

**Decision No. 346**

**Nezam Motabar,  
Applicant**

**v.**

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

1. The application in this case was received on 11 October 2005. The Applicant's request for anonymity was denied on 10 November 2005 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. This judgment disposes of that objection. It is rendered in plenary session, with the participation of Jan Paulsson, President, Robert A. Gorman, Francisco Orrego Vicuña, Sarah Christie and Florentino P. Feliciano, Judges.

**Factual Background**

2. In early 2002, the Applicant was invited by a Senior Recruitment Officer of the Bank to apply for the position of Regional Financial Manager, Level GH. The Applicant did so, but the position was awarded to another. On 13 June 2002, however, the Bank offered the Applicant an Open-Ended appointment as a Senior Financial Management Specialist, Level GG, in the Middle East & North Africa Regional Office (MNA), and, upon his acceptance, his proffered letter of appointment stated that "your appointment will be subject to a probationary period of up to two years." According to the Applicant, the Senior Recruitment Officer assured him that he would be confirmed in due course. The Officer also allegedly informed the Applicant that among the benefits of his post would be a so-called mobility premium, a benefit intended to afford expatriate staff reasonable assistance to help them maintain their cultural, professional and personal links with their home countries.

3. On 27 June 2002, the Applicant signed his Letter of Appointment, which mentioned his salary and certain benefits, but not a mobility premium. The Applicant's service at the Bank began on 8 July 2002, and his immediate supervisor was the person who had recently been awarded in preference to him the position of Regional Financial Manager, Level GH.

4. In October 2002, the Applicant inquired about his entitlement to the mobility premium, but he was informed through an e-mail dated 30 October 2002 from the Benefits Unit that he was not eligible for such benefit under Staff Rule 6.21, para. 2.01, because he was hired on the basis of his U.S. citizenship and not his Iranian citizenship.

5. In January 2003, the Applicant completed the first six months of his probationary employment. His supervisor on 21 January asked him to submit a draft of an interim Overall Performance Evaluation (OPE) covering the period 8 July 2002 to 7 January 2003 ("the first interim OPE"). The Applicant did so in late January 2003, and an exchange of several drafts followed between the Applicant and his supervisor. In view of that exchange, and some contemporaneous technical problems with the OPE system, the first interim OPE was not signed by the supervisor until 9 September 2003, and by the Applicant until 11 September. The Applicant was rated "partially successful" in three of the four key work program results, and also in three of the four behavioral assessments. It was not until 6 February 2004 that the first interim OPE was signed by the reviewing manager.

6. In the meantime, the Applicant was serving the second six months of his probationary employment, running from 8 January to 7 July 2003. In August 2003, he prepared a draft of the OPE covering that period ("the

second interim OPE”), and forwarded it to his supervisor on 17 August. Although it appears that this second interim OPE was never finalized, the Applicant on 14 January 2004 met with his supervisor, along with a Senior Human Resources Officer and with the Director of Operational Core Services, MNA Regional Office (“the MNA Director”); at that meeting his supervisor gave the Applicant a copy of her draft of the second interim OPE, which set forth the same ratings as in the first interim OPE. At a meeting in early March 2004 among the same four individuals, the Applicant was given a written report by his supervisor, in which she stated that he was not fulfilling his terms of reference and that he presented “performance issues in the FM [Financial Management] area.”

7. At the conclusion of both the January and March 2004 meetings, the MNA Director informed the Applicant that confirmation of his appointment was in jeopardy. On 22 April 2004, the MNA Director notified the Applicant in writing of his decision not to confirm the Applicant’s appointment. The Applicant left the service of the Bank on 8 July 2004, after precisely two years of probationary service.

8. On 23 June 2004, the Applicant filed a Statement of Appeal with the Bank’s Appeals Committee. He challenged the Bank’s decision not to confirm his appointment, and requested relief that included revocation of the “unfair and adverse” OPEs, and compensation for failure to pay him a mobility premium and a salary increase (SRI) in 2003. The Respondent on 8 July 2004 contested the jurisdiction of the Appeals Committee to decide upon claims relating to the mobility premium, the first interim OPE, and the 2003 SRI.

9. The Appeals Committee – in its decision dated 29 September 2004 – agreed that these claims had not been timely presented by the Applicant, and that the only claim over which the Appeals Committee had jurisdiction related therefore to the Bank’s decision not to confirm the Applicant’s appointment. After a full hearing, the Appeals Committee on 14 April 2005 issued its report concluding that the Bank did not abuse its discretion in deciding not to confirm the Applicant’s appointment, and thus recommended that all of the Applicant’s requests be denied. This recommendation was accepted by the Vice President, Human Resources, and the Applicant filed his application with the Tribunal on 11 October 2005.

10. The Applicant contests the following Bank decisions: (i) the non-confirmation decision of 22 April 2004; (ii) the non-payment of a mobility premium in 2002 through 2004; (iii) the failure to grant an SRI in 2003; and (iv) the “failure to accord [him] due process.” As remedies, the Applicant requests the following: rescission of the non-confirmation notice and retrospective reinstatement; retroactive payment of salary, mobility premium, and SRIs of 2003 through 2005; removal and destruction of his OPEs; compensation of \$1 million if specific performance is denied; and costs estimated at \$10,000.

11. The Respondent has raised jurisdictional objections to the Tribunal’s consideration of the unpaid mobility premium, the first interim OPE and the unpaid 2003 SRI. It asserts that all of these claims were untimely presented to the Appeals Committee, and that as a result the Applicant has failed to exhaust internal remedies as required by Article II(2) of the Statute of the Tribunal. The Respondent requests that the Tribunal address these matters of jurisdiction first, under Tribunal Rule 8, before directing the Respondent to submit an answer with respect to the merits of the non-confirmation decision.

## Decision on Jurisdiction

12. Article II(2)(i) of the Statute of the Tribunal provides: “No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless ... the applicant has exhausted all other remedies available within the Bank Group ...” The Tribunal has frequently held that such exhaustion of internal Bank remedies requires recourse to the Appeals Committee in a timely manner. See *Malekpour*, Decision No. 320 [2004], para. 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. ... 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.

13. Staff Rule 9.03, para. 5.01, deals with appeals of Bank decisions to the Appeals Committee: "A staff member who wishes to appeal an administrative decision to the Appeals Committee must submit the appeal in writing to the Secretariat of the Appeals Committee within ... 90 calendar days of receiving the written decision ...." The Applicant filed his appeal to the Appeals Committee on 23 June 2004. Thus, Bank decisions communicated to the Applicant more than 90 days before – i.e., before 25 March 2004 – could not have been timely challenged before the Appeals Committee, and thus cannot now fall within the jurisdiction of the Tribunal.

14. Of the claims set forth in the application, such is perhaps most obviously the case with the Applicant's challenge to the Bank's decision not to pay him any mobility premium. The Applicant received an e-mail from the Bank's Benefits Unit on 30 October 2002 that "according to SR [Staff Rule] 6.21, para. 2.01 ... you are *not* eligible for mobility premium." (Emphasis in original.) It was explained that this rule provided that when a staff member has dual citizenship which includes U.S., the U.S. citizenship must prevail. The Bank's decision to deny the mobility premium was thus unequivocal, and was expressly based on a reason that was true not only in 2002 but also in 2003 and 2004, as the Applicant should have well understood. A timely appeal from this decision should have been taken by the Applicant no later than 28 January 2003. His appeal dated 23 June 2004 was thus filed nearly a year and a half too late. As to that Bank decision, the Tribunal lacks jurisdiction for failure to exhaust internal remedies.

15. The application also contests the Bank's failure to grant an annual salary increase in 2003. Although the Applicant does not clearly state the basis for his claim, it may well rest on Staff Rule 6.01, para. 3.07, which states that "[a] staff member on probation at the time of a general salary review will be eligible for a salary increase under the salary increase matrix." It is to be noted, however, that paragraph 3.02 of that Staff Rule states that "[s]taff members whose performance is unsuccessful will not receive a salary increase." Moreover, the Applicant's probationary period began in July 2002, so that he had served for less than a year when the 2003 SRI exercise went into effect. Conceivably, he may have been entitled to a salary increase at that time.

16. In any event, no such increase was granted to the Applicant, either at that time or at any time during the calendar year 2003. The Respondent contends that

each bi-monthly salary payment to him constituted notice to him that he did not receive an SRI for 2003, which would typically be made in the summer. Applicant therefore was on notice that he did not receive an SRI for 2003 more than 90 days prior to June 23, 2004, when he filed [his appeal with the Appeals Committee].

If the Respondent is suggesting that the Applicant should be deemed to know precisely when the SRI went into general effect in mid-2003, the Tribunal is not persuaded. But surely when the calendar year 2003 came and went, the Applicant should have reasonably understood that the Bank had decided – whether by design or carelessness – to pay him no salary increase for the year 2003, an increase which he now claims before the Tribunal. The Applicant should therefore have challenged this decision within 90 days, or by the end of March 2004. His appeal to the Appeals Committee, filed on 23 June 2004, was thus untimely. Again, for this reason, the Tribunal is without jurisdiction to pass upon this claim. (The time to challenge Bank decisions starts to run from the "date when the Applicant ought reasonably to have been aware that there could have been [an adverse decision]." *Thomas*, Decision No. 232 [2000], paras. 29, 31; *see also Prescott*, Decision No. 234 [2000], para. 28.)

17. Should, however, the Tribunal ultimately determine – when the decision not to confirm the Applicant's appointment is addressed on the merits – that that decision was an abuse of discretion warranting compensation in the form of lost salary, it can consider whether salary increases would have been paid absent any such abuse.

18. Construed generously, the application also challenges the validity of the first interim OPE. Although this is not explicitly itemized by the Applicant among the four challenged decisions, it is clear from the content of his arguments in the application that the Applicant believes that the substance of the first interim OPE was arbitrary and that the underlying procedure was unfair and in violation of the pertinent staff rules. The interim OPE was in fact explicitly challenged before the Appeals Committee. But the Appeals Committee concluded that it was

challenged too late.

19. It will be recalled that this OPE was to cover the period 8 July 2002 to 7 January 2003; that the “partially successful” evaluations of the Applicant’s work and behavior were signed by the Applicant’s immediate supervisor on 9 September 2003; and that the reviewing manager did not sign the OPE until 6 February 2004. If the Applicant believed that the first interim OPE was an abuse of discretion, he was in a position to challenge it beginning on the latter date and continuing until 90 days thereafter, or by 6 May 2004. For this reason, the Appeals Committee concluded that the Applicant’s appeal of the Bank’s decision, which was filed with the Appeals Committee on 23 June 2004, was clearly untimely.

20. The Tribunal notes, however, that Article II(2) of the Statute provides that the jurisdictional requirement of exhaustion of internal Bank remedies may be excused for “exceptional circumstances.” (No such excusing circumstances are expressly contemplated in the Staff Rule setting forth the 90-day filing requirement before the Appeals Committee.) The Tribunal further notes that during the 90-day period in which the Applicant might have appealed from his first interim OPE, he was presented at a meeting in early March 2004 with written notice of a continuing shortfall in his performance (relating to the second interim OPE period) – and indeed on 22 April 2004, he was given written notice that his appointment was not to be confirmed.

21. Given these fast-moving and overlapping events, brought about largely by the Bank’s own failure to adhere to reasonable OPE deadlines, and given the obviously more grave implications of his 22 April 2004 notice of non-confirmation, the Applicant’s failure to challenge his first interim OPE by 6 May is fully understandable and indeed excusable. Moreover, the validity of the first interim OPE is so intimately related to the Applicant’s challenge to the decision not to confirm his appointment – a challenge which the Respondent does not contest on jurisdictional grounds – that attempting to exclude consideration of that OPE would likely prove to be futile. It is therefore the decision of the Tribunal that it has jurisdiction to hear the Applicant’s challenge to his first interim OPE, on both substantive and procedural grounds.

22. The Tribunal concludes, however, that none of the other failures to exhaust internal remedies, as discussed above, may be excused by virtue of the statutory provision for “exceptional circumstances.” The Tribunal in particular rejects the Applicant’s contention that he was uninformed of the rules relating to timely appeal and exhaustion of internal remedies, and that it was the responsibility of the Bank to so inform and coach him. In *Sharpston*, Decision No. 251 [2001], para. 52, the Tribunal, referring to a number of earlier decisions, held that “ignorance of the law is no excuse.” And in *Levin*, Decision No. 237 [2000], para. 22, the Tribunal noted:

With respect to the Applicant’s contention that he was not apprised of his rights or offered any assistance by the Respondent in contesting the decision to terminate his employment, it suffices to state that the Respondent did not have any such explicit obligations.

Rather, it is reasonable to expect staff members to take the initiative to learn of the avenues of redress that are available within the Bank, from such sources as the Staff Association, Human Resources, the Ombuds Services, and the Appeals Committee Secretariat.

23. The Applicant makes repeated references in his pleadings to the fact that the Appeals Committee explicitly considered and ruled upon his claims for the mobility premium, the 2003 SRI and the first interim OPE, so that in his view he has indeed exhausted internal Bank remedies. But this view is clearly mistaken. The Appeals Committee considered those claims only in the context of a challenge to its jurisdiction, and for each claim it found a lack of jurisdiction because of untimeliness and declined to rule upon the merits. This is not an exhaustion of internal remedies, which contemplates a timely resort to the Appeals Committee and, typically, its resolution of the merits of the contested claims.

24. The Applicant’s pleadings also refer frequently to failures of due process, and to express assurances of confirmation of employment that were allegedly given to the Applicant by a Senior Recruitment Officer when the Applicant was considering initial Bank employment in early 2002. These contentions may be pursued by the Applicant when he and the Respondent present on the merits their respective positions concerning the Bank’s decision not to confirm the Applicant’s appointment.

## **Decision**

For the foregoing reasons, the Tribunal decides that it is without jurisdiction to address on the merits the Applicant's claims with respect to the denial of a mobility premium and of a salary increase in the years 2003 and thereafter. The Tribunal does, however, have jurisdiction to address on the merits the Applicant's claim with respect to his first interim OPE, as well as his claim with respect to the Bank's decision not to confirm his appointment. The dates for the filing of pleadings on the merits with respect to these limited claims will be determined by the President of the Tribunal and communicated to the parties.

/S/ Jan Paulsson  
Jan Paulsson  
President

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

At Washington, DC, 26 May 2006