

Decision No. 319

Kayoko Shibata Medlin,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on December 9, 2003, by Kayoko Shibata Medlin 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, and composed of Francisco Orrego Vicuña (President of the Tribunal) as President, Elizabeth Evatt (a Vice President of the Tribunal), Jan Paulsson and Sarah Christie, Judges. The Applicant's request for anonymity was denied on February 19, 2004 on the basis that it was not established that the publication of the Applicant's name was likely to be seriously prejudicial to her. The usual exchange of pleadings took place and the case was listed on April 27, 2004.

2. The Applicant complains that the Bank has not promoted her, despite the fact that she is qualified for a higher grade and has performed duties at that grade for a significant period of time and with considerable success. The Applicant also complains that when she sought a re-evaluation of her post in accordance with the Staff Rules, her Sector Director did not follow through. If she had done so, the Applicant contends, her job would have been upgraded and she would have been promoted. She further complains that after she lodged an appeal concerning this situation, the Bank retaliated against her by curtailing her responsibilities and by giving unfair evaluations of her performance. She seeks promotion from Grade E to Grade F retroactive at least to July 2002, compensation and costs.

The facts

3. The Applicant joined the World Bank in March 1999 as a Knowledge Management (KM) Analyst at Grade 20 (now designated Grade E). She was appointed to the Poverty Reduction and Economic Management (PREM) Network's Gender Unit (PRMGE). She has remained at Grade E since 1999. At the time the Applicant was appointed, she had discussions with her immediate manager, the Sector Manager, PRMGE, about the level at which she was to be appointed. The Applicant had hoped to be appointed as a KM Officer at Grade F but the Sector Manager told her that the Unit only required someone at the level of Analyst (Grade E), not Officer (Grade F).

4. The Applicant asserts that since 2000 she has performed tasks that are beyond Grade E and that her managers have recognized this and in fact modified her terms of reference (TOR) in 2000. She cites numerous examples of work which, she claims, were at Grade F level: she was actively involved in seminar discussions; she organized seminars and workshops across the World Bank; she was a pivotal contact for enquiries regarding the Gender Unit's activities; she interacted with different Vice Presidencies and Thematic Group leaders on Gender and Information and Communication Technology ("ICT"); she helped draft a number of important documents; from time to time she travelled on special missions to a range of countries. These, the Applicant believes, were not routine missions: her managers drafted specific terms of reference for them and she was required to prepare written reports upon her return from mission.

5. The Applicant claims that these tasks were at Grade F level and were included in her Annual Results Agreements. They formed a substantive part of her annual Overall Performance Evaluations (OPEs). In her

2000 and 2001 OPEs, her managers rated her performance “outstanding/best practice,” “superior,” “fully successful” or “fully accomplished” in all categories.

6. The Applicant alleges that, based partly on the fact that she performed considerable work at Grade F and partly on her excellent OPE in 2001, she asked to be promoted to Grade F. The Applicant’s complaint is based primarily on the argument that the Grade F work was not voluntary, extra-curricular career developmental work but was included in her Annual Results Agreements and reflected in her OPEs. But her manager informed her that the Gender Unit was too small to warrant a Grade F post and that even though the Unit benefited from some of this work, it did not justify an upgrade.

7. The Bank acknowledges that the Applicant was given a Spot Award in recognition of a successful seminar series on Gender and the Digital Divide. This activity, however, was never among PRMGE’s priorities, although the Applicant’s volunteer activities may well have been valuable to the Unit. Her manager and the Sector Director, PRMGE, included the Applicant’s extra-curricular activities in her OPEs as a demonstrable record of achievement which would assist her in any application she might make for Grade F positions.

8. In April 2002, the Applicant contacted an Ombudsman at the Bank to seek an informal resolution of her claim for promotion. Although his intervention was not successful, he suggested that the Applicant contact the Co-ordinator of the World Bank Knowledge Sharing Program (hereinafter “the Co-ordinator”), for advice about her career aspirations. In the light of comments by her managers, the Applicant concluded that she was unlikely to advance beyond the Analyst position within the PRMGE Unit. Soon thereafter, the Applicant’s Sector Manager advised her to apply for vacancies at Grade F outside PRMGE.

9. On May 8, 2002, the Applicant met with the Co-ordinator. He reviewed her original TOR, the 2000 modified TOR, and her most recent OPE. She says that after a discussion about her current program, he expressed the view that her post may well have been under-graded at Grade E. However, he also informed her that no job profiles had yet been prepared for KM Specialists but that he and his colleagues were in the process of developing such profiles.

10. The Co-ordinator also talked to the Sector Director, PRMGE, about the Applicant’s concerns regarding her grade and her work. The Sector Director asked the Co-ordinator for the Terms of Reference for KM personnel. The Co-ordinator sent her some examples of KM positions at different levels, but conceded that they did not reflect established norms for these levels. The Sector Director explained to the Co-ordinator that some of the Applicant’s activities had not been assigned to her, but had been undertaken on her own initiative. The Co-ordinator appears not to have been aware of this. He appears to have played no further role in this matter.

11. The Sector Director and the relevant Human Resources Officer (HRO) also discussed the Applicant’s grade at this time. The HRO recommended that if the Sector Director had any doubts about the Applicant’s grade, she should contact the HR Compensation Unit to conduct a re-grading analysis. On May 22, 2002, the HRO e-mailed the Sector Director, informing her of the ongoing initiative to develop standard job profiles for KM positions. She also recommended that the Sector Director should advise the Applicant that although the Sector Director was convinced that the Applicant was appropriately graded at Grade E, the Applicant could apply to have her functions graded by the HR Compensation Unit. The Sector Director informed the Applicant accordingly, but did not herself request review by the Compensation Unit.

12. At about the same time, the HRO consulted the Compensation Unit in case there were to be a review or evaluation in terms of Staff Rule 6.05, para. 3.02, which calls for an assessment “of a job profile and/or grade” by the “responsible manager and Human Resources Officer” with “the concurrence of the sector board, network head or a similar body, if applicable.”

13. Meanwhile, in March 2002, in her 2001-2002 OPE, the Applicant had asked management to “reassess my grade level by comparing to the KM Officer’s TOR and to inform me the result of their assessment.” On July 3, 2002, the Sector Director signed the OPE and recorded, in response to the Applicant’s request: “*we have already done this* and have concluded that the TOR for Kayoko’s position is at best an E level position ... [W]e

do not have a business need in our unit for a level F Knowledge Management Person,” and if the Applicant “was interested in a level F position, she needs to apply for such positions elsewhere in the Bank” (emphasis added). The Applicant draws the conclusion that the Bank thus failed to conduct the evaluation in accordance with Staff Rule 6.05.

14. The Sector Director’s assessment that the Applicant’s position was at best a Grade E position was derived, at its origin, in her consultation with the Co-ordinator and her consideration of KM TORs at Grades D, E and F, which she compared with the TOR for the Applicant’s position.

15. On February 10, 2003, the Applicant filed an appeal with the Appeals Committee contesting the failure to conduct the review and her consequent non-promotion to Grade F. The Applicant asserts that after she filed her appeal, her managers significantly reduced her tasks in the Unit, essentially limiting her to web maintenance work, and that her managers also gave her a reduced rate of salary increase and a less favorable OPE than before. Although the Sector Manager had previously considered (in 2002) that her attendance at a conference would be a good “fit” for the Applicant’s work program, the attitude of her Unit now changed.

16. The Respondent, to the contrary, contends that the Applicant was simply asked to follow PRMGE’s priorities and devote more attention to her core responsibilities rather than engage in extra-curricular activities.

17. In May 2003, three months after the Applicant filed her appeal, the Gender Unit advertised a vacancy for a Grade F Gender Specialist position. The Applicant claims that the vacancy notice referred to many of the tasks that she had been performing, and that this new Gender Specialist post was essentially a KM position for which she was eminently qualified. However, the Sector Director allegedly informed her that she had a preferred candidate, and that the Applicant lacked the competence to do some of the required analytical work, including regression analysis.

18. It is not disputed that the advertisement was open. Neither the Applicant’s immediate supervisor nor the Sector Director served on the short-listing committee. There were more than 47 candidates. The Applicant was not short-listed for interview. The Applicant contends that the person who was granted the Grade F position had only recently started working in the Gender Unit and was not a KM Specialist. Moreover, the appointee took over some of the Applicant’s previous responsibilities. The Applicant states that she is still sometimes given assignments similar to the ones that she used to perform, but only outside her Department. This, the Applicant believes, means that others in the Bank recognize her skills and competencies, unlike her own managers.

19. On July 28, 2003, the Appeals Committee determined that the Sector Director had “technically abused her managerial discretion by failing to comply with the requirements of Staff Rule 6.05, [section] 3, in responding to the Appellant’s request for a reassessment of her grade.” Nevertheless, the Committee accepted the Sector Director’s assessment that the Unit did not have a business need for a Grade F KM person. It also considered that although the Applicant had performed work above that expected for staff at Grade E, this had been at her own initiative and not because it had been required by her managers. The Committee considered that even if the job review had been carried out, the Unit did not need a KM officer at Grade F. Therefore, the failure to conduct a review was irrelevant in relation to the Applicant’s request for a promotion. The Appeals Committee considered that the breach had been a procedural rather than substantive defect. It recommended that the Applicant not be granted any relief.

20. On August 12, 2003, the Acting Vice President of Human Resources informed the Applicant that she had accepted the recommendations of the Appeals Committee.

21. The Applicant contests before the Tribunal the failure to follow the re-grading procedures of Staff Rule 6.05, sections 3 and 4, and challenges the denial of promotion on July 3, 2002 (the date on which the Sector Director signed the Applicant’s OPE).

Considerations

22. The Applicant's claim that she is entitled to be appointed to a Grade F position is based on her argument that the Grade F work she performed was not voluntary, extra-curricular career developmental work, but was included in her Annual Results Agreements and reflected in her OPEs. The Bank responds that the scope of the Applicant's TOR was specialized and narrow. In essence, her job required her to transfer the knowledge and learning materials that PRMGE staff generate and make them easily available on the Unit's website. This called for skills and knowledge of website design and construction that the other PRMGE staff did not have. The Respondent further contends that management did not call on her to perform work at Grade F. Had she been appointed at Grade F, she would have been required to provide strategic input and to engage in negotiations with external partners or other Bank units. The record shows that some of these tasks are apparently currently performed by the PRMGE's Sector Manager, and others by the Grade F Gender Specialist.

23. PRMGE undisputedly attracts young people who seek to gain experience beyond their core responsibilities so they can develop their careers within the Bank (and presumably elsewhere). The Tribunal endorses the approach adopted by the Bank of allowing the Applicant the opportunity to attend conferences and training events and to volunteer and take on initiatives of interest to her. This enriched her job in the PRMGE and would enhance her career prospects. As long as these activities did not adversely affect her core responsibilities, the Applicant was given considerable latitude.

24. The Applicant had known from the time she started at the Unit that it was her work program and not her qualifications or skills that dictated her level of appointment. Her managers had been explicit with her with respect to her job expectations. The HRO told the Applicant that even if she undertook to perform work beyond her core functions, this would not necessarily, let alone automatically, secure promotion to a higher level; the better approach for her would be to apply for all Grade F positions for which she might qualify.

25. There may well have been a misunderstanding about the review of the Applicant's position. The Applicant expected that the Respondent would initiate a special review of her grade, but the Sector Director, PRMGE, considered that she had done all that was required of her. The Applicant claims that the Bank acted inconsistently in relation to its assessment of the value and the appropriate level of the Applicant's work. The Bank had acknowledged that the work she did was a priority, but not at Grade F. Yet, a little over three months after she filed her appeal, the Unit advertised a Grade F position for a Gender Specialist.

26. The Applicant's managers have a discretion to organize the PRMGE and to define the scope of the requirements for all of its jobs. The PRMGE has a staff complement of only ten people. The determination that it had no business need for a Grade F KM position was not an abuse of managerial discretion. The Applicant had known from the beginning that the post she was to occupy was established at Grade E. Furthermore, the Bank demonstrates that, when compared with other staff members who perform similar work in other PREM Anchor Units, the level of the Applicant's post is higher than her peers; the others are all at Grade D. PREM has no KM positions at Grade F and there are only four Grade F KM positions in the Bank as a whole.

27. The Manager, Human Resources Compensation Management Division (HRSCM), who testified at the Appeals Committee, was specifically asked if management has any obligation to promote a staff member who is performing job duties above his or her grade level and which are included in the Results Assessment part of the OPE. He stated that promotion might be required after an evaluation is made as to whether the staff member's salary is commensurate with activities actually performed. But he also stated that:

[W]e tend to hire people with qualifications beyond the job, so it is not unusual to have people with skills or capabilities which go well beyond the job they are doing at that particular point. And that creates at times some tension in terms of do we have enough scope for someone to grow.

28. It is a Bank prerogative within its discretion to evaluate jobs and functions. Accordingly, absent a request, the failure to conduct a review would not be a violation of a staff member's rights.

29. The issue is then whether the Applicant's request in her OPE for a written response should be deemed a request for a job grade review for the purposes of Staff Rule 6.05. The Applicant requested in unambiguous terms that management "reassess my grade level by comparing to the KM Officer's TOR and ... inform me [of] the result of their assessment." The expert evidence before the Appeals Committee referred to above was that a request could be as informal as a verbal request to a manager. In this case, it was in writing.

30. The Bank submits that if the Applicant required a regrade, she should formally have requested it. The Tribunal disagrees with the Bank. The record shows that the Applicant did contact the "responsible manager" and the appropriate "Human Resources officer" as envisaged in the applicable Staff Rule. There was no Sector Board for her area of work. The Sector Director could have been in no doubt that the Applicant wanted her job to be evaluated, whether she cited the Staff Rule or not. The Tribunal accordingly finds that the Applicant did request a review within the meaning of Staff Rule 6.05.

31. The question then becomes whether management substantially complied with the requirements under the Staff Rule. The Tribunal concludes that it did not. The HRO testified that her interaction with the Applicant was a consultation, but not a "review" within the meaning of the Staff Rule; that had it been a review, a third party would have been brought in. In preparation for a likely review, the HRO was informally trying to assess if the Applicant "was performing special projects on a continuous basis or if they were in fact special projects and an ad hoc situation." She admitted that she was not conducting an official determination, i.e. a review, but was merely exploring options. The intervention of the Co-ordinator appears to have been limited to an informal assessment of the versions put up by both the Applicant and her Sector Director, and to help the Applicant assess her opportunities for career development.

32. The Tribunal accepts that if there were to be a formal review, the Compensation Unit would have been involved. It was not for the Sector Director, PRMGE, to determine this matter unilaterally, based on informal discussions with HR and the Co-ordinator. This comment is reinforced in light of the dispute of fact about the nature and extent of the Applicant's allegedly voluntary, *ad hoc* or extra-curricular developmental work. The Tribunal considers that the steps undertaken by management and HR did not comply with the Staff Rule, not least because the Applicant was not engaged in the process. The Sector Director appears to have misunderstood the requirements under the Staff Rule. HR should have advised the Applicant and the manager of the Unit how to proceed, but the HRO testified before the Appeals Committee that "we did not pursue it."

33. The Bank has responded ambiguously to the Applicant's claim. The Sector Director considered that, as she had explained to the Applicant that the Unit did not have a business need for a KM person at Level F, she was not required to do any more. She blamed the HR Department for what she called "a fairly chaotic situation with our HR support, which I think is very unfortunate and played into this." However, she also admitted that she read the Staff Rule about job reclassification for the first time only three days before the Appeals Committee Hearing. It was only then, she said, that she discovered that the Staff Rule called for a structured, if not a formal, process.

34. The Tribunal concludes that the Bank's conduct was not sufficiently compliant. It remains to be determined whether the Bank's failure amounted to a compensable irregularity. If promotion of the Applicant was a likely outcome of a review, the Applicant would have a substantive grievance. In the circumstances, however, the Tribunal is satisfied that the Applicant was most unlikely to have been promoted, even if a proper review had been conducted. Yet, due process is an inherent requirement in the employment relationship, and therefore it may be appropriate to penalize procedural irregularities even if they did not ultimately lead to a different substantive outcome.

35. In elaboration of her claim that the Respondent unfairly retaliated against her, the Applicant claims that after she protested her grade and filed her appeal, her work assignments were significantly reduced. She asserts that this amounted to a unilateral change to the terms and conditions of her work and had an adverse impact on her expectations both within the Unit and elsewhere in the Bank.

36. The Tribunal rejects these allegations. The Applicant was hired to do certain work, but she also had the

opportunity to do a range of other work that fell beyond the express requirements of her job description. The Applicant's assertion that her work at Grade F was curtailed because management was unwilling to remunerate her for performing work at Grade F is not established by the record. She was merely required to devote more attention to her core responsibilities rather than engage in other activities.

37. The Tribunal concludes that the Applicant's claims in this case do not fall within the scope of the prohibition against "retaliation" as defined in Staff Rule 8.01, para. 3.02 (as it read at the relevant time), which applies specifically to reports of suspected misconduct. This is not the case here. Nor was there any improper motivation on the part of the Bank.

38. The Tribunal does not consider that the conduct of the Unit towards the Applicant was improperly motivated. When PRMGE understood that some of the work she had been doing was at the Grade F level and that this had led the Applicant to believe that she was entitled to claim a promotion to Grade F, the Bank did not act unfairly when it confirmed the core nature of her job and delineated more clearly her developmental and voluntary work from the job requirements as set out in her TOR. The Unit was, however, insufficiently punctilious in its treatment of the Applicant. The Tribunal notes that the Applicant's assessments from 1999 until she challenged her grade were positive about her achievements. They did not distinguish between voluntary and core work. Furthermore, there is no indication in the earlier assessments up to the time the Applicant filed her appeal that her supervisors had noted any particular areas which were unusual or *ad hoc*.

39. As for the Applicant's complaint about her failure to be short-listed for promotion for the Grade F post in 2003, the Tribunal considers that although there may well have been an overlap in the skills and attributes which the Applicant has and those which were required in the Grade F KM position, this did not in itself entitle the Applicant for selection or appointment to that Grade F position. This was an open competition several months after the facts and circumstances giving rise to her appeal. There is no evidence that her failure to secure the job was linked to the appeal. Finally, when her managers exhorted the Applicant to apply for jobs outside the Unit if she wanted promotion beyond Grade E, this was not plainly an abuse of discretion in regard to any alleged failure to promote her.

40. The Tribunal considers that the Respondent should be ordered to pay compensation for the denial of the Applicant's procedural rights even if she has not succeeded in showing that a grading exercise would have led to her promotion. As the Tribunal determined in *K. Singh*, Decision No. 188 [1998], para. 21:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered. Even if the Respondent is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of its discretion.

41. The Applicant has a legitimate concern about the proper level of her job; the Staff Rule seeks to balance consistency across the Bank and in different occupational classes. Hence, it was important to comply with the established procedure. Compensation for the failure to respect these procedural rights does not relate to any pecuniary loss, but penalizes the Respondent for the irregularity.

Decision

For the above reasons, the Tribunal decides that:

- (i) the Respondent shall pay the Applicant compensation in the amount of \$5,000 net of taxes;
- (ii) the Respondent shall pay the Applicant costs in the amount of \$3,000; and
- (iii) all other pleas shall be dismissed.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

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

At London, England, June 18, 2004