

Decision No. 320

Dariusz Malekpour,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on March 1, 2004, by Dariusz Malekpour against the International Bank for Reconstruction and Development. The Applicant's request for anonymity was denied on May 4, 2004 on the basis that it was not established that the publication of the Applicant's name was likely to be seriously prejudicial to him. The Bank has raised a jurisdictional objection to be decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Bola A. Ajibola (a Vice President of the Tribunal) as President, Robert A. Gorman and Florentino P. Feliciano, Judges. The usual exchange of pleadings with respect to jurisdiction took place and the case was listed on May 11, 2004 to decide the issue of jurisdiction only.

The Relevant Facts: Procedural History

2. The Applicant is a Senior Financial Officer, Level GG, in the Corporate Finance Department ("SFRCF") (formerly titled "FINCF") of the Bank. There, the Applicant's task was basically to contribute to the development of financial policies of the Bank. He first joined the Bank as a Regular staff member in 1991 as an Economist, Grade Level 23, in the Bank's Economic Development Institute, National Economic Management Division. He joined the SFRCF in 1993 and has been working there since then.

3. The Applicant asserts that he was unhappy with the working environment of SFRCF. He claims in his application that in his recent Overall Performance Evaluations ("OPEs"), his managers did not evaluate him fairly and properly. The Applicant points to his 2002 OPE (for the period of April 1, 2001 through March 31, 2002) where his supervisor wrote:

He [the Applicant] often does not take comments on his work very well and prefers to work to a large extent on his own. ... The role of the Department as it has now evolved requires much more focus on issues of financial strategy and the application of financial policies that require close interaction with colleagues in the Department and with Treasury and [Controller's], an array of practical financial and modeling skills and a knowledge of market instruments and techniques. These are the kinds of skills where Dariusz is relatively weak. The result is that increasingly Dariusz has little work to perform, even though the Department is fully stretched to meet its work program.

4. Finding that evaluation unacceptable, the Applicant filed on November 8, 2002 an appeal (Appeal No. 1242) with the Appeals Committee, challenging the performance evaluation set out in his 2002 OPE. In his appeal, he identified the 2002 OPE as "[t]he decision affecting [him] and being appealed."

5. Before the Appeals Committee, the Applicant contended that the evaluation embodied in his 2002 OPE, quoted above, is "the culmination of ... 30 months of retaliation and abusive treatment." The Applicant set out a history of the alleged abusive treatment he had suffered in the SFRCF during the thirty months leading up to his 2002 OPE. As relief, he requested placement in a non-hostile, non-discriminatory work environment in any other part of the Bank; appropriate modification of his Human Resources file to ensure that his OPEs of the past three years did not adversely affect his current prospects in the Bank; financial compensation for the

allegedly unfairly low salary increases granted by his Director; a fair and impartial review of his eligibility for promotion; and financial compensation for the adverse impact of the alleged retaliation and abusive treatment “on the health and welfare of his self and his family.”

6. The Respondent challenged the jurisdiction of the Appeals Committee over the matters referred to by the Applicant in his Statement of Appeal. The Respondent contended that the jurisdiction of the Appeals Committee was limited to issues relating to the fairness or propriety of only the Applicant’s 2002 OPE. It was emphasized that the Applicant’s complaints about certain specific events that had allegedly occurred more than ninety days before he lodged his appeal with the Appeals Committee had not been made in a timely manner and should accordingly be dismissed.

7. In his reply to the Bank’s jurisdictional challenge before the Appeals Committee, the Applicant made it very clear that he was appealing certain statements made in his 2002 OPE, a matter he believed to be plainly within the jurisdiction of the Appeals Committee. The recitation of certain events that had allegedly occurred more than ninety days before his recourse to the Committee was intended, he stated, to set out what the Applicant regarded as the basis for his contesting the evaluation in his 2002 OPE as wrongful. The Applicant wrote:

I appealed the OPE-2002 that was signed on August 13, 2002. The Appeal was filed on November 8, 2002, well within the 90 calendar days stipulated in Staff Rule 9.03, Section 5.01. In the Statement of Appeal ... I do provide a statement of relevant facts, together with supporting documents and evidence as the basis for contesting the decision being appealed and the reliefs being sought. References to the prior years’ OPEs or specific events that occurred more than 90 days ago, etc., do provide the reasons why the OPE-2002, dated August 13, 2002 was a wrongful decision. They also provide the basis for the reliefs sought. I submit that the OPE-2002 was timely appealed on November 8, 2002.

8. On January 22, 2003, the Appeals Committee decided the jurisdictional issue raised by the Respondent. The Committee found that, pursuant to the Bank’s Staff Rule 9.03, para. 5.01, it could not consider any management decisions that had been taken more than ninety days prior to November 8, 2002, the date the Applicant came before the Appeals Committee. The Appeals Committee concluded that it had jurisdiction to hear the appeal only as it related to the evaluation in the Applicant’s 2002 OPE. The Appeals Committee agreed to hear evidence of an alleged pattern and practice of managerial abuse resulting in the Applicant’s 2002 OPE, but refused to evaluate the merits of any managerial decision made more than ninety days before November 8, 2002.

9. The Appeals Committee subsequently heard the Applicant’s complaints about his 2002 OPE. On September 15, 2003, the Committee rendered its Report on the *merits* of the Applicant’s Appeal No. 1242. The Committee did not find any abuse of discretion on the part of the Applicant’s reviewing Director in assessing and completing his 2002 OPE. Further, the Committee did not find that the Director had retaliated against the Applicant in the course of evaluating his performance in his 2002 OPE. In the view of the Committee, the Applicant had failed to show a causal relationship between his alleged prolonged subjection to retaliation and the low performance rating received in his 2002 OPE. At the same time, however, the Committee stated that the environment in which the Applicant had worked was “very difficult,” and recommended that SFRCF management

provide the [Applicant] with a clearly defined work program commensurate with his skills and abilities, and that management and the Applicant agree upon clearly defined expectations of acceptable behavior and communication in the work place in accordance with Bank’s practices and policies.

10. In the present application, the Applicant lists the Bank acts or decisions that he is contesting in the following manner:

(i) identification of the Applicant – as of the mid-1990s by the senior management in Finance – as a member of a group of staff suffering from various degrees of “dysfunctionality” that needed to be dealt with;

- (ii) failure to inform the Applicant before October 3, 2003 of the mid-1990s decision to identify him as a member of “dysfunctional” staff and targeting him for “dysfunctionality” treatment;
- (iii) retaliatory actions and decisions against the Applicant pursuant to the mid-1990s decision. The retaliatory actions and decisions became explicit in early 2000 and gained in intensity over time;
- (iv) mismanagement of the Applicant’s career;
- (v) failure to promote the Applicant in 2000 on the ground that “... all finance managers hated [him] ...”;
- (vi) failure to provide the staff with a non-hostile, non-retaliatory work environment;
- (vii) inflicting pain and suffering on the Applicant and his family by subjecting him to humiliating and abusive treatment;
- (viii) [the] Applicant’s (primary) OPEs for fiscal years 2000, 2001, 2002, and 2003; and
- (ix) [the] Applicant’s Salary Review Increases (SRIs) in 2001, 2002, and 2003.

11. The Applicant also details the affirmative relief he seeks:

- (i) promotion to Grade H position retroactive to April 2000;
- (ii) removal of primary OPEs for fiscal years 2000, 2001, 2002 and 2003 from the Applicant’s file and the destruction of all copies;
- (iii) retroactive increase in SRIs of 2001, 2002, and 2003 for the “norms” in those fiscal years;
- (iv) assignment to any non-hostile, non-discriminatory unit outside the Finance complex;
- (v) back pay at Grade H level as of April 2000;
- (vi) differential in the SRI at Grade H (“norm”) and the actual SRI, backdated to appropriate dates in 2000, 2001, 2002, and 2003;
- (vii) compensation for “mismanagement” of the Applicant’s career, for humiliating him, for inflicting emotional distress on him, and adversely affecting his life and the well-being of his family amounting to \$1,500,000.00; and
- (viii) costs in the estimated amount of \$3,000.00.

12. The Bank challenges the jurisdiction of the Tribunal, contending that this application is inadmissible under Article II of the Statute of the Tribunal “except for the challenge to the 2002 OPE.”

Considerations

13. Article II(2) of the Statute of the Tribunal sets out the requirements for admissibility of applications to this Tribunal:

No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:

- (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and
- (ii) the application is filed within one hundred and twenty days after the latest of the following:
 - (a) the occurrence of the event giving rise to the application;

(b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted; or

(c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.

14. The Tribunal has emphasized several times the importance of the statutory requirement of exhaustion of internal remedies (e.g., *Berg*, Decision No. 51 [1987] para. 30). In other decisions, the Tribunal has ruled that a staff member's failure to observe the time limits for submission of an internal complaint or appeal constitutes non-compliance with the statutory requirement of exhaustion of internal remedies (e.g., *Setia*, Decision No. 134 [1993], para. 23; *Sharpston*, Decision No. 251 [2001], paras. 25-26).

15. In the present application, the Applicant is contesting numerous alleged Bank acts or decisions said to have occurred starting from the mid-1990s. The record, however, shows that the Applicant has exhausted internal remedies only in respect of his claim relating to his 2002 OPE and that the Appeals Committee has addressed both the jurisdictional and the merits aspects of that claim. The Committee rendered its Report in respect of jurisdiction on January 22, 2003, in which it concluded that it had jurisdiction to hear the Applicant's appeal only to the extent that it related to the evaluation of his 2002 OPE by his reviewing Director.

16. In its Report dated September 15, 2003, the Appeals Committee considered the *merits* of the Applicant's claim and rejected that claim, finding neither abuse of discretion nor retaliation on the part of the reviewing Director in evaluating the Applicant's performance and awarding him a low rating in his 2002 OPE.

17. In the present application to the Tribunal, filed on March 1, 2004, the Applicant in effect asks the Tribunal to reach different conclusions from those reached in the two Reports of the Appeals Committee. In respect of the Report on jurisdiction dated January 22, 2003, the record does not show that the Applicant presented the jurisdictional issue to the Tribunal in a timely manner. The Tribunal must accordingly hold the present application inadmissible to the extent that it seeks to re-litigate the jurisdictional objection of the Bank which the Appeals Committee sustained in its first Report.

18. The Applicant argues that the present application has been brought in a timely manner before the Tribunal. His contention is that during the hearing before the Appeals Committee on the *merits* of his appeal, the Bank for the first time disclosed the existence of a Bank "decision" "identifying" the Applicant "as a member of a group of staff [members] suffering from various degrees of 'dysfunctionality' that needed to be dealt with." The Applicant states that he received the September 15, 2003 Report of the Appeals Committee on the merits only on October 3, 2003. Since the Tribunal granted the Applicant, on January 15, 2004, an extension of 30 days from the due date for the submission of this application, the Applicant contends that this application was seasonably filed. Thus, he concludes that he is entitled to raise as discrete claims the string of alleged decisions and acts of the Bank commencing from the mid-1990s up to the completion of his 2003 OPE and 2003 SRI.

19. The Tribunal is not persuaded by this contention. Assuming, without deciding, that there had indeed been an act or "decision" of the Bank in the mid-1990s, characterizing the Applicant (along with other staff members) as "dysfunctional," of which he was notified by the Bank only on October 3, 2003, it does not follow that the Applicant may now challenge such a "decision" before the Tribunal. The Applicant was fully aware from the time of their occurrence of all the acts he describes as retaliatory and abusive treatment flowing from his alleged characterization as "dysfunctional." There is no question that such alleged acts of implementation occurred much earlier than one hundred and twenty days before the filing of the present application. Furthermore, the Applicant does not pretend that he contested those supposed mid-1990s acts before the Appeals Committee prior to October 3, 2003.

20. The Tribunal has emphasized on a number of occasions that all internal remedies have to be formally

exhausted and that these include timely recourse to the Appeals Committee. (See, e.g., *Bredero*, Decision No. 129 [1993], paras. 22-23; *Levin*, Decision No. 237 [2000], para. 13.) The Applicant must formally and in a timely manner invoke and exhaust available internal remedies in order that the allegedly improper Bank decisions may be challenged in an application before the Tribunal. The Applicant did seasonably raise claims before the Appeals Committee, but only in respect of his 2002 OPE. The Respondent concedes that this application is admissible before the Tribunal, but only in so far as such 2002 OPE claims are concerned. The Tribunal agrees with the Respondent on this point.

21. The Applicant's argument appears to be an effort to tack numerous alleged Bank acts and "decisions" since the mid-1990s onto his complaint about his 2002 OPE, by alleging that those old acts and "decisions" constituted evidence of a "pattern" of "abusive treatment and retaliation" on the part of the Bank ultimately leading to the allegedly unfair evaluation in his 2002 OPE. In *Jalali*, Decision No. 148 [1996], para. 35, the Tribunal rejected such a litigation strategy as an indirect way of avoiding the requirement of exhaustion of internal remedies:

Not having raised [the Bank's decisions] before and not having taken them through administrative review, the Applicant cannot now incorporate these earlier decisions by the Bank as part of a "pattern" that can be indefinitely subjected to review by the Tribunal. The Tribunal has explained in several cases that there are important reasons for the requirement that Bank decisions be reviewed in a timely manner and that internal remedies be exhausted, including timely recourse to administrative review and to the Appeals Committee.

In *Mitra*, Decision No. 230 [2000], para. 11, the Tribunal noted that the resolution of staff claims brought many years after the operative events

could be seriously complicated by the absence of important witnesses or documents, and would in any event result in instability and unpredictability in the ongoing employment relationships between staff members and the Bank.

22. The Applicant's arguments about "exceptional circumstances" do not convince the Tribunal. The burden is on the Applicant to show that "exceptional circumstances" exist which justify relief from or suspension of the exhaustion requirement in Article II(2) of the Statute of the Tribunal. (*Hristodoulakis*, Decision No. 296 [2003], para. 17.) The Applicant declares that he is neither a citizen nor a resident of the United States, but refrains from explaining how that circumstance imposes such real and serious impediments to exhausting internal remedies as to constitute "exceptional circumstances." "[M]ere inconvenience," the Tribunal has ruled, "is not sufficient" to constitute "exceptional circumstances." (*Hristodoulakis*, *id.*)

23. The Applicant also mentions that he has recently received a notice of redundancy dated March 22, 2004 as a result of which his employment with the Bank will be terminated as of October 1, 2004. He asserts that were the Tribunal to declare a lack of comprehensive jurisdiction over the present application, his ability to contest the declaration of redundancy would be severely impaired. The Tribunal does not find this contention convincing either. There is nothing to prevent the Applicant from contesting in due course the legality or propriety of the redundancy notice before this Tribunal *provided* that he shall first have seasonably exhausted internal remedies. The Tribunal does not consider a redundancy notice by itself an "exceptional circumstance" that should release the Applicant from the duty to exhaust internal remedies for his numerous other claims grounded on acts that occurred far back in time.

24. The record shows that the Applicant has contested before the Appeals Committee, in Appeal No. 1301, filed on December 4, 2003, his salary review increase of 2003 as an abuse of discretion on the part of the Director of SFRFCF. The Bank filed its answer to this appeal on January 8, 2004, maintaining that the Applicant's 2003 SRI was "an appropriate reflection of his relative performance in the Unit" and urging dismissal of Appeal No. 1301 and denial of his request for relief. That appeal appears to be still pending before the Appeals Committee. Thus, the Applicant's claim relating to his 2003 SRI is not yet ripe for review, the internal remedies not having been fully exhausted.

Decision

For the foregoing reasons, the Tribunal decides that the application is inadmissible, except with respect to the claim relating directly to the Applicant's 2002 OPE. The dates for the filing of pleadings on the merits with respect to this limited claim will be determined by the President of the Tribunal and communicated to the parties.

/S/ Bola A. Ajibola
Bola A. Ajibola
President

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

At London, England, June 18, 2004