

Decision No. 276

Eugene Nyambal,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on April 3, 2002, by Eugene Nyambal 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, composed of Francisco Orrego Vicuña (President of the Tribunal) as President, Bola A. Ajibola (a Vice President of the Tribunal), A. Kamal Abul-Magd and Jan Paulsson, Judges. One request made by the Applicant for the production of documents was granted by the Tribunal. Requests made by the Applicant for anonymity and for oral proceedings were denied by the Tribunal. The usual exchange of pleadings took place and the case was listed on September 9, 2002.

2. This case involves claims by the Applicant regarding alleged mismanagement of his career, non-selection to an Open-Ended position, and damage to his reputation.

Relevant facts

3. The Applicant held a series of Long-Term Consultant (LTC) appointments in the Africa Region (AFR), Africa Technical Families Private Sector (AFTPS) from October 1995 through August 2000. At various times in his career at the Bank, the Applicant was a team leader and/or task manager for Benin, Togo, Niger, Cameroon, Senegal, Rwanda and Burundi. His country assignments, however, were frequently reduced in scope.

4. In July and August 1998, the Applicant raised concerns with his manager, as well as with the AFR Vice Presidents, related to his work program and the possibility of conversion of his appointment.

5. At the time, the Bank was moving toward achieving its "One Staff" policy by eliminating the use of LTC appointments throughout the Bank. Staff Rule 4.01 ("Appointment") was revised in July 1998 to eliminate the LTC category and to provide expressly that such appointments would not be extended beyond December 31, 2000. According to a memorandum dated August 18, 1998, the Staff Association Non-Regular Staff Committee (SANRS) informed the staff that the Vice President, Human Resources (HRS), had, in a June 18, 1998 memorandum, asked managers to inform all Non-Regular Staff (NRS): (i) whether their position would be converted to an Open-Ended or Term appointment; and whether (ii) they would be "preferred candidates" for these positions; or alternatively (iii) they would be simply extended for a short period prior to termination.

6. On August 27, 1998, the Applicant met with his then manager and two Human Resource Officers (HROs) to discuss his concerns. The Applicant claims that during this meeting, an agreement (the "1998 Agreement") was reached on his work program and on the advertisement of his position during the NRS conversion process.

7. Given that the Applicant's manager was to assume a new assignment, and that the Applicant would thus have a new manager, it was specifically agreed, as recorded in an HRO's written summary of that meeting, that:

No vacancy will be advertised now. This allows the new manager [to] determine how he/she would advertise the position following NRS "conversion" guidelines; [the Applicant] undertakes to discuss with the new manager in order to agree performance criteria required for him to be considered "the preferred candidate" when the vacancy is advertised.

8. There was also an agreement regarding the Applicant's work program which provided, among other things, that work opportunities which the Applicant and his manager had previously identified would be handed over to the interim management of the unit for follow-up.

9. After the departure of the Applicant's manager, an Interim Management Team (IMT) was established in the Applicant's unit. On October 27, 1998, the Applicant was advised of the preparation by the IMT of a work program agreement for the Applicant, under which the Applicant would be given task management responsibilities for projects in Senegal and in Benin. He was also told that performance indicators would be put in place and restated on a monthly basis to permit the Applicant's performance to be followed for the purposes of feedback and guidance.

10. On November 18, 1998, the AFR Vice Presidents responded to an August 27, 1998 communication from the Applicant regarding his work program and employment status. With particular regard to the Applicant's NRS conversion, they made clear that his prospects for conversion would depend on his meeting the criteria for a suitable opening during the period of his current contract. They added that they had requested the IMT to extend the Applicant's contract until the end of the fiscal year to give him time to demonstrate his performance in the agreed work program.

11. On May 27, 1999, in a meeting with the IMT and the Acting Sector Manager, the Applicant was informed that his performance during the previous year had been satisfactory, but that his contract would be extended for one additional year before a final decision was made on his conversion. When the Applicant subsequently questioned the non-conversion of his appointment, a member of the IMT informed him that the IMT had decided to give him additional time to further develop his operational and communication skills in order for him to meet the Benin project's requirements for core team members in Open-Ended positions.

12. Subsequently, on September 15, 1999, the Applicant requested that the AFR Vice Presidents conduct an administrative review of his work and performance. The Applicant claimed that he had suffered from discrimination and an abuse of power, especially regarding: (a) his career status and prospects; (b) his work program; and (c) salary issues. The Applicant requested: (i) conversion to an Open-Ended appointment; (ii) restoration of a stable work program and assignments; and (iii) revision of his salary and classification based on his achievements and responsibilities.

13. On December 3, 1999, the AFR Vice Presidents sent the Applicant a response to his request for administrative review. The AFR Vice Presidents found that the Applicant had been given a series of short-term assignments, even though he had been performing satisfactorily and had delivered on the "work understandings" described in their note of November 18, 1998. They also noted that there were inconsistencies in the Bank's follow-through for previous agreements and a lack of clarity with regard to management's staffing intentions and constraints for AFTPS. They found, however, that there had been stability in the Applicant's work program and that the Applicant's salary had been adjusted according to a reclassification undertaken in April 1998.

14. On the basis of their findings, the AFR Vice Presidents:

(a) recommended that management consider hiring the Applicant on a 2 or 3-year Fixed-Term appointment;

(b) encouraged the Applicant to apply for vacancies for Open-Ended appointments, including outside the Africa Region;

(c) asked that if in the future there was a need for changes in his work program, the Applicant's managers provide him with prior information and a clear rationale for the change; and

(d) asked his manager to work with HRS to ensure that cost-of-living changes be offered in the Applicant's case in line with adjustments that were made to the remuneration of Long-Term Consultants.

15. On February 14, 2000, the Applicant engaged in a mediation process which was unsuccessful, although it resulted in his getting retroactive salary increases for 1999 and 2000.

16. On April 25, 2000, the Sector Manager, Private Sector Development (PSD), informed the Applicant that his contract, which was to expire on June 30, 2000, would not be extended. He encouraged the Applicant to apply for an Open-Ended position that was to be advertised in AFTPS.

17. On May 19, 2000, a PSD Specialist position was advertised. It was in the Finance, Private Sector and Infrastructure (FPSI) Network in the PSD Sector. The Applicant applied and was interviewed for the position by representatives of the PSD Sector Board in their capacity as Board members with the responsibility of clearing candidates for the advertised position. On August 3, 2000, the Applicant was verbally informed by the Sector Manager, PSD, that none of the five candidates interviewed had been selected for the PSD Specialist position.

18. On August 4, 2000, the Applicant sent an e-mail to one of the AFR Vice Presidents in which he raised concerns regarding his salary increases for the previous two years, the alleged mismanagement of his work program, the denial of conversion to an Open-Ended appointment, and the alleged manipulation of his Overall Performance Evaluation. The AFR Vice President responded to this e-mail on August 14, 2000, stating that the Applicant's concerns had already been satisfactorily addressed.

19. In an e-mail to the Sector Manager, PSD, dated August 21, 2000, a Senior HRO summarized the relevant facts relating to the recruitment and selection process for the vacancy to which the Applicant had applied. The purpose of the summary was to enable the Sector Manager, PSD, to provide written feedback to the Applicant regarding his interviews. The HRO explained that the Applicant was one of five candidates shortlisted and interviewed for the vacancy by three representatives of the PSD Sector Board. According to the interviewers, the Applicant: (i) had a good grasp of PSD policies, instruments and issues, and a background in business environment, competitiveness and export promotion issues, but did not have special or cutting-edge experience or expertise in other important areas; (ii) appeared to be more project- than policy-focused; and (iii) sometimes tended to react rather defensively to unexpected questions. The HRO noted that one interviewer had questioned the Applicant's capacity to work well with peers across institutional boundaries and share credit for accomplishments. Because of these concerns, the Africa Region concluded that the Applicant's fulfillment of the stated criteria was not sufficient to justify his selection for this vacancy. In the end, it was decided that only two of the five shortlisted candidates met the technical criteria and would satisfy the requirements for Sector Board clearance. However, as neither of these candidates was able to work proficiently in French (an essential requirement for the position), the hiring manager decided not to fill the vacancy and to conduct an external search at a later date. The position was not subsequently filled.

20. On August 29, 2000, the Sector Manager provided the Applicant with more detailed feedback on his application for the PSD Specialist position and the reasons for his non-selection. He also reconfirmed to the Applicant that his LTC contract would not be renewed beyond August 31, 2000. Thereafter, the Applicant received 3 months of administrative leave with salary and benefits until November 30, 2000.

21. On September 12, 2000, the Applicant's Team Assistant sent an e-mail to AFR staff members announcing the Applicant's departure from the Bank. The next day, the Applicant objected to that communication in an e-mail to his AFR colleagues, questioning whether this was an attempt to tarnish his professional reputation. In an e-mail to all AFR staff dated September 15, 2000, one of the AFR Vice Presidents apologized to the Applicant for the manner in which his departure had been communicated.

22. On October 26, 2000, the Applicant filed a Statement of Appeal with the Appeals Committee challenging: (a) the decision not to select him for an Open-Ended position; (b) the resulting termination of his employment with the Bank; (c) the mismanagement of his career, which had already been recognized in the administrative review; and (d) the wide release of the September 12, 2000 e-mail announcing his departure.

23. On November 6, 2000, the Respondent filed a challenge to the jurisdiction of the Appeals Committee, stating that the only issue that was timely before the Committee was the Applicant's unsuccessful candidacy for

the PSD Specialist position.

24. The Applicant thereafter resigned from the Bank, prior to commencing his new assignment as Assistant to the Executive Director for Africa at the International Monetary Fund.

25. On January 11, 2001, the Appeals Committee concluded that it had jurisdiction to review: (i) the decision not to select the Applicant for the position of PSD Specialist; and (ii) the decision to announce the Applicant's departure from the Bank by the September 12, 2000 e-mail.

26. In its report on the merits dated November 21, 2001, the Committee concluded that: (i) it could not re-examine the events that had led to the administrative review, since the Applicant had accepted the outcome of the administrative review process and the ensuing mediation; (ii) there was no abuse of discretion in the non-selection of the Applicant for the position of PSD Specialist; (iii) although the Sector Board clearance process needed significant improvement to ensure greater transparency, ultimately the decision whether to hire the Applicant was the responsibility of the Respondent; and (iv) the September 12, 2000 e-mail did not constitute an abuse of discretion, and the damage done to the Applicant was minimal given that the Applicant had been able to find a suitable position before his relationship with the Bank was terminated. Therefore, the Committee recommended that the Applicant's requests for relief be denied. On December 4, 2001, the Vice President, HRS, informed the Applicant that she had accepted the Committee's recommendations.

27. The Applicant filed an application with this Tribunal on April 3, 2002 challenging three actions of the Bank: (i) not to select him for the post of PSD Specialist in AFTPS; (ii) to issue the September 12, 2000 e-mail; and (iii) to harass him systematically in his work program and professional duties, as well as to discriminate against him in promotion, salary and all career advancement opportunities.

28. The Applicant accuses the Bank of a failure to observe his terms of appointment and conditions of employment. Specifically, he refers to the following Principles of Staff Employment which, he says, the Bank has failed to observe:

(i) Principle 2.1, which requires the Bank's Organizations to "at all times act with fairness and impartiality and ... follow a proper process in their relations with staff members," and to "respect the essential rights of staff members that have been and may be identified by the World Bank Administrative Tribunal."

(ii) Principle 2.1(a), which requires the Bank's Organizations to "establish and maintain appropriate safeguards to respect the personal privacy of staff members and protect the confidentiality of personal information about them."

(iii) Principle 2.1(d), which requires the Bank's Organizations to "provide staff members security in their employment consistent with the terms of their appointments, their satisfactory performance and conduct, and the efficient administration of the Organizations."

(iv) Principle 6.1(a), which requires the Bank's Organizations "to recruit staff members of the highest caliber appropriate to job requirements and to retain them so long as there is reasonable coherence between their career interests and the evolving mission and circumstances of the Organizations."

29. For the above and other alleged violations of his conditions of employment, the Applicant asks the Tribunal to grant the following relief:

1. reinstatement of his employment at the Bank, but to an Open-Ended position suitable to the Applicant's training, experience and present salary;

2. 24 months' net pay at the Applicant's ending salary level as restitution for the Bank's willful violations of its own Rules and procedures in treating the Applicant in an unfair and discriminatory manner;

3. damages for injuries caused by the Bank to the Applicant's professional reputation, in the amount of

U.S.\$1.5 million;

4. a letter of apology to the Applicant from the President of the Bank to be disseminated Bank-wide, expressing regret for the Bank's discrimination against the Applicant in his professional career; and

5. a letter from the Bank Appeals Committee expressing regret for having followed biased and improper procedure in its hearing in the Applicant's case on October 25, 2001, and republication of its report dated November 21, 2001 to correct material factual errors.

Considerations

30. When, on October 26, 2000, the Applicant filed his Statement of Appeal with the Appeals Committee complaining of the actions mentioned in paragraph 22 *supra*, the Respondent filed a challenge to the jurisdiction of the Appeals Committee, maintaining that the only issue that was then still timely was the Applicant's non-selection for the PSD Specialist position. The same jurisdictional objection was raised by the Respondent before the Tribunal. The Tribunal will, therefore, examine said objection before discussing the substantive elements of the Applicant's complaints.

The jurisdictional objection

31. The Respondent bases its jurisdictional objection to most of the Applicant's claims on Article II(2) of the Tribunal's Statute, the relevant part of which stipulates that:

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.

32. The Respondent submits that the Tribunal has no jurisdiction with respect to the Applicant's complaints of career mismanagement (e.g. his allegations of systematic harassment of the Applicant in his work program and professional duties, and of discrimination against him with respect to promotion, salary and career advancement opportunities). Those issues, the Respondent argues, were thoroughly reviewed and addressed through the administrative review process. If the Applicant was dissatisfied with the outcome of that process, he should have appealed it within 90 days of receiving the Vice Presidents' administrative review memorandum or within 30 days of the conclusion of mediation. Since the Applicant accepted the outcome of the administrative review process and the ensuing mediation, the Appeals Committee, and subsequently the Tribunal, cannot re-examine the events that led to the administrative review. The Respondent concludes that the Tribunal has jurisdiction only to review the grievances arising from the Applicant's non-selection for the PSD Specialist position, and from the Respondent's September 12, 2000 e-mail announcing the Applicant's departure from the Bank.

33. To the above jurisdictional objection by the Respondent, the Applicant maintains that his several complaints are not separable, and that the 2000 non-selection for the PSD position was merely the culminating event in a pattern: "The pattern of abuse, and its culmination the non-selection, are all of a piece." He insists that during his career at the Bank, he took advantage of all available remedies "from 1997 until his final departure from the Bank in September 2000." In each case when the Applicant pursued such internal remedies, he received some accommodation to his concerns, at least in the sense of promises of better treatment. The Applicant argues that he had to keep trying repeatedly because these promises were not kept. The Applicant also argues that if the Tribunal were to limit its consideration of this case to the 2000 selection process, it would be difficult for it properly to assess the Applicant's claim.

34. The Tribunal does not accept the Applicant's arguments with respect to the jurisdictional objection. As stated before, Article II, paragraph 2, is unequivocal in that "[n]o such application shall be admissible, except under exceptional circumstances ... unless: (i) the applicant has exhausted all other remedies available within

the Bank Group.” The Tribunal’s view of the requirement has always been that it “is of the utmost importance.” (*Klaus Berg*, Decision No. 51 [1987], para. 30.) It “ensures that the Bank shall be afforded an opportunity to redress any alleged violation by its own action, short of possibly protracted and expensive litigation before this Tribunal.” (*Id.*) In *Setia*, Decision No. 134 [1993], para. 23, the Tribunal decided that:

[W]here an Applicant has failed to observe the time limits for the submission of an internal complaint or appeal, with the result that his complaint or appeal had to be rejected as untimely, he must be regarded as not having complied with the statutory requirement of exhaustion of internal remedies.

35. The facts in this case are quite simple and undisputed. Concerned about his career with the Bank, and extremely keen to have his LTC position converted to an Open-Ended (Regular) employment, the Applicant, on September 15, 1999, requested from the two AFR Vice Presidents an administrative review of his performance.

36. The AFR Vice Presidents responded on December 3, 1999 to the Applicant’s request for review. Their response is described in paragraph 13

supra. On the basis of their findings, the AFR Vice Presidents made the recommendations described in paragraph 14 *supra*.

37. Although the outcome of the requested administrative review was thus favorable to the Applicant as to some of his complaints, the reviewing managers did not accept his allegations of abuse of power and collusion to ruin his career. At this point, it was for the Applicant to opt for one of two courses of action available to him: either to accept the outcome of the administrative review or to resort to the next available channel of internal remedies, namely complain to the Appeals Committee.

38. The Applicant himself admits that he opted for the first course of action when he argues that “having received substantial concessions to his position in each Administrative Review, [he] had no strong reason to approach the Appeals Committee each time to get the rest of what he wanted.”

39. This line of reasoning disregards the statutory requirements of exhausting internal remedies, and of doing so within the time limits prescribed by Article II of the Statute of the Tribunal.

40. The delay in bringing the Applicant’s complaints to the Appeals Committee was the result of the Applicant’s conscious choice. This delay was due to the Applicant’s casual treatment of the relevant legal requirements, and is not excused by exceptional circumstances under Article II of the Statute.

41. The Applicant filed his Statement of Appeal with the Appeals Committee only on October 26, 2000, more than ten months after receipt of the decision on his request for administrative review, and more than five months after the unsuccessful mediation process. In these circumstances, the Tribunal finds that only two of the Applicant’s complaints were submitted to the Appeals Committee within the time prescribed by the Statute. Those that were not timely submitted cannot now be considered by the Tribunal. The two remaining elements of the Applicant’s complaints are thus his non-selection to the PSD Specialist position and the September 12, 2000 e-mail.

Non-selection for an Open-Ended position

42. Since 1995, when the Applicant joined the Bank as an LTC, conversion of his employment status to Open-Ended or Regular was his goal. As early as 1997, the Applicant applied to compete for a permanent position in his own unit (i.e. PSD Specialist). To the Applicant’s frustration, that competition was cancelled.

43. Throughout his pleadings, the Applicant relies heavily on what he describes as the “1998 Agreement,” by which the Bank allegedly promised the Applicant conversion of his employment to an Open-Ended position; although he was required to apply and compete with other candidates, he was to be considered the preferred candidate, provided that he met certain requirements. For its part, the Bank insisted that the Applicant was never promised conversion to an Open-Ended position as a “preferred candidate,” subject to continued good performance.

44. The so-called "1998 Agreement" relied upon by the Applicant is an e-mail by an HRO reflecting a discussion during a meeting that took place on August 27, 1998 between the Applicant, his then manager and two HROs. As is evident by the language of this memo, mentioned above in paragraph 7, there was no commitment that the Applicant's position would be converted into a Regular one. The memo simply stated that a discussion would take place between the Applicant's new manager and the Applicant regarding performance criteria by which the Applicant would be considered "the preferred candidate" when the vacancy was advertised. The memo also stated that the Applicant's new manager would decide the manner in which the position would be advertised in accordance with conversion guidelines.

45. This was later confirmed in a memo by the two AFR Vice Presidents sent on November 18, 1998 to the Applicant and described as "Your Work Program and Employment Status." The relevant parts of said memo are those relating to NRS conversion. Contrary to the Applicant's understanding of their meaning, it is unequivocally stated therein as follows:

[F]or all recruitment including open ended and term it is the Region's policy to advertise all positions. As you know, you are free to apply to positions within and outside the Region

In your case, as advised by your manager, your prospects for conversion will depend on your meeting the criteria for a suitable opening during the time of your current contract.

In light of these clear and unequivocal statements, the Tribunal does not subscribe to the Applicant's reading of the 1998 memorandum as embodying a promise to guarantee the conversion of the Applicant's status to an Open-Ended position.

46. The above was confirmed by the memorandum of December 3, 1999 addressed to the Applicant by the two AFR Vice Presidents in response to the Applicant's September 15, 1999 request for administrative review. In that memorandum, two statements are of particular significance. The first is the one encouraging the Applicant "to continue applying for any vacancies for open-ended appointments for which you feel you qualify We also advise you to search for opportunities in the IFC and MIGA." The second is the one regarding conversion to an Open-Ended position: "You should keep applying, but *as you know there are no guarantees*" (emphasis added).

47. These statements do not support the Applicant's allegations that the Bank's management had embarked on a deliberate and ill-intentioned scheme to ruin the Applicant's career by manipulating the selection process for advertised Open-Ended positions of interest to the Applicant. To the contrary, they support the Respondent's assertion that no guarantee was ever given to the Applicant to have his employment status converted to that of a Regular or Open-Ended position.

48. In sum, contrary to the allegation of the Applicant, the record evidences the good will of the Respondent and its genuine effort to assist the Applicant in fulfilling his aspiration of converting his employment status to Open-Ended. The fact that the desired conversion did not materialize does not prove that the Bank failed to honor a promise; the record does not reveal the existence of such a promise.

49. Finally, as noted in paragraph 17 *supra*, on May 19, 2000, the position of PSD Specialist in AFTPS was advertised. The Applicant applied and was interviewed for the job. However, as a result of interviewing the Applicant and four other candidates applying for the same job, the Sector Manager, PSD, decided that none of the five interviewed applicants would be selected. He did so because there was no strong endorsement by the Sector Board for clearance of any of the five candidates, and because he wished to reserve his limited budget for a better future candidate. The Applicant was subsequently informed of the reasons for his non-selection.

50. In light of the above, the Tribunal concludes that the non-selection of the Applicant to an Open-Ended position was taken for valid business considerations. The Applicant has not substantiated his allegation that his non-selection was the culmination of a premeditated plan to ruin his career with the Bank.

51. The Tribunal confirms what it has decided on several previous occasions, namely that a Fixed-Term contract, like that of the Applicant, is what the expression says: “a contract for a fixed period of time.” (*Carter*, Decision No. 175 [1997], para. 13, citing *Mr. X*, Decision No. 16 [1984], para. 35.) Consequently, a staff member whose contract has expired has no right either to renewal or extension of his appointment, or to the conversion of his Fixed-Term appointment to a permanent one.

The e-mail announcement

52. The Tribunal agrees with the Applicant that the e-mail informing other Bank employees of the Applicant’s departure and the termination of his employment was improperly communicated within the Bank. The Applicant also alleges that this announcement was circulated among members of the African Development Bank. He does not, however, substantiate this allegation by submitting any relevant documents. For its part, the Respondent admits the impropriety of the e-mail and apologizes for what it describes as an honest mistake.

53. Although the Bank’s conduct in this respect is susceptible to criticism, it neither caused the Applicant any perceptible harm, nor prevented him from securing a position with the International Monetary Fund.

Decision

For the above reasons, the Tribunal decides to dismiss the application.

/S/ Francisco Orrego Vicuña

Francisco Orrego Vicuña
President

/S/ Nassib G. Ziadé

Nassib G. Ziadé
Executive Secretary

At Washington, D.C., September 30, 2002