

Decision No. 354**Massoud Moussavi,
Applicant**

v.

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

1. The present judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, Robert A. Gorman and Francisco Orrego Vicuña, Judges. The application in this case was received on 21 April 2006. The Bank has raised a jurisdictional objection. This judgment disposes of that objection.

2. The Applicant is challenging his managers' decision not to increase his 2004 and 2005 salaries, as well as the earlier salary reviews on which that decision was based. Among other things, the Applicant specifically contends that "a fair salary review requires at the very least a review of past SRIs [Salary Review Increases] and ... the underlying OPEs [Overall Performance Evaluations] ... to see if they reveal a systemic bias." The Bank has raised a jurisdictional objection to the Applicant's challenge of his past SRI ratings and OPEs.

Factual Background and Jurisdictional Challenge

3. The Applicant joined the Bank in March 1979, and was declared redundant effective as of 5 January 2006. Beginning in 1996, he was graded at level GG, and he was serving as a Senior Information Officer at the time of the events involved in this case. He worked in the Operations Solutions team of the Information Solutions Group (ISG) from 1988 to 2001. After an assignment outside the Bank through the Staff Exchange Program (SEP), he rejoined the team in 2004. He claims that in early 2004, he realized for the first time that his salary was "substantially ... lower than the salaries of most (perhaps all) staff at [his] grade level with approximately the same experience and qualifications."

4. After unsuccessfully requesting that his managers grant him a salary increase, the Applicant requested a salary review in April 2004; the review was in fact undertaken by Ms. Sekimoto, the Senior Human Resources (HR) Officer for ISG. A draft preliminary analysis prepared by HR, dated 24 June 2004, concluded that the Applicant's current salary derived from his relatively low performance ratings over the years.

5. After consulting the Ombudsman, the Applicant made a request for a further salary review by the Compensation Management Unit in HR, and this was undertaken. In a report dated 25 October 2004, Mr. Arroyo of the Compensation Management Unit also concluded that the Applicant's SRI ratings – which are based upon a staff member's annual OPEs and a comparison with others in his or her work group – were "a significant factor in his relatively low salary compared to his peers." Mr. Arroyo pointed out that the Applicant's SRI ratings dating from 1999 to 2004 were 3.2, 3.1, 3.2, 3.1, 3.2, and 3.3, respectively. The Applicant's OPEs for the several years in question, with respect to both his work programs and his behaviors, were principally "Fully Successful" and occasionally "Superior." In the light of the conclusions of this October 2004 salary review, the Applicant's managers denied his request for an *ad hoc* salary increase.

6. In January 2005, the Applicant appealed this denial to the Appeals Committee, which held a hearing on 28 June 2005. Contemporaneously, in June and July 2005, the Applicant's ISG Management Team, reacting to the need for staff reductions because of severe budgetary cuts, concluded that the Applicant's position should

be declared redundant. He was so informed on 6 July by the Vice President of ISG.

7. The Appeals Committee Panel issued its Report on 30 August 2005. It concluded that HR's method of conducting the 2004 salary review was not "observable" so that it was not possible to determine whether the failure to adjust the Applicant's salary upward was reasonable or not. The Panel found a lack of clear standards, and of written rules and procedures governing the salary-review process, as well as inconsistencies in the testimony of those involved in the process. The Appeals Committee Panel noted that while the SRIs accounted for part of the difference in salaries, they "did not account for the entire differential between the [Applicant's] salary and that of his comparators, and that part of the differential remained unexplained."

8. In the course of finding the decision not to effect an upward adjustment of the Applicant's salary to have been "arbitrary," the Appeals Committee Panel made the following observations about the Applicant's OPEs and SRI ratings through the years:

[The Panel] observed that although the subject of the Appeal was management's decision not to upwardly adjust the [Applicant's] salary after a salary review, the parties had submitted a significant amount of evidence and proposed a number of witnesses to testify concerning the [Applicant's] duties and performance during the years preceding the salary review. The Panel noted that the [Applicant's] OPEs and ... SRI ratings were already a matter of record and advised the parties that the Panel would not be focusing on the details of the [Applicant's] past duties and performance during the hearing.

9. The Appeals Committee recommended: that the Bank promptly obtain "an independent review" of the Applicant's salary, "without the involvement of any of the parties who played a role" in his prior salary review; that the Bank provide the Applicant with "a detailed written explanation of the methodology used, and [the] basis for the conclusions reached" in the new salary review; that ISG management "consider afresh whether, in light of the new salary review, a salary adjustment" was warranted; that any such adjustment be made retroactive to 27 October 2004; and that the Applicant be awarded attorney's fees. On 19 October 2005, the Vice President of Human Resources Services (HRSVP) informed the Applicant that he accepted the recommendations of the Appeals Committee.

10. In November and December 2005, the Applicant – who anticipated leaving the Bank on 5 January 2006 pursuant to the declaration of his redundancy – exchanged several e-mails with Mr. Marcelis, a representative of the Compensation Management Unit in HR, to which the HRSVP had assigned the task of pursuing the recommendations of the Appeals Committee, and who carried out the review. The Applicant sought information about the methodology and deadline of the anticipated salary review.

11. On 22 December, that review having been completed, the Applicant received the final decision with a detailed written explanation of the methodology used. Mr. Marcelis concluded in his review that the Applicant's low salary was consistent with his SRIs over recent years, and thus that "[t]he results do not support the proposition that [the Applicant's] salary is inappropriately positioned relative to his peers." The 22 December memorandum to the Applicant also informed him that ISG management "has decided not to adjust your salary."

12. It is this 2005 salary review and the resulting decision of ISG management not to grant the Applicant a salary increase that are the subject of this application. Although references are made to the 2004 salary reviews in the pleadings of both the Applicant and the Respondent, those would seem to have been superceded by the 2005 review and ISG Management's decision. Rather than have a distinct challenge to these 2005 decisions taken to the Appeals Committee, which had already considered the salary-review exercises of 2004, the Bank granted the Applicant's request to proceed directly to the Tribunal.

13. In his application, the Applicant asserts that in order to determine whether his salary review was fair or was an abuse of discretion, it is necessary to examine, and to compare with his peers, his OPEs and the SRI ratings and percentage salary increases derived from those OPEs, for at least the period 1999 to 2004. For example, he asserts:

It is self-evident that if a given salary is really going to be reviewed, the fairness of the overall salary can only be assessed if the component parts are assessed. By definition, therefore, a fair salary review requires at the very least a review of past SRIs and a review of annual percentage increases. To really assess the fairness of my salary, the underlying OPEs would need to be examined to see if they reveal a systemic bias. In my case, my managers consistently underrated my contributions. ...

For the salary review to be meaningful would require looking at whether the SRIs given to me over the years were equitable as compared to SRIs given to those in the comparator groups, including an analysis of the comparative OPE ratings and comments for me and the comparator groups.

14. The Respondent takes the position that this request is beyond the jurisdiction of the Tribunal, because of the Applicant's failure in each of the several pertinent years to challenge his OPE, along with the conversion of his OPE into an SRI that measures his performance against that of his peers, and the use of that SRI in the computation of his actual salary increase. The Respondent contends that the Applicant contemporaneously knew – or reasonably should have known – the methodology for determining his SRIs and salary increases, so that the time limit for challenging the fairness of his salary was within 90 days of the salary decision in each year, as provided in Staff Rule 9.03 setting forth the time limits for appealing to the Appeals Committee. That was not done. Accordingly, asserts the Respondent, this case is governed by Article II(2)(i) of the Statute of the Tribunal, which provides that applications shall not be “admissible, except under exceptional circumstances as decided by the Tribunal, unless ... the applicant has exhausted all other remedies available within the Bank Group ...,” which the Tribunal has interpreted to require timely resort to the Appeals Committee to challenge an adverse decision.

Analysis and Conclusions

15. The jurisdictional challenge which the Tribunal must decide is relatively narrow. The Bank concedes that salary-review decisions are as a general matter subject to review by the Tribunal for conformity to the standards of reasonableness and non-arbitrariness. Accordingly, the Bank is prepared to address, and it acknowledges the Tribunal's power to decide upon, the various complaints that the Applicant has raised regarding such matters as the evidence placed before the reviewer, the failure to establish guidelines in advance and to disclose any alleged “standard methodologies,” the lack of independence of the 2005 reviewer from the 2004 reviewer, the lack of ongoing communication with the Applicant, and so forth. The Respondent even states that it “is prepared, when this case is addressed on the merits, to explain that a salary review that takes established performance data as a given is reasonable.”

16. The only question before the Tribunal is whether the Applicant is in substance seeking a re-examination of his OPEs and SRIs from the period 1999 to 2004. If so, that must indeed be declared beyond the jurisdiction of the Tribunal by virtue of Article II(2)(i) of its Statute and the Applicant's failure to timely exhaust internal remedies through contemporaneous resort to the Appeals Committee.

17. To address this jurisdictional issue, it is necessary to understand the basics of the Bank's annual evaluation and salary-determination processes. Every staff member receives an annual OPE, which, among other things, sets forth evaluations of his or her accomplished work programs and behaviors in adjectival terms: Unsuccessful, Partially Successful, Fully Successful, Superior and Outstanding. The salary-determination process is carried out broadly in the same time frame. It is well explained by the Bank in extensive memoranda distributed each year to all staff members. (These were distributed in hardcopy form until about 2001, when they began to be communicated through the Bank's Intranet.) For example, the following explanation was provided in 2002:

As the first step in the distribution of the overall pay increase, managers will assign their staff to one of the four performance categories (i.e., categories 2 to 5) included in the 2002 Salary Review Matrix. This is different from the OPE, in which managers assess staff performance relative to *individual objectives*. In contrast, in the SRI managers rate staff performance *compared to those of peers* at the same level of responsibility and the same grade. Also, the SRI produces a single overall performance rating, whereas

the OPE provides a series of ratings on different objectives and behaviors. Thus, while the two evaluations should be broadly consistent, they are not the same.

These performance ratings are then applied to the Salary Review Matrix, shown in Table 2, which provides a range of increases for each combination of performance category and salary zone. (Emphasis in the original.)

18. By consulting a pair of accompanying tables, the staff member can readily determine whether his or her current salary falls within Zone 1, Zone 2 or Zone 3, and can also identify the percentage range of salary increases within each of the intersecting performance categories. For example, in the 2002 salary review, a staff member with a salary in the lowest zone, and with a performance rating of 3, could receive between a 1.3% and a 7.8% salary increase (depending upon more refined SRIs such as 3.1 or 3.3). One of these tables also allows each staff member to identify the minimum, midpoint, and maximum salary of all staff members at his or her grade level.

19. The Applicant contends that the Tribunal (by the Bank's own concession) has jurisdiction to determine whether the 2005 salary review was arbitrary or fair, and that the only way to make such a determination is to examine for fairness and possible discrimination the underlying OPEs and SRIs, not only of the Applicant but also of his peers. He asserts that this would not require the Tribunal to undertake a proscribed re-consideration of the validity of the OPEs and SRIs years after the fact. For example, he states in his Answer on Jurisdiction:

In his Application, [the Applicant] made it clear that it was arbitrary for the Respondent not to have assessed *the fairness* of those SRIs and OPEs when it conducted the various [2004 and 2005] salary reviews. ... But he never argued that those SRIs or OPEs should be changed. Nor – as is made abundantly clear by the fact that he asks only that his salary be adjusted upward as of April 2004 when he first requested a salary review – has he asked the Tribunal to provide such relief. ... Accordingly, it is simply incorrect to suggest that he is appealing individual SRIs and OPEs.

... If a review of a salary does not – and, the Respondent claims, cannot – look at and assess *the factors* it believes lie behind the low salary, then the review cannot make any assessment as to whether or not the salary is in fact fair. ... Accordingly, the Tribunal should find jurisdiction to assess whether or not the reviews were arbitrary because, among other things, they did not assess *the annual percentage increases* awarded to [the Applicant] and his comparators to determine whether or not *those increases accurately reflected the underlying SRIs and OPEs*. (Emphasis added.)

20. The Tribunal concludes, despite the Applicant's careful attempt to bring this issue within the Tribunal's jurisdiction, that he is in fact asking the Tribunal to review Bank decisions – the ratings in his OPEs and SRIs – from years before, and that his requests have not been presented in a timely fashion. The Appeals Committee reached essentially this conclusion in ruling that it would not revisit the validity of the Applicant's SRIs through the years, but would rather accept them “as a matter of record” for the purpose of determining the validity of the 2004 salary review. Even so, it found for a variety of reasons that the review was arbitrary and should be undertaken once more, subject to stipulated safeguards. The Tribunal concurs that the Applicant's attempt to revisit the underlying OPEs and SRIs was not made in a timely fashion, and accordingly concludes that the Applicant did not exhaust the available internal remedies pursuant to Article II(2)(i) of the Statute of the Tribunal.

21. The Applicant objects that he is not asking for the *remedy* of a change in his OPEs or SRIs, but only of the overturning of his salary review and the setting of a new salary for him in 2004 and 2005, along with appropriate pension and other benefits. Regardless of the precise remedy requested, however, the Applicant is seeking a determination from the Tribunal that various OPE ratings in years past failed to give him due credit for certain projects and skills, and that various SRI ratings in years past were unfair in comparing him with his peers – so that those unfair OPEs and SRIs should be ignored (or in substance redetermined, despite the Applicant's disclaimer) in the course of recalculating a fair salary for 2004 and 2005. Indeed, as just noted, part

of the remedy he seeks from the Tribunal is its redetermination of a fair salary and related employment benefits.

22. As the Applicant's claims quoted in paragraphs 13 and 19 *supra* make clear, he asks the Tribunal to *reassess the fairness* of performance and salary ratings given to him from at least 1999 through 2004 – despite the fact that he had not complained about those ratings at the time. A principal purpose of the timeliness and exhaustion requirements in the Statute of the Tribunal is to allow for the reconsideration or adjudication of Bank decisions at a time when pertinent managers and other witnesses are accessible, when their memories are fresh, when documents are available, when intervening changes of position have not occurred, and so forth. That purpose would be altogether defeated if a host of older, underlying adverse decisions could be challenged by a staff member many years later because they are subsumed and given weight in a more recent decision, such as a salary review. That is just as true whether the precise remedy sought by an applicant is the Tribunal's invalidation of the earlier decisions or its invalidation of the ultimate decision that derives from them.

23. To hold otherwise would be to invite staff members – who, for example, after a long Bank career are declared redundant or are awarded a certain pension – to challenge performance evaluations and salary increases covering a period of many years because they arguably affect the fairness of the redundancy or pension decision. The Tribunal has consistently “rejected such a litigation strategy as an indirect way of avoiding the requirement of exhaustion of internal remedies.” (See *Malekpour*, Decision No. 320 [2004], para. 21. See also *Jalali*, Decision No. 148 [1996], para. 35; *O*, Decision No. 323 [2004], para. 28.)

24. Of course, the situation would be different if the past evaluations or pay increases were not known – or could not reasonably have been known – at the earlier time by the currently complaining staff member. The Tribunal has stated that these may be the sort of “exceptional circumstances” that can justify a departure from the requirement of exhaustion of internal remedies under the terms of Article II(2) of the Statute. The Applicant in this case asserts that he did not know, and could not reasonably have known, that his SRIs and salary increases were year after year at or near the bottom of his peer group. He claims that the first time he learned that he was an “outlier” in his salary – and indeed that he, at level GG, was “practically being paid a GF salary” – was in April 2004, which led him to request the initial salary review.

25. The Respondent counters that the Applicant, throughout his service at the Bank – and particularly during the pertinent years of 1999 through 2004 – was presented by the Bank with all of the information needed for a reasonable person, and particularly for a computer scientist with a Ph.D. degree, to calculate how his salary compared with those of his peers at level GG. This calculation would have clearly demonstrated that the Applicant was extremely low in the salary scale for his GG grade level, and could have precipitated complaints, or at least questions, on the part of the Applicant to his managers or to HR.

26. A description of the detailed information provided by the Bank each year to staff members will demonstrate why the Applicant's claims are unconvincing.

27. Each year, staff members are informed of the average increase in Bank salaries overall. It is the simplest of arithmetical steps for a staff member to compare his or her salary for the year just passed and the salary for the year ahead, to determine his or her own salary increase, and then to compare it with the Bank's average.

28. But even more pertinently, as has been explained in paragraph 18 *supra*, every year, in conjunction with the salary-increase exercise, the Bank has provided all staff members with a clear and uncomplicated table showing current salary ranges at each grade level. These in turn identify the lowest, average (market reference point), and highest salary figures within each grade, and a bracketed range of salary figures for the three so-called salary zones. It is the simplest matter for a staff member, obviously knowing his or her own current salary, to examine that table to see how that salary compares with the current salaries of peers at the same grade level, as well as those at the grade level immediately below.

29. In any year during the period 1999-2004, the Applicant could immediately have ascertained that his current salary as a level GG staff member was usually only slightly higher than the average salary of a level GF staff

member, and well below the highest salary being paid to such a staff member one level below his own. He could also have been able to determine immediately that his salary, year after year, was only a few hundred dollars above the lowest salary figure for level GG staff members throughout the Bank. The Tribunal is unimpressed by the Applicant's assertion that he was altogether unaware until April 2004 of this pattern of substandard salary status.

30. In addition, it was a relatively straightforward matter for the Applicant each year to calculate his SRI rating – the numerical equivalent of his OPE as compared with his peers – which was in turn a primary determinant of his percentage salary increase. A simple grid chart distributed each year during the SRI exercise indicated to a staff member in the Applicant's position that he was in the lowest of three salary zones from year to year. Knowing this, and calculating his percentage salary increase from the previous year, that staff member would have learned from the chart that he fell within performance category 3 (in a range of 2 to 5) – and usually at the middle or low end of category 3, which represented a merely "Fully Successful" performance.

31. In other words, not only should the Applicant readily have known from year to year that his salary figure consistently placed him at a very low level comparatively within his own grade (and about at the middle of the next lower grade), but he should have readily appreciated that his forthcoming percentage salary increase was linked to a comparatively low performance category (or SRI). The Tribunal thus endorses the view stated in the Respondent's Reply on Jurisdiction:

In each of those years, if [the Applicant had] wanted to challenge the result or even explore the reasons for his ratings and resulting salary, he could have done so. Instead, in each of those years [the] Applicant did not challenge the fairness of his OPE, his SRI Rating, or his SRI. His time to challenge those matters expired long ago.

32. Although sustaining the Bank's jurisdictional challenge, the Tribunal wishes to reiterate that the Applicant is free to place before the Tribunal, when presenting his case on the merits, all issues addressed and arguments sustained by the Appeals Committee, several of which are summarized in paragraph 7 *supra*. Moreover, the Applicant may argue that a salary review that reaches a conclusion based solely on earlier performance and salary reviews is inherently arbitrary, so long as he does not seek review of the underlying assessments made in those OPEs and SRIs.

Decision

For the reasons stated above, the Tribunal decides that:

- (i) the Bank's jurisdictional challenge with respect to the Applicant's 1999-2004 performance and salary evaluations is sustained; and
- (ii) the dates for the filing of further pleadings on the merits with respect to the remaining issues 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 Paris, France, 28 September 2006