



World Bank Administrative Tribunal

2012

Decision No. 469

**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 Peter C. Hansen of the Law Offices of Peter C. Hansen, LLC, and 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 has raised preliminary objections stating that the Application is untimely. The present judgment deals only with the Bank's preliminary objections.

FACTUAL BACKGROUND

4. In his first Application filed with the Tribunal on 28 November 2006, the Applicant challenged the termination of his employment. In a judgment issued in December 2007, *M*, Decision No. 369 [2007], the Tribunal found for the Applicant. The remedies awarded by the Tribunal included the following:

- (i) the decision to terminate the Applicant's employment is rescinded;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.

5. The Applicant returned to the Bank on active payroll in February 2008. Disagreements soon ensued between the Applicant and the Bank regarding what reinstatement meant for the Applicant.

6. In May 2008, the Applicant asked the Tribunal for an interpretation of its judgment in Decision No. 369. Specifically, the Applicant asked for clarification regarding two issues. The first was whether he was entitled to “all salary and benefits as [Country Manager (Africa)]” until he was “reassigned to another country manager position.” The second was whether he was required to formally apply for positions that were “the same” or “similar” to his old position and be subjected to competitive selection procedures, rather than be appointed to such positions without an application or selection process.

7. On 24 June 2008, in a letter to the parties, the Tribunal addressed the Applicant’s request for clarification. On the issue of reinstatement, the Tribunal provided the following clarification:

Regarding the second question, the Tribunal in *M* ordered the Bank to reinstate [the Applicant] “to the same position or to a position similar to the one he was occupying.” It is self-evident that “[a] suitable ‘comparable position’ is unlikely to materialize instantly on the occasion of an order of reinstatement. Consultation and accommodation may be called for. The Bank is entitled to exercise its managerial discretion in the manner in which it implements the order (although of course it cannot alter the terms of the order).” *Yoon (No. 3)*, Decision No. 267 [2002], at para. 15.

The Tribunal further recalls paragraphs 26-27 of its decision in *Yoon (No. 4)*, Decision No. 317 [2004]. In that case, in order to determine whether the Bank had complied with the Tribunal’s Order of reinstatement of a staff member to a “comparable position”, the Appeals Committee had:

“(i) substantively assessed the proposals and conditions that were the subject of post-judgment communications between the Bank and the Appellant;

(ii) examined the consultation and accommodation that occurred between the parties in placing the Appellant in a “comparable” position;

(iii) compared the Appellant’s position at the time of reinstatement to the one she was occupying when she was terminated; and

(iv) reviewed the length of time it took for the Bank to reinstate the Appellant.”

The Tribunal found that the approach of the Appeals Committee on the issue “merit[ed] to be endorsed, and to serve as a template for any future similar cases.”

The Tribunal reminds the parties of its position on the issue of reinstatement expressed in *Yoon (No. 3)* and *Yoon (No. 4)*. From the information provided to the Tribunal, it appears that the Bank is attempting to implement the Tribunal’s judgment. Whether the Bank’s efforts are adequate is a matter that must first be assessed through the applicable internal mechanisms, as illustrated by *Yoon (No. 4)*.

8. In providing this clarification, the Tribunal made the following three observations on the issue of reinstatement. First, consultation and accommodation is necessary on the issue of reinstatement. Second, the Bank has some discretion in the manner in which it implements the Tribunal’s order of reinstatement. Third, if the Applicant wants to challenge whether the Bank has taken adequate efforts to reinstate him, the Applicant has to exhaust internal remedies.

9. Difficulties persist regarding the Applicant’s reinstatement. The Applicant insisted that his professional interest was in a Country Manager position similar to his position before the termination of his employment. The Bank maintained, however, that the Applicant had to go through the established competitive process for any vacant Country Manager positions.

10. Sometime in 2008, the Applicant applied unsuccessfully for two vacant Country Manager positions. The Applicant pointed out to management that he was not able to compete effectively for such a Country Manager position because, due to the investigation and the subsequent termination, he did not have recently completed Overall Performance Evaluations (“OPEs”). The Applicant told management that shortlisting committees work on the basis of OPEs, and the absence of OPEs in his case raised “red flags” to such committees. It does not appear that management offered any solution to the issue of OPEs and the competitive process, but the Applicant was advised to meet with the Vice President, Human Resources (“HRSVP”).

11. The Applicant met with HRSVP in December 2008. Following this meeting, on 22 December 2008, HR informed the Applicant 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. The Applicant, however, replied on the same day declining to accept this position because it was not a suitable position for him.

12. In January 2009 the position of “Country Manager (Africa)” was advertised. But this time, it was advertised as a level GH position. The Applicant contacted HR and expressed his interest in this position, stating: “This was my old job ... which should be mine naturally,” given the fact that the “Tribunal decision was to reinstate me in the same position or similar.”

13. On 23 February 2009, 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.” HRSVP thus asked him to report for duty for the position that was assigned to him in ECA. In the e-mail message 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.

As stated before, ECA has agreed to waive the minimum time in assignment with respect to your continuing to apply for CM/SM or other jobs you are interested in and of course you are free to continue to apply to such positions.

14. The record indicates that the Applicant reported for the assignment in ECA in the first week of March 2009. On 27 March 2009, he, however, informed HRSVP by e-mail that “the position in ECA is not suitable for me. I feel out of place.” He told HRSVP that pursuant to his suggestion he had applied for a number of Country Manager positions and sought HRSVP’s support, stating: “I need your advice and support on all of this so that I can have a position where I can truly make a difference and positively contribute to the work of the institution.”

15. Also in March 2009, the Applicant applied for the “Country Manager (Africa)” position after he had received an e-mail message from HR stating: “If you wish to apply (as it is a GH level position) you could Just wanted to make sure that if you would wish to be considered, you have an opportunity.” On 28 April 2009, the Bank however informed the Applicant that it had decided to cancel the vacancy for the “Country Manager (Africa)” position.

16. In May 2009, the Applicant sent a number of e-mail messages to HR seeking clarification as to why the position of the “Country Manager (Africa)” had been cancelled and why he had not been selected even though he held the same position before and the Tribunal ordered his reinstatement to the same position or a similar one. It does not appear that the Applicant received specific answers to these questions.

17. The Applicant continued to apply in 2009 and 2010 for various Country Manager vacancies or other positions without success. He describes the reasons for his lack of success as follows:

It appears that the Applicant has not been selected for Country Manager or other positions as (a) he does not have two recent . . . OPEs because during the two years while he was away from the Bank owing to the wrongful termination of his employment by the Bank and (b) Country Manager positions were at the GG level at the time the Applicant’s employment was terminated but most were upgraded to the GH level with effect from 1 October 2008.

18. In June 2010, the Bank announced the appointment of an external candidate as the “Country Manager (Africa).” Disappointed, the Applicant filed a Request for Review before Peer Review Services (“PRS”) in October 2010 claiming that the Bank violated the terms of Decision No. 369 because (i) he had not been reinstated in the same position or a similar one, in particular he was not selected for his former position; and (ii) his expatriate benefits had not been paid. At the request of the Applicant, the PRS proceedings were stayed so that the parties could resolve the matter through mediation.

19. During 2009 and 2010, the Applicant remained in ECA at level GG. ECA management, however, was not satisfied with the Applicant’s performance. For example, in an e-mail message of 26 April 2010, a Director in ECA told the Applicant that: (i) even though he was given terms of reference for a Senior Operations Officer position in ECA, management was concerned that the Applicant did not have a “full work program” and made little effort to seek out additional activities; and (ii) even though in September 2009, the Applicant was warned about “extensive unauthorized absences,” he continued to take such “unauthorized absences.”

20. In November 2010, the Director in ECA informed the Applicant by e-mail that the ECA region was facing a challenging budget situation in coming years and the region needed to reduce staff. The Director told the Applicant that his recommendation would be to eliminate the Applicant’s position and added that: “The elimination of your position would result in a separation for redundancy. However, you would also have the option to elect an ‘Early Out’ separation or a mutually agreed separation. ... If you elect to take one of these two options please let me know by December 14, otherwise, we will proceed with the redundancy approval process.”

21. While the Bank, however, states that the Applicant’s position was not actually eliminated, and that no adverse employment action taken against him on 14 December 2010, the Applicant states that since that date he “has no work, his time is being charged to idle” in ECA.

22. In 2011, the Applicant continued to remain assigned in ECA and his case with PRS remained stayed pending mediation efforts. Ultimately mediation failed and in October 2011 the Manager of the Bank’s Mediation Office informed the parties that the Mediation Office had closed the case because the parties “could not reach an agreement on the issues.”

23. As mediation failed, the PRS proceedings were expected to resume. But, in late September 2011, a Lead Human Resources Specialist informed the Applicant that “the Bank Group would be willing to consider a request from you to submit the disputed employment matters ... directly to the Tribunal.”

24. The Applicant then decided to proceed to the Tribunal because he believed that “it is clear now that there is no good faith to implement the Tribunal decision.” On 5 October 2011 the Applicant sent an e-mail message to the Chief Counsel, Mr. Rivero, requesting an agreement to come directly to the Tribunal.

25. The Bank acceded to the Applicant’s request by an e-mail message on 7 October 2011:

We have received your e-mail of October 5, 2011, requesting agreement from the World Bank to allow you to proceed directly to the Administrative Tribunal without exhausting prior remedies regarding your claim that the World Bank is not in good faith implementing the prior decision of the Administrative Tribunal, No. 369.

Having consulted with Bank management, I am writing to inform you that the Bank agrees to your request to proceed to the Administrative Tribunal without exhausting prior remedies in connection with your claim as described above, but in doing so the Bank reserves the right to raise any applicable defenses. Specifically, the World Bank is granting this extension only with the express understanding that it reserves any and all available arguments and defenses, including that your claim is already time-barred.

26. On 19 January 2012, the Applicant filed the current Application with the Tribunal, stating:

The Applicant contests the Bank’s decision not to implement the Tribunal’s order contained in its Decision No. 369 by failing to:

- (a) 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
- (b) pay the Applicant all benefits he would have received from the date of termination to the date he resumed employment.

27. As remedies, the Applicant “seeks the Tribunal clarification and interpretation of the intent of its order so that the Bank will place him in a Country Manager position or a

similar managerial level position in compliance with the terms of the Tribunal's order and pay to him all the expatriate benefits in respect of which payment is due and outstanding." Moreover, the Applicant seeks "additional compensation for moral damages and discrimination." On 17 February 2012, the Bank filed preliminary objections.

THE PRELIMINARY OBJECTIONS

Summary of the Bank's contentions

28. The Bank argues that the Application is barred because it was not filed within the time limits set by the Tribunal's Statute and Rules.

29. First, the Bank argues that none of the events of which the Applicant complains occurred within the applicable 120-day time limit. The Bank adds that Article II(2)(ii)(a) of the Tribunal's Statute imposes a 120-day time limit in which to file a claim with the Tribunal, which begins to run on the date of the "event giving rise to the application." That event, says the Bank, is commonly a World Bank employment decision, or an action concerning the terms and conditions of an applicant's employment, and once that event has occurred, or an applicant receives notice of that event, an applicant must file a claim challenging that event within 120 days. Otherwise, the claim is inadmissible before the Tribunal.

30. The Bank contends that here the Applicant is not challenging a single, or any specific, decision by the Bank; instead, he appears to be complaining generally that he still does not have a Country Manager position. The Applicant complains most vehemently about the Bank's failure to reinstate him as "Country Manager (Africa)" after his reinstatement in 2007. The Bank argues that any claims relating to that time period occurred outside the Tribunal's time limits.

31. The Bank explains that in this case "events giving rise" to the Application clearly occurred no later than 14 December 2010. It states that this date, on which the Applicant claims his employment was to be terminated, is the last substantive date featured in the Application. The Bank argues that most of the events complained of by the Applicant occurred well before that date, dating back to his reinstatement in 2007, and that, therefore, using 14 December 2010 as the last date is the most generous for the Applicant's claims. The Bank states that, counting 120 days from 14 December 2010, the last possible date on

which the Applicant could file a claim concerning some of the matters in the Application was 13 April 2011. The Bank contends that when the Applicant requested the right to a direct submission to the Tribunal on 7 October 2011, all of the claims that ended up listed in his Application were already time barred, and that he has therefore failed to satisfy the requirements set out in Article II(2)(ii)(a) of the Tribunal's Statute.

32. Second, the Bank argues that the Application is also untimely under Rule 7(8) of the Tribunal's Rules. Under this provision, if the Bank agrees to allow an applicant to submit his claims to the Tribunal directly, the applicant must file his or her claim 90 days from the date on which the Bank notifies the applicant of its agreement to direct submission. The Bank states that in this case it is undisputed that it notified the Applicant of its consent to direct submission on 7 October 2011; accordingly, the Applicant had to file his Application 90 days later, or on 5 January 2012. He however filed his Application only on 19 January 2012, which was 104 days after 7 October 2011, when the relevant 90-day time period began. Thus, the Bank argues, under Rule 7(8) of the Tribunal's Rules, the Application is time barred.

Summary of the Applicant's contentions

33. First, the Applicant argues that he had 120 days in which to file, a 90-day limit being clearly inapplicable. He argues that the 120-day time period should commence from 7 October 2011, the day the Bank gave its consent for direct submission. He explains that the Bank's consent was the "event" that established the *dies a quo* for appeal, for which the longer statutory limit of 120 days applies under the clear terms of the Tribunal's Statute. He states that the Bank's argument, if successful, would overthrow the basic principle that access to the Tribunal is governed in all cases by the Tribunal's Statute. Moreover, the Applicant argues, it would allow the Bank, as a party to litigation, to dictate a shorter time limit for its opponent's pleadings. The Applicant contends that such an overt repudiation of the Tribunal's due process constitutes a foursquare assault on the Applicant's statutory right of access to the Tribunal. He states that the Application was filed on 19 January 2012, and that, counting from 7 October 2011, this was well within the 120-day time limit imposed by the Tribunal's Statute.

34. Second, the Applicant argues that he must always be able to challenge the Bank's non-compliance with the Tribunal's decision. He explains that he seeks specific enforcement of a prior Tribunal order: "Just as one cannot prove a negative, one cannot

identify a specific moment at which an Order is left unfulfilled. It is the nature of an Order to be unfulfilled until action is taken to fulfill it.”

35. The Applicant adds that continuing jurisdiction to hear enforcement demands does not need to be specifically granted by the Tribunal’s Statute. This is because such a grant flows from the reinstatement order of the Tribunal. A court must possess the inherent power to declare whether its orders have been carried out. He explains that a Tribunal order is a mandatory directive, not a subjective perception of employment conditions. The Tribunal’s reinstatement order did not confer on the Applicant a right to some mix of “employment benefits,” but the specific right to be placed in “the same position or to a position similar to the one he was occupying at the time of the termination of his employment.” Until the Bank reinstates the Applicant to such a position, it remains on the jurisdictional hook.

36. Moreover, the Applicant states that the Application is timely because the Bank continues in the challenged wrongdoing. He states that: “Until Applicant is actually restored to the same or a comparable position, Respondent owed him a continuing duty under the Tribunal order. While there may be milestones along the path of non-compliance, the end of the trail is never reached until the duty to reinstate dissolves.” In the Applicant’s view, he may always challenge the Bank’s non-compliance with the Tribunal’s decision.

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

37 The dispute as to whether the Bank has properly reinstated the Applicant pursuant to the *M* decision started shortly after December 2007 when the Tribunal ordered that the Applicant be reinstated “to the same position or to a position similar to the one he was occupying at the time of the termination of his employment.”

38. In *Yoon (No. 3)*, Decision No. 267 [2002], para. 15, the Tribunal observed that:

This case raises unusual issues because reinstatement itself has been unusual. The Bank’s past practice has been to opt for monetary compensation in lieu of effective reinstatement, as Article XII of the Tribunal’s Statute entitled the Bank to do. Effective July 31, 2001, this Article has been amended to give the Tribunal authority to order specific performance when it rescinds a contested decision. It is important for affected staff members to know where they stand in the event they believe that their entitlement to reinstatement has been violated. The Tribunal

perceives that reinstatement may not be a simple matter, particularly with respect to specialist personnel. A suitable “comparable position” is unlikely to materialize instantly on the occasion of an order of reinstatement. Reinstatement is likely to require consultation and accommodation.

39. Here it is evident that “consultation and accommodation” have not brought an end to the dispute, and there are no signs that the dispute will be resolved any time soon. In the meantime, according to the Applicant, he sits idle, drawing a level GG salary without a work program.

40. In the circumstances, the Tribunal is unable to uphold the Bank’s preliminary objections, to the effect that the Application is untimely, and that specific acts must be challenged within 120-day or 90-day time limits of their occurrence. As the Applicant states “one cannot identify a specific moment at which an Order is left unfulfilled.” The Tribunal finds that the following comments from the Applicant are relevant here:

Respondent ... asserts that Applicant must bring a separate case for each alleged instance of non-compliance. In Applicant’s case, this would lead to more than 40 separate cases if simply his wrongfully rejected efforts at reinstatement to a Country Manager were counted. Even if the avalanche of litigation proposed by Respondent were fully adjudicated, this would still not cure the underlying wrong done to Applicant by Respondent’s continuing non-compliance with the Tribunal’s Order. Respondent’s ongoing failure would simply give rise to further symptoms and further cases.

41. A decision by the Tribunal to uphold the Bank’s preliminary objections would not bring the underlying dispute any closer to resolution. It is time for that underlying dispute to be addressed on the merits and to bring finality to the judgment rendered in 2007. The Bank’s compliance, or lack of compliance, with the judgment in *M*, whether by its assignment of the Applicant to ECA or otherwise, is a matter for the merits.

42. In this case, there is no need for the parties to return to PRS since they have agreed to come directly to the Tribunal. Accordingly, the Tribunal dismisses the Bank’s preliminary objections and will hear the parties’ pleadings on the merits.

DECISION

- (1) The Bank's preliminary objections are dismissed.
- (2) The dates for the filing of pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties.
- (3) The Bank shall pay the Applicant the amount of \$7,663 as costs arising from the preliminary objections phase of these proceedings.

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

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Paris, France, 27 June 2012