could not operate effectively in the Bank, despite her many years of good work.

74. Even though the Division Chief, EC4IN, informed the Management Review Group that the evaluation was a draft, the failure to conduct the review process in the time specified and to ensure that the Applicant had an opportunity to comment on the draft before it was sent on was a management failing which could have had adverse consequences for the Applicant. Placing it in her personnel file could have influenced others who might

have been considering employing her.

75. The handling of the evaluation process by the Respondent did not comply with the January guidelines. The action taken on the draft of March 20 involved a failure to observe proper procedures. Although this action was not necessarily intended to cause harm, it was not consistent with fair treatment.

Observance of Code of Ethics

76. The Applicant claims that the Respondent violated the World Bank Group's Code of Ethics by instructing her to use an unrealistically low input price to justify a project which was otherwise not financially viable. The Code of Ethics provides that staff members should "provide decision-makers with candid analysis." The Applicant asserts that this is a condition or rule which must be observed by the Bank in its dealings with staff. She argues that it was unethical to direct her to use misleading figures, that it would have been unprofessional for her to use them and that she could not complete the SAR chapter unless she used misleading figures. The Tribunal notes that the Applicant raised this issue in her request for administrative review. The review concluded that the Code of Professional Ethics had been observed, but no reasons were given. The Appeals Committee did not consider this issue. The Applicant has raised a matter of potentially serious concern. It is incumbent on the Bank to encourage staff to observe the Code of Ethics in providing "candid analysis" and to ensure that their concerns in that regard are given proper consideration. The Tribunal notes that two of the Applicant's colleagues expressed unease that her attempts to act in the interests of the Bank had been disregarded. However, the circumstances are not sufficiently clear to justify a finding that there was a violation of the Code. The problem seems rather to have been that of mismanagement or mishandling of the problem that arose concerning the KR Project.

77. The Applicant has raised several other issues which the Tribunal need not consider.

FINDINGS

78. The Tribunal is of the opinion that the Bank failed to treat the Applicant with fairness and impartiality and according to proper process in the following respects:

(i) The Applicant's 1996 PRR was unbalanced and did not give proper weight to the fact that the Applicant had raised genuine concerns about certain aspects of a project which were not resolved at the time she had to prepare her report and that this had affected her ability to complete the project.

(ii) The Applicant was not given appropriate support by management in resolving the problems she had raised concerning the project.

(iii) There were irregularities in the way her performance appraisal was conducted and in the handling of the draft evaluation.

(iv) The Applicant's job prospects and reputation have been damaged by the failure of the Respondent to treat her fairly.

79. Taken together, the actions of the Bank towards the Applicant include mismanagement and lack of fairness which amount to unreasonableness and arbitrariness. These actions violate the standards of treatment required by the Principles of Staff Employment.

80. In view of the Tribunal's findings concerning the decision of January 7, 1997, the Applicant's claim for specific performance by the Respondent of the agreement that her position would be made permanent if her performance were satisfactory, as well as her claim for reinstatement, do not arise for consideration. However, the Applicant is entitled to compensation and other relief for the irregularities outlined above.

Decision

The Tribunal unanimously decides to award compensation to the Applicant in the amount of \$200,000 net of

taxes, including costs.

Francisco Orrego Vicuña

President

Nassib G. Ziadé

Executive Secretary

At London, England, May 14, 1999