Decision No. 323

O,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on April 8, 2004, by O against the International Bank for Reconstruction and Development. The Bank has raised a jurisdictional objection to be decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Elizabeth Evatt (a Vice President of the Tribunal) as President, Robert A. Gorman, Sarah Christie and Florentino P. Feliciano, Judges. The usual exchange of pleadings with respect to jurisdiction took place and the case was listed on July 14, 2004 to decide the issue of jurisdiction only.

2. The Applicant contests the following decisions:

(1) the refusal to place under seal her former manager's charges of misconduct relating to a statement of travel expenses from a mission in January/February 2000;

(2) the initiation of a Performance Improvement Plan (PIP) in November 2000 and her previous, related performance evaluations;

(3) the decision to extend the PIP in November 2001; and

(4) a January 16, 2002 memorandum noting that the PIP had ended and warning against any future slippage from the performance standard required.

The relevant facts

3. The Applicant is a Senior Counsel who has worked in the Bank's Legal Vice Presidency since 1986. In February 2000, while the Applicant worked for the Bank's East Asia and Pacific Practice Group, Legal Vice Presidency ("LEGEA"), she traveled, among other places, to the Philippines to attend a legal conference. At this conference, the Applicant attended a meeting with the President of the World Bank and the Chief Justice of the Philippines. The Applicant's manager did not attend this meeting.

4. In March 2000, the Applicant's manager referred to the Office of Professional Ethics the Applicant's statement of travel expenses, because he believed that it showed that she had attempted to defraud the Bank. The Ethics Office promptly conducted a preliminary inquiry regarding the Applicant's claim for travel expenses. Although it found that there were some discrepancies in her statement of travel expenses, it concluded that there was no factual basis for finding any fraudulent intent in the statement such as the submission of inflated or fabricated expenses or receipts, let alone any deliberate attempt to defraud the Bank. On April 6, 2000, the Ethics Office informed the Applicant's manager that the Applicant's statement of travel expenses should not be considered an act of misconduct under Staff Rule 8.01. On June 23, 2000, the Applicant corrected her statement of travel expenses under cover of a memorandum to her manager.

5. In the summer of 2000, the Applicant's manager reassigned her legal work on projects in the Philippines to other staff in LEGEA. The Applicant considered that this decision was a retaliatory measure because in the course of working on a number of projects she had, as she put it, "raised difficult issues, and on which I have

taken an independent position."

6. On July 6, 2000, the Applicant requested mediation from the Bank's Mediation Office concerning two issues. First, the Applicant considered that her manager's referral of her statement of travel expenses to the Ethics Office had been unwarranted and she wanted her name cleared. Second, the Applicant considered that her manager's decision to reassign her work on judicial reform in the East Asia region was improper interference. On July 18, 2000 the mediation was terminated without resolution of those two issues.

7. On September 28, 2000, the Applicant sent an e-mail to the Managing Counsel of the Legal Department in which she voiced her concerns over the reassignment of her work. She asked the Bank's Legal Department to try to prevent the reassignment of her work in the Philippines and to initiate an inquiry concerning the reassignment. She noted that "[t]he legal department cannot fulfill its mandate if its lawyers have to worry that they are vulnerable to reassignment whenever they take independent positions. I believe that this has happened to me in the Philippines …. If I am reassigned from the Philippines, I believe that it will send a signal to other task managers that principled lawyers are fair game."

8. Also in September 2000, the Applicant's manager took on an assignment outside the Bank. He later resigned from the Bank. On October 3, 2000, the Applicant requested annual leave to attend a conference in The Hague. Her application was refused, in part, so the Applicant alleges, in order that her manager could complete the Applicant's performance evaluation before leaving the Bank. The Applicant's manager completed this assignment on October 6, 2000.

9. After the Applicant's manager left the Bank, the Managing Counsel of the Legal Department, on November 16, 2000, gave the Applicant written notice that, with effect from November 27, 2000, she would be placed on a PIP for the following six months. In his explanation for doing so, he stated that the Applicant had, among other things, demonstrably failed to accept normal managerial oversight in relation to her work and she also did not properly keep her managers informed about important aspects of her work. The Applicant did not consider this fair. In the main, the Applicant claimed that the factual basis for the PIP was not her actual work performance but her former manager's unwarranted and improper assumptions about her performance.

10. On November 13, 2001, the Managing Counsel of the Legal Department wrote to the Applicant to inform her that the PIP would remain in force until December 31, 2001. He noted, in justification for the extension, one particular incident where the Applicant had refused to accept that the LEGEA Chief Counsel's decision on funding was final. The Managing Counsel concluded from this incident that the Applicant still refused to accept the LEGEA Chief Counsel's authority. He further concluded that the Applicant's performance had not improved in certain specific respects which he considered to be material, and he informed her that during this extension of the PIP she would continue to work in the Africa practice group, and would be supervised by the Chief Counsel of the Africa Practice Group, Legal Vice Presidency (LEGAF). He noted that the General Counsel of the Bank had approved this decision.

11. On January 16, 2002, the Managing Counsel sent the Applicant a memorandum, which provided in part:

> On November 13 last year, I sent to you a memorandum, setting out the terms of an extension of your PIP until December 31, 2001. I noted in that memorandum that at the end of the plan period, your performance would be evaluated against the standards set out in the original plan of November 16, 2000.
>
> The evaluation of your performance has now been completed, based on reports received from [the Chief Counsel of LEGAF], which in turn drew on input from regional and LEGAF staff. I am pleased to say that [the Vice President and General Counsel of the World Bank] has accepted my assessment that your performance has improved significantly, and accordingly the plan will not be further extended. I congratulate you on your response to the feedback you have received and the efforts you have made to remedy the concerns of the [Vice-Presidential Unit] which led to the original plan.
>
> At the same time, it is important that you sustain this improvement, and avoid any recurrence of the

behaviors that led to those concerns. The standards of performance you have displayed while on the PIP are the baseline standards that we expect you to perform while carrying out your present duties and responsibilities. At the minimum therefore, you are expected to exhibit these performance standards consistently. Any slippage from these standards would not be acceptable, and would require us to consider all our options, including separation from the Bank on performance grounds.

12. On February 11, 2002, the Applicant sought mediation for a second time. The subject of this mediation process was management's decision in November 2000 to place the Applicant on a PIP, its decision a year later to extend that PIP, and the January 16, 2002 performance-assessment memorandum. The Applicant also brought up issues concerning the reassignment of her work in 2000 and the Ethics investigation in 2000. This second mediation process continued during 2002 and was not terminated until November 19, 2002.

13. On November 27, 2002, the Applicant wrote to the Appeals Committee and requested an extension of time in which to file an appeal in respect of the memorandum of January 16, 2002 concerning the PIP. The Appeals Committee Secretariat noted that the Applicant had initiated mediation within 90 calendar days of receiving notice of the January 16, 2002 memorandum and that the mediation process had officially terminated on November 19, 2002. The Appeals Committee granted the Applicant's request for a 30-day extension and the Applicant's new deadline to file her appeal before the Appeals Committee became January 21, 2003. The Applicant informed the Chief Counsel of LEGAF that she had secured an extension.

14. On December 9, 2002, the Applicant commenced a third mediation. All claims brought before the second mediation were submitted again before the third one. The Chief Counsel of LEGAF participated on behalf of the Bank. This mediation was unsuccessful, however, and terminated on May 5, 2003.

15. On January 14, 2003, the Applicant informally notified the Bank's Mediation Office and the Chief Counsel of LEGAF that she intended to file an appeal but that she was willing to continue mediation to obviate the need for formal proceedings. The Applicant submits to the Tribunal that the mediation should be understood to have been a resumption of the second mediation, not a new process, so that her appeal brought on June 4, 2003 to the Appeals Committee would be timely.

The proceedings before the Appeals Committee

16. On June 4, 2003, the Applicant filed her Statement of Appeal before the Appeals Committee. She sought review of: (1) the Philippines travel claim/Ethics investigation; (2) the reassignment of her Philippines-related work; (3) the initiation of the PIP in November 2000; (4) the extension of the PIP in November 2001; and (5) the January 16, 2002 memorandum terminating the PIP process. The Respondent raised a jurisdictional challenge before the Appeals Committee. It submitted that none of the grounds of appeal was receivable because the Applicant had not filed the appeal within the applicable time periods.

17. On July 25, 2003, the Appeals Committee issued its decision on jurisdiction. It concluded that it had jurisdiction to consider only the Applicant's appeal as it related to the January 2002 memorandum concerning the termination of the PIP and it rejected the claims against all earlier decisions as being time-barred. Although the Appeals Committee noted that the Applicant had not filed an appeal before January 21, 2003, the Committee concluded that the third mediation which the Applicant had initiated in December 2002 had in substance been a continuation of the second mediation process, which had run from February 11, 2002 to November 19, 2002. It further concluded that the continued mediation extended the time within which the Applicant could file her appeal against the January 16, 2002 memorandum.

18. Notwithstanding its finding that the third mediation was a continuation of the second mediation, and that the third mediation "tolled" the Applicant's time within which to file an appeal against the January 2002 memorandum, the Appeals Committee nevertheless determined that the Applicant's PIP-extension claims raised in the second and third mediation periods were time-barred. The Appeals Committee concluded that after the second attempt at mediation ended on November 19, 2002, the Applicant had 30 days to appeal. But

because she waited 20 days between the second and third mediation periods, the Applicant used up part of the 30-day period and therefore had only 10 days left at the end of her third mediation, which ended on May 5, 2003, to file an appeal. On this basis, the Appeals Committee concluded that the Applicant had missed her 10-day deadline for her PIP-extension claim when she filed her appeal on June 4, 2003, which was 30 days after the third mediation ended.

19. The Appeals Committee also refused jurisdiction over the Applicant's claim that some of the language of the January 16, 2002 memorandum was a retaliatory measure. It found that since the Applicant's Statement of Appeal did not expressly allege retaliation, she could not thereafter present such a claim before the Appeals Committee.

20. On November 18, 2003, the Appeals Committee held a hearing to consider the merits and it concluded, on November 21, 2003, that the language complained of in the Respondent's January 16, 2002 memorandum was not arbitrary, and that it reflected the general practices of the Bank's Department of Human Resources. The Appeals Committee therefore denied the Applicant's request for relief.

21. On December 11, 2003, the Vice President of Human Resources wrote to the Applicant informing her that she had accepted the Appeals Committee's recommendation for denial of the appeal.

The Applicant's request for relief before the Tribunal, and Jurisdictional Objections

22. The Applicant submitted her application to the Tribunal on April 8, 2004. The Applicant requests as relief an order: (1) that the Bank should clear from its personnel files all materials relating to the Applicant's PIP and that the Ethics Complaint be placed under seal; (2) that the Bank retract the Managing Counsel's memorandum of January 16, 2002 and give the Applicant a written apology for the offensive language; (3) that the Applicant be granted compensatory economic damages and moral damages for the economic loss and the professional and emotional stress, to be set at an amount of two years' salary; and (4) that the Applicant be reimbursed for legal costs to be determined.

23. The Respondent has acknowledged that the Tribunal has jurisdiction concerning the January 16, 2002 memorandum terminating the PIP. It submits that, with the exception of that memorandum, the Applicant has failed to pursue her claims in a timely manner. The Respondent relies on paragraph 4.02 of Staff Rule 9.01 ("Office of Mediation"), which then provided that if mediation fails, "staff members may utilize other informal or formal processes available *as long as applicable time limits are met*" (emphasis in original). It argues that the Applicant was obliged to submit her complaints to the Appeals Committee within 30 days following each failed mediation, pursuant to Staff Rule 9.03, para. 5.01, which is quoted at paragraph 34 of this judgment. The Respondent further contends that repeated efforts at mediation cannot resuscitate a stale claim and thereby establish jurisdiction.

24. The Applicant submits that all of her claims are within the scope of the Tribunal's jurisdiction because they are "one ball of wax," forming a single series of continuous wrongdoing. According to the Applicant, the January 16, 2002 performance-assessment memorandum "sums up Respondent's tortious conduct towards her …. It was a continuation in unbroken succession of [her manager's] tortious conduct towards Applicant." She further maintains that "all matters leading to the improper and threatening language of the January 16 letter are fairly encompassed by that contested document."

25. The Applicant further contends that her agreement to continue mediation and to stay an action with the Appeals Committee in January 2003 was based upon her understanding that her appeal with the Appeals Committee in respect of her consolidated set of claims would be maintained.

The Tribunal's jurisdiction

26. The Tribunal's jurisdiction is governed by Article II of its Statute, which, in paragraph 2, provides as follows:

> No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:
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> (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal; and
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> (ii) the application is filed within one hundred and twenty days after the latest of the following:
>
> […]
>
> (b) receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for or recommended will not be granted […]

27. The Tribunal has frequently emphasized the importance of the statutory requirement of exhaustion of internal remedies set forth in Article II(2). *See Berg*, Decision No. 51 [1987], para. 30:

> This statutory exhaustion requirement is of the utmost importance. It ensures that the management of 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.

The Tribunal has in several instances ruled that a staff member's failure to observe the time limits for submission of an internal complaint or appeal constitutes non-compliance with the statutory requirement of exhaustion of internal remedies. (*See Dhillon*, Decision No. 75 [1989], paras. 23-25; *Steinke*, Decision No. 79 [1989], paras. 16-17; and *Setia*, Decision No. 134 [1993] para. 23.)

28. As noted above, the Applicant contends that her several earlier claims are not subject to the exhaustion requirement because they are parts of “one ball of wax,” starting in early 2000 and culminating in the January 2002 memorandum. The Tribunal’s jurisprudence, however, disfavors the notion that an applicant can preserve untimely claims by means of a “one ball of wax” theory. The Tribunal in *Malekpour*, Decision No. 320 [2004], para. 21, rejected what it considered to be a strategy of that applicant to link a series of untimely claims to establish jurisdiction after the fact:

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

29. In *Malekpour*, the Applicant claimed that one specific performance assessment had been the culmination of 30 months of retaliatory and abusive treatment and that the background facts which had occurred over the 30 months should properly be considered in determining the fairness of the last assessment. The Applicant in this matter (as in *Malekpour*) asks the Tribunal to consider all claims as a continuous pattern of wrongdoing, but as in *Malekpour*, the Tribunal refuses to do so, finding that the Applicant must exhaust her internal remedies in a timely manner with respect to each of her claims.

30. The Applicant’s references to earlier Tribunal decisions in support of her contention are misplaced. The Applicant cites *Chhabra*, Decision No. 139 [1994], paras. 46-48, and *Barnes*, Decision No. 176 [1997], para. 29, as authority for the claim that she has been the victim of a continuing wrong. But in the view of the Tribunal, these cases are inapposite and distinguishable on their facts. In *Chhabra*, the applicant challenged her below-norm performance assessments; the Respondent submitted that this was time-barred for failure to seek administrative review in respect of all but the last assessment. The applicant in *Chhabra* contended that the past merit increases formed part of the *res* and that all of these matters were “one ball of the same wax” and were relevant in assessing the context of the awards. The Tribunal accepted jurisdiction to consider all the merit awards, but only because the Respondent had not challenged jurisdiction before the Appeals Committee. As it raised this challenge for the first time before the Tribunal, the Bank was deemed to have waived any challenge to jurisdiction (*Chhabra*, para. 48). *Chhabra* is therefore not authority for the Tribunal taking

jurisdiction based on the "one ball of the same wax" theory. In *Barnes*, jurisdiction was not in issue. The issue in dispute was whether the Tribunal was entitled to look at the record of evaluations in order to determine whether the Bank's final decision not to extend the applicant's Fixed-Term contract constituted a breach of the applicant's rights. The Tribunal was not requested to exercise jurisdiction in respect of earlier and separate Bank decisions.

31. As to the Ethics investigation, her reassignment, the initiation of the PIP and related performance evaluations – all of which took place in, or prior to, 2000 – the Applicant could have challenged these decisions before the Appeals Committee in a timely manner. She did not, and she cannot now be heard to complain about those events, involving different persons and occurring at different times, by claiming a pattern.

32. The Applicant's claims in respect of the Ethics investigation and reassignment of work were taken to mediation on July 6, 2000, and the mediation terminated on July 18, 2000. On August 8, 2000, in an e-mail to the Vice President and General Counsel, the Managing Counsel and the Office of Mediation, the Applicant stated that "[d]espite my best efforts, I am sorry that it has not been possible for [my manager] and I [sic] to work out our differences during the mediation process that took place last week." It was at this point that the Applicant's time began running for initiating an appeal before the Appeals Committee, pursuant to Staff Rule 9.03, para. 5.01, quoted in pertinent part at paragraph 34 *infra* of this judgment. The Applicant was required to present her grievances to the Appeals Committee within 30 days of that terminated mediation, but she failed to do so. The Tribunal thus concludes that the Applicant failed to exhaust internal remedies, and that the Tribunal has no jurisdiction to consider her claims concerning the Ethics investigation and the reassignment of her work in the Philippines.

33. As to the initiation of the PIP on November 16, 2000, the Applicant did not raise any claim about this until she entered mediation on February 11, 2002. By then, she was well outside the 90-day time limit for taking this claim to either mediation or the Appeals Committee under Staff Rules 9.01 (then applicable) and 9.03. Moreover, even with respect to those categories of claims set forth in Staff Rule 9.01, para. 4.02(c), commencement of mediation did not necessarily preserve the Applicant's right of appeal. Nor did it revive a claim already out of time. Staff Rule 9.01, para. 4.02(c), then provided: "Requests for Mediation of workplace disputes involving bias, discrimination, harassment or work environment have no time limits, but should be made as soon as practical. Should Mediation fail, staff members may utilize other informal or formal processes available *as long as applicable time limits are met.*" (Emphasis in the original.)

34. The Tribunal must also determine whether the extension of the Applicant's PIP in November 2001 is within the Tribunal's jurisdiction. This claim was brought before both the second and the third mediations. The issue for the Tribunal's consideration is the effect which successive but related mediations have on the limitation period for bringing claims to the Appeals Committee in order to accomplish a proper exhaustion of remedies. The Staff Rules do not provide for the present situation of successive mediations. The operative Staff Rule is Staff Rule 9.03 ("Appeals Committee"), which states in relevant part at paragraph 5.01:

> 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 either: (i) 90 calendar days of receiving the written decision; or (ii) 30 calendar days following the termination of mediation which failed to resolve the issue arising from the same administrative decision.

35. In addition, Staff Rule 9.01 ("Office of Mediation") provided at paragraphs 4.02(b) and (c) that:

> (b) Parties to a dispute involving an Administrative Decision … must request Mediation within 90 days of the disputed decision. In certain circumstances, Bank staff may request either mediation or file an appeal with the Appeals Committee within 90 days of an Administrative Decision. … In such cases, if a staff member chooses mediation and it is unsuccessful, for whatever reason, the staff member may then file an appeal with the Appeals Committee within the remainder of the initial 90 days, or within 30 days after the unsuccessful mediation, whichever period is the longer.
>
> (c) Requests for Mediation of workplace disputes involving bias, discrimination, harassment or work

> environment have no time limits, but should be made as soon as practical. Should Mediation fail, staff members may utilize other informal or formal processes available *as long as applicable time limits are met*. (Emphasis in the original.)

36. The Staff Rules provide that staff members are entitled to 30 days after an "unsuccessful mediation" to file an appeal before the Appeals Committee. However, the Respondent relies on the conclusion of the Appeals Committee that after the second mediation, the time for taking an appeal must be reduced by the time that elapsed between the two mediations, i.e. 20 days was deducted, leaving her only 10 days to appeal. There is no express provision in the Rules to support this conclusion and, in principle, to reduce the time in this way is to defeat the purpose of the 30-day rule, i.e. to preserve appeal rights and to allow a reasonable time for the preparation and filing of a useful statement of appeal. The Tribunal cannot find any justification for interpreting the Rule in the manner proposed by the Respondent on the basis of the Appeals Committee decision. It considers that, in the absence of an express provision to the contrary, Staff Rule 9.01, para. 4.02(b), required that a full 30 days must be available at the end of mediation to bring to the Appeals Committee claims that were actively in mediation. In the present case, the Applicant applied to the Appeals Committee on June 4, 2003, within 30 days after the termination of the last mediation. The Applicant was thus within the time limit for filing an appeal concerning the extension of her PIP in November 2001.

37. It is not contested by the Respondent that the third mediation was a continuation of the second with respect to the Applicant's claim regarding the January 16, 2002 memorandum. Indeed, the record indicates that the Applicant was within the time limit for appealing this claim.

38. The Tribunal observes that the Appeals Committee took an unduly narrow and formalistic approach to its jurisdiction in refusing to allow the Applicant to put forward her complaint of retaliation as part of her claim based upon the January 2002 memorandum. It is clear from the language of the Statement of Appeal, read with the supporting documentation, that the Applicant alleged that the language used in the memorandum was in bad faith and was linked to earlier conduct on the part of management. The Tribunal finds that the Applicant, because of her effort to exhaust internal remedies on this issue, ought to be entitled to set forth the factual basis for her contention that the context and the language of the January 2002 memorandum rendered that memorandum retaliatory in nature and amounted to a violation of her rights.

Decision

The Tribunal therefore decides that it has jurisdiction to consider the merits of the Applicant's claims regarding (1) the extension of her PIP in November 2001 and (2) the January 16, 2002 performance-assessment memorandum, and of only those claims. The dates for the filing of pleadings on the merits will be determined by the President of the Tribunal and communicated to the parties.

/S/ Elizabeth Evatt
Elizabeth Evatt
President

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

At Washington, DC, November 12, 2004