



World Bank Administrative Tribunal

2013

Decision No. 472

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

v.

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

**World Bank Administrative Tribunal
Office of the Executive Secretary**

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

v.

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

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Florentino P. Feliciano (Vice-President), Mónica Pinto (Vice-President), Jan Paulsson, Francis M. Ssekandi and Ahmed El-Kosheri.
2. The Application was received on 19 January 2012. The Applicant was represented by George A. Pieler, Attorney at Law. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency.
3. The Applicant claims that the Bank failed to reinstate him in accordance with a prior judgment of the Tribunal. The Bank raised preliminary objections stating that the Application was untimely. In *M (No. 2)*, Decision No. 469 [2012], this Tribunal dismissed the Bank's preliminary objections.
4. The present judgment accordingly deals with the merits of the Application.

BACKGROUND

5. The Applicant joined the Bank in 1992 as a Financial Specialist. In 1998 his appointment was converted from Fixed-Term to Open-Ended. In 2000, he was promoted to the position of Senior Financial Specialist, Level GG. In September 2004, he was appointed "Country Manager (Africa)" (at the Level GG), a position he assumed on or about 24 October 2004.
6. In 2005, while he was serving as "Country Manager (Africa)," allegations of misconduct were lodged against the Applicant. The Bank terminated his employment on 2 August 2006, following an investigation of alleged sexual harassment, retaliation and abuse of authority, as well as charges of conflict of interest.

7. In *M*, Decision No. 369 [2007], the Tribunal rescinded the Bank's decision to terminate the Applicant's appointment and ordered the Bank to reinstate him. The Tribunal's judgment states that:

- (i) the decision to terminate the Applicant's employment is rescinded;
- (ii) the Bank shall reinstate the Applicant to the same position or to a position similar to the one he was occupying at the time of the termination of his employment, and shall pay the Applicant all remuneration and benefits he would have received from the date of termination to the date he resumes employment, after deduction of any monies already paid to the Applicant upon termination;
- (iii) the Bank shall pay compensation for [damage] to the Applicant's personal and professional life in the amount of three years' net salary, based on the last salary drawn by the Applicant;
- (iv) the Bank shall remove from the Applicant's personnel file all records relating to the allegations of misconduct, including the INT Final Report and the decision of the HRSVP, and shall substitute a copy of this judgment; [and]
- (v) the Bank shall contribute to the Applicant's costs and expenses, in the amount of \$90,000.

8. The Applicant returned to the Bank "on active payroll" in February 2008. According to the Bank, the Applicant "was reinstated to active employment at his former grade level [GG] in compliance with Decision No. 369, and his remuneration and benefits were paid to him retroactive to his date of termination (August 2, 2006)." Disagreements soon ensued between the Applicant and the Bank regarding what reinstatement meant in the Applicant's case.

9. On 24 June 2008, the Tribunal responded to a request by the Applicant for clarification of its decision in *M*. The terms of the Tribunal's response are reproduced in Decision No. 469 and will not be repeated here. Nor will the full details of the unsuccessful attempts to reinstate him to a mutually acceptable position, also set forth in Decision No. 469, be reproduced here.

10. The essence of the Applicant's claim in this Application is that the Bank violated the terms of Decision No. 369 by failing to reinstate him to his former position – "Country Manager

Africa)” – or by failing to reinstate him to a similar Country Manager position. The Bank responds that it has complied with Decision No. 369 in good faith.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

Compliance with the order of reinstatement

11. The Tribunal has in several of its judgments made clear that it considers that (i) consultation and accommodation are necessary with respect to the practicalities of reinstatement, (ii) the Bank has a degree of discretion with respect to what it offers the staff member to be reinstated, yet (iii) ultimately it may be necessary to make a substantive assessment of the proposals, conditions, and urgency reflected in the Bank’s actions subsequent to an order of reinstatement in the event it were necessary to rule on a complaint that the Bank has not complied with the order.

12. It should be self-evident that an assessment of the Bank’s compliance with an order of reinstatement may involve highly variable circumstances. At one extreme the job in question may be an internal staff support position with respect to which identical openings arise frequently. In such circumstances, it may be reasonable to assume that the reinstatement should be an almost mechanical matter. At the other extreme, the post may entail senior managerial responsibilities in field offices, including sensitive external political relations. The job of Country Manager by its very essence is situated at this extreme.

13. Not everyone is suited for this role. An exceptionally able economist may not have the intangible skills to interact successfully with the local political and bureaucratic leadership. Moreover, a person who is a successful Country Manager in one place is not necessarily suited in all others; cultural, linguistic and other relevant factors come into play, not to mention individual life experiences and contacts. In other words, once appointed to the job of Country Manager, no one can have an expectation – let alone an entitlement – to insist that they retain that status. These are sought-after posts, and there are only a limited number of countries that fit the individual qualifications of those who desire to occupy them.

14. Against this background, it seems clear that the Applicant has fundamentally misconceived his rights in the wake of the successful Application in *M*.

15. The Bank’s Vice President of Human Resources (“HRSVP”) met with the Applicant in December 2008. During this meeting, the HRSVP informed the Applicant that the Bank had

found a GG-level position for him which “builds on [the Applicant’s] area of expertise and meets a direct business need” of the Bank. Following this meeting, on 22 December 2008, a Lead HR Specialist sent an e-mail message informing him that the Bank had decided to assign him to the Europe & Central Asia Vice Presidency (“ECA”) of the Bank as a Senior Technical Specialist (Level GG) based in the Bank’s headquarters. In the e-mail message, the HR Specialist provided details about the position, stating: “As [the HRSVP] mentioned during the meeting, this is a real, solid position which will enhance your CV by giving you real demonstrable experience in Middle Income Countries (MIC’s), in a different region (ECA).”

16. Within 40 minutes, the Applicant responded to the e-mail message declining the offer, stating that he could not accept the position because in his view he lacked the requisite knowledge and expertise in the area. He emphasized that his professional interest was in a Country Manager position similar to the one he was occupying before his termination.

17. On 7 January 2009, the Applicant wrote a message to the Lead HR Specialist and the HRSVP calling their attention to the fact that the Country Manager position from which he had been terminated was being advertised and opined that in light of the Tribunal’s decision “this position ... should be mine naturally except if HR finds another Country Manager position somewhere such as Azerbaijan.” Apart from the fact that the Bank at that moment was advertising the post at Level GH, which in the Applicant’s case would entail a promotion which was no part of the Tribunal’s decision, this was not an auspicious opening position on the part of the Applicant, inasmuch as it presumed that he was simply entitled to a Country Manager position.

18. On 23 February 2009, the HRSVP told the Applicant by e-mail that the Bank was not “obliged to appoint [him] in a position at a higher grade than [he] held at the time [he] left the Bank in 2006.” The HRSVP thus asked him to report for duty for the position that was assigned to him in ECA. In the e-mail message the HRSVP stated:

This follows up on our earlier conversation, your response, and current reality. We are now close to a year after you came to the Bank on active payroll. Efforts have been made from both sides to explore possible assignments. From both sides we have concluded that a placement is required in order to get you back in an active work program. I understand that your preference is to obtain a GH level Country Manager position, but from the Bank’s side, we have been consistent in advising you that while you are free to apply and compete for such a position, the Bank is not obliged to appoint you in a position at a higher grade than you held at the time you left the Bank in 2006. As you know, you and we have explored other

options with ECA, Africa, and FSD and at this time it is clear that the only concrete option identified is the one we discussed in December 2008.

As no other options are available or have been identified, this is to inform you that my decision is that you are to report for duty to take up the position created for you in the ECA VPU on March 2, 2009.

I understand that you have some concerns about the position in that it brings some new areas of work. However, based on consultation with ECA management and on earlier consultations last year with the VP and Head of the FSD Network, we believe that the position is a reasonable match with your skills and background. As was set out in the earlier e-mail to you, this position will provide you with an excellent opportunity to develop real demonstrable experience in another Region and in an area of relevance to the Bank and its clients and attuned to current needs, and thereby widen and strengthen your profile, thus positioning you better for other opportunities.

19. The Applicant reported for duty at the beginning of March 2009. On 27 March, he wrote to the HRSVP to say that the position was “not suitable for me,” and making it clear again that he felt the Tribunal’s decision entitled him to be reinstated as a Country Manager.

20. On 7 April 2009, he sent an e-mail to the Lead HR Specialist in which he wrote, on the one hand, that he did

not think that the Bank should not (sic) simply dump me into a situation where I am unable to perform just as a way of saying that they found me a job

and, on the other hand, that:

The understanding from the Decision of the Tribunal all along was that I was to be placed in a Country Manager position. ... As to the title, I am not interested in a title other than Country Manager at this stage. Any other title will convey the message that I have been demoted

21. The first statement is correct in substance. The second, on the other hand, is not only a non sequitur, but the manifestation of a fundamental misapprehension of the consequences of the reinstatement. The judgment in the Applicant’s favor was issued on 14 December 2007. The Country Manager post from which the Applicant had been wrongly removed had been filled by someone else in March 2007. The Applicant suggests that the Bank should have kept the position vacant in anticipation of a possible reversal of his dismissal. This is of course completely unacceptable; the work of the World Bank must go on irrespective of the difficulties caused by

erroneous administrative decisions in individual cases, which fall to be remedied legally in other ways.

22. Nor is it acceptable for the Applicant to posit that he had a right to be returned to the country in question when, following a period during which the country office had been closed because of security concerns, the Bank decided to select a new Country Manager. The formulation “same or similar” in the Tribunal’s reinstatement orders are highly contextual, and contrary to the Applicant’s apparent assumption does not denote a presumption in favor of the “same” post. As said, there may be circumstances where the reinstatement to the same job is such a straightforward matter that it would make little sense not to proceed that way. In the case of a small country office, to the contrary, where the Country Manager is relieved of his functions in circumstances that have been the subject of adverse publicity, it may be counterproductive to the objectives of the Bank and to its mission in that country to insist, come what may, on his return.

23. The Tribunal understands the Applicant’s grievance, in the sense that the accusations on the grounds of which he was terminated were not justified and that the Bank exacerbated the ramifications of his termination by its passivity with regard to embarrassing and prejudicial allegations in the press which, as the Tribunal pointed out in paragraph 97 of Decision No. 369, “clearly called for clarification.” The reparation due to the Applicant may in some ways be incomplete. Some things cannot be undone; apart from the preservation of the Applicant’s employment status, remuneration and other benefits, his remedy was pecuniary, in the form of substantial compensation on account of the non-material elements of his prejudice. He cannot, in addition, be entitled to reinstatement to a position in an environment which has changed and where it may not be in the Bank’s interest that he returns. The Applicant’s preference is immaterial, and so is the fact that his original termination was a wrongful action on the part of the Bank. That part of the equation has been satisfied by the Applicant’s pecuniary compensation – the remedies he received included “compensation for damage to [his] personal and professional life in the amount of three years’ net salary.”

24. In other words, “same or similar” means what it says; it is an option. As always, the discretion thus at the Bank’s disposal must be exercised in a manner that avoids abuse. For instance, if a purely administrative function previously occupied by the reinstated staff member were available and there is no apparent reason to place the staff member into a different position at some inconvenience to him or her, the Bank may be sanctioned for having exercised its option arbitrarily. The present case does not come close to that example.

25. The Applicant has placed himself in considerable difficulty by making it clear that he was “not interested” in anything but the post of Country Manager. It is not correct to assume that the universe of “similar” positions is exhausted by the category of “Country Managers.” Nor is it correct to assume that by virtue of the order of reinstatement he is entitled to priority over other applicants for positions of his liking. Such an exceptional trump card was no part of the remedies given to him as a result of his successful initial Application. The Bank explains that Country Managers at the Applicant’s level (GG) are usually not immediately re-appointed as Country Managers, and that only one in six are so re-appointed, including those who are simply extended in the same country once their term is up. The Bank is correct to assert that it is “not responsible for ensuring that former Country Managers obtain only other Country Manager positions in perpetuity – the number of such positions alone, makes this impossible.” The Applicant cannot assert that his contract with the Bank assigning him to the Country Manager position in 2004 granted him such perpetual right. In fact, the official memorandum of 2004 outlining the Applicant’s assignment as Country Manager stated:

The duration of your assignment is expected to be ... three years ... from approximately September 23, 2004 [i.e. until August 2007]. Upon completion of this assignment, you may expect to return to a suitable position in AFTFS at your then current grade.

He, therefore, cannot claim that the reinstatement order gave him perpetual right to a Country Manager position.

26. As stated above, the Applicant is correct in stating that the Bank cannot simply “dump” him into a job which does not correspond to his qualifications and aspirations. The question is whether what the Bank has done in its dealings with him can be fairly so characterized. This involves subjective assessments which are inherently approximative. It must be said, however, that the Applicant does not account for the fact that, at the managerial level, professional success involves hard work, the cultivation of relations and opportunities, and the development of a reputation for usefulness and pro-activeness. Individual managerial assignments in the Bank are earned on merit; disregard of this principle would be unfair to other staff members and inconsistent with the Bank’s policy of professional competitiveness and excellence.

27. In the period following the Applicant’s reinstatement, two GG-level Country Manager positions became vacant, and the Applicant was invited to apply. He declined to apply for the first on grounds of its geographic unattractiveness; he was unsuccessful with respect to the other

due to his lack of fluency in the relevant working language, as well as his lack of experience in Middle-Income countries.

28. After issuance of Decision No. 369, as seen, it took nearly a year for the Bank to find what it considered to be a “similar” position for the Applicant. The Bank says that the process was time-consuming due to the Applicant’s “inflexibility” as well as the lack of openings for someone at his level and with his qualifications.

29. The position ultimately offered to him reports directly to a Sector Director. It is, says the Bank, “similar to the type that the majority of former GG-level Country Managers occupy after their terms.”

30. The Bank contends that the position of Senior Technical Specialist in the ECA region was proper because it (a) was consistent with his area of expertise, (b) met a demonstrable business need, and (c) would bolster his CV in exposing him to Middle-Income country issues as well as to a different region.

31. After being placed in this position, the Applicant has applied for numerous other Country Manager positions, and indeed for even more senior positions such as Sector Director. The reinstatement order did not obligate the Bank to arrange a guaranteed spot for him in these open competitive processes.

32. The Tribunal notes that, in April 2010, the Applicant’s manager recorded dissatisfaction with the Applicant’s performance in ECA. The manager noted that the Applicant was not assiduous in seeking assignments in his current post. The Applicant himself states that since December 2010, he “has no work, and his time is being charged idle” in ECA.

33. The Applicant has complained about what he perceived as the difficulty of being shortlisted for new openings given that he had not concluded his first term as Country Manager and that he had not been with the Bank for two years until his reinstatement, and therefore did not have recent Overall Performance Evaluations (“OPEs”) to show to shortlisting committees. He apprehends that this is the equivalent of a negative signal (or “red flag”, as he says).

34. This is of course a problem inherent with the reinstatement of any wrongfully terminated staff member, and it obviously calls for a solution somewhere short of concluding that such an individual must be given automatic preference because of the lack of recent evaluative material.

The compensation awarded by the Tribunal for damage to the Applicant's career contemplated such difficulties, and the expectation was that the Applicant would take the opportunities for him to rebuild his performance record at the Bank. The record suggests, however, that the Applicant failed to take reasonable steps to explore the opportunities, as he was not ready and willing to move forward without the guarantee of a Country Manager position.

Additional compensation

35. The Applicant seeks expatriate benefits which would have been paid if he and his family had remained in the country in question. The Bank answers that expatriate benefits are not paid to staff members once they move back to the U.S. from overseas assignments. Yet that is in effect what the Applicant seeks to obtain.

36. Staff Rule 6.17, paragraph 2.01, makes clear that expatriate benefits cease upon departure from a post. The Bank indicates that expatriate benefits were paid until August 2006 although all of the Applicant's family had left the duty station in April that year, and that it has not sought reimbursement of these overpayments. The Applicant himself had left the country some time before, and his posting was in fact ended for security reasons before his termination.

37. In other words, the expatriate benefits ceased for reasons that have nothing to do with the Applicant's termination, and were on no account due to him beyond August 2006. Expatriate benefits are designed to compensate staff members for costs associated with living in another country. They cease when staff members leave the post or shortly thereafter. The Bank thus owes him no additional expatriate benefits.

The amicus brief

38. The World Bank Group Staff Association's *amicus curiae* brief was received by the Tribunal on 6 December 2012. The brief focuses on "the obligation of the Bank to comply with binding decisions," a matter described in the brief as being of fundamental importance for the Bank's internal justice system. With this the Tribunal is naturally in agreement.

39. More specifically, however, the brief argues that the Bank's efforts "have been far from adequate," and that the "burden surely falls on the Bank to demonstrate compelling reasons why it could not" reinstate the Applicant to his previous position, and "to show convincingly that the different position it has offered ... is indeed 'similar' in key respects." The Tribunal disagrees.

40. As seen above, the Tribunal takes a more contextual approach to the issue of reinstatement. In its view, the beneficiary of an order of reinstatement at a managerial level cannot simply rely on the Bank to offer him satisfaction; the need for “consultation and accommodation” at that level must operate as a two-way street; persons seeking such grades of responsibility need to perceive the reinstatement process for what it is – an opportunity, with no loss of remuneration or benefits, to demonstrate the kind of good will and institutional commitment that reassures all participants in the process that the individual in question offers a contribution. The Staff Association is right to deplore the fact that half a decade has passed without a satisfactory reinstatement, but as the author of the decision in favor of the Applicant, the Tribunal is well acquainted with the circumstances of the case from its inception and with the record over the past five years, and is unable, for the reasons given above, to fault the Bank at this stage of the case.

Concluding remarks

41. It is worth recalling that the Applicant was awarded compensation in an amount that exceeds any previous judgment in the Tribunal’s history, thus acknowledging and compensating for the wrongfulness of the Bank’s actions in his case. The Applicant’s entitlement cannot be greater than what the Tribunal ordered, and did not include a guarantee of continual preferential treatment as a matter of right, given (a) the objective difficulties of reinstatement in sensitive Country Manager positions, and (b) the fact that he was given only a three-year term as Country Manager in the first place, and that reappointment to that position would have been competitive in any event.

DECISION

The Applicant’s claims are dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D. C., 13 February 2013