

Decision No. 314

Maria Beatriz C. Schiesari,
Applicant

v.

International Finance Corporation,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on October 9, 2003, by Maria Beatriz C. Schiesari against the International Finance Corporation (IFC). The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Francisco Orrego Vicuña (President of the Tribunal) as President, Elizabeth Evatt (a Vice President of the Tribunal), Jan Paulsson and Sarah Christie, Judges. The Applicant's request for anonymity was denied on January 29, 2004 on the basis that it was not established that the publication of the Applicant's name was likely to be seriously prejudicial to her. The usual exchange of pleadings took place and the case was listed on March 24, 2004.

2. The Applicant joined the IFC on September 18, 2000 as an Insurance Officer at Grade F. She had a two-year Open-Ended probationary contract. On July 26, 2002, the IFC issued a notice to the Applicant that her employment would not be confirmed. In addition to protesting the decision not to confirm her employment, the Applicant alleges that she was discriminated against with respect to her grade from the time she was appointed; that management was biased in its evaluation of her performance; that it created a hostile working environment; and that it invaded her privacy. The Applicant seeks an order setting aside the Respondent's decision not to confirm her employment, compensation equivalent to three years' net salary plus benefits for loss of career opportunities and mental suffering, the deletion from her file of all references to her non-confirmation for performance-related reasons, and legal costs.

Preliminary determination on jurisdiction

3. The Applicant's claim of discrimination in relation to her starting salary has given rise to a jurisdictional objection. The application is silent as to the ground on which she was allegedly discriminated against. In oral argument before the Appeals Committee, her attorney stated that the Applicant had been discriminated against because she is a woman. She learned later that a male colleague and her male predecessor had both been employed at a higher level, Grade G.

4. In May 2000, the Applicant applied for the position of Insurance Officer at Grade F in the IFC. At the time, the Applicant was told informally that the salary would be "over \$100,000" per year. She was interviewed in June and advised by telephone before the end of that month that she had been selected. But the written offer of employment dated July 13, 2000 from the IFC's Manager of Global Staffing & Recruitment Human Resources Services proposed a starting salary of \$75,000. The Applicant questioned this amount and was told that she had earlier been misinformed.

5. The Respondent submits that this claim should be dismissed because it is out of time. Rule 8(1) of the Rules of the Tribunal provides:

Any objection by the respondent to the jurisdiction of the Tribunal or to the admissibility of the application, or any other objection for which a decision is sought before any further proceedings on the merits take place, shall be made in writing within twenty-one days of the date of the receipt by the respondent of the application.

6. The Applicant argues that because the IFC did not object to jurisdiction in time it waived its right to challenge jurisdiction. The IFC's objection was brought on December 9, 2003, some 60 days after the Respondent received the application. The Respondent in its rejoinder argues that because the main issue – non-confirmation – was properly before the Tribunal, no good purpose would have been served by filing separate papers dealing only with objections to jurisdiction which are tangential to the main issue in respect of which there is no jurisdictional challenge. Yet the Rule is clear. The Respondent ought to have notified the Tribunal within 21 days of its challenge to jurisdiction and of its grounds. The objection to jurisdiction thus fails for want of compliance with Rule 8(1).

The facts

7. Following her application for a job with the IFC in May 2000, several individuals interviewed the Applicant, including the Manager of the Insurance Unit. The Applicant made a good impression. The Manager and the other interviewers were confident, both from her curriculum vitae and reassurances given in the interview, that the Applicant had broad insurance experience and considerable knowledge of major infrastructure projects.

8. The Applicant's tasks involved evaluating and monitoring the insurance coverage of the IFC's investments in emerging markets and providing advice to the IFC and to investors in these emerging markets.

9. There were work-related problems from the beginning. When the Applicant joined the IFC, there were a number of changes of staff in the Unit. Her predecessor was transferred to another post in the IFC. Another staff member retired, and another staff member was promoted to Unit Manager. A Junior Program Assistant was in training as an Insurance Officer. These and related staff changes came at a time of considerable workload. Furthermore, the Applicant's predecessor had left a backlog of work and it is not disputed that his work methods were disorganized.

10. The Applicant was assigned to work in the IFC's Latin America and Caribbean Region because she is conversant with Portuguese and Spanish. Her Manager assessed the Applicant's work as sound. However, possibly because English was not her first language, her reports and correspondence needed editing. The Applicant worked very long hours in the office, often late into the night, but did not manage to cope with her workload.

11. On March 11, 2001, six months into her probationary period, her Manager wrote in the Applicant's review that she must attend to certain matters "in order for her to be eligible for confirmation." The tone of the review was, however, positive: the Applicant is said to have "handled her responsibilities well, and is developing a reputation amongst her internal clients, for providing good service in a friendly manner, despite challenging circumstances created by the work style of her predecessor." But the review also cited a range of problems: some technical and relating to insurance and interaction with the Investment Officers, others relating to language proficiency. However, the most important issue was whether she could demonstrate a clear capacity to manage the considerable volume of work.

12. After the first review, the problems persisted. As required by the IFC's performance review process, the Applicant was reviewed again in July 2001, nearly a year after she had started. The Applicant's Manager noted that despite the Applicant's long hours, she struggled to cope with the pressure of work. The Manager speculated that a major cause of the Applicant's poor performance was her failure to tackle her work in a systematic way. The Applicant claims that she completed her portion of the review but never received the Manager's response. This is of no consequence as there are no significant differences between the two versions.

13. A further performance evaluation process commenced on September 24, 2001. The Manager prepared a draft memorandum, which she gave to the Applicant for comment. The Applicant was not pleased with the contents. She thought that if negative comments remained in her file, they could damage her future with the Bank Group. After some exchanges between the Manager and the Applicant, the former gave the Applicant a final version of this review on December 13, 2001. The Manager retained the substance of the opinions she

had expressed in the September draft because, in her view, there had been no improvement by December in the Applicant's performance in key areas. The review concluded:

Work prioritization remains a weak spot. You need to develop a system of handling your inbox so that the average time for reviews is brought below your current 3 months average, and to prioritise conflicting demands on your time. I know that we are working on both of these issues, as I write, and I hope you can develop and maintain an effective system that achieves these objectives. Your current productivity level does not do justice to the many hours that you are putting into your work.

14. The Manager identified a number of other weaknesses; none of these were new. The tone of the letter was courteous and supportive, but its substance explicit. It also made clear that the Manager had decided to delay confirmation for another six months, and added:

This is in no way a reflection of any dissatisfaction with your work, but rather to give you additional time to address weak spots, and to focus on the technical aspects of your work, where additional training and/or assistance from your peers is being arranged.

15. The Applicant received her copy of the evaluation on December 13, 2001, the same day she went home for Christmas. While she was away, she e-mailed the Manager to protest that the document was not an accurate reflection of the discussions they had had. On January 3, 2002, when the Applicant returned from leave, she met with her Manager to discuss the evaluation. On January 8, 2002, the Applicant again e-mailed the Manager acknowledging certain problems and agreeing that management would make some arrangements to lessen her workload. There was some discussion about whether another staff member would take over some of her work.

16. The Applicant contends that Human Resources (HR) personnel were unhelpful towards her. Specifically, she says, they erroneously told her managers that persons on two-year probationary periods could not be extended beyond two years. She cites *Conthe*, Decision No. 271 [2002], to the effect that such an extension is in fact permitted. The Applicant questions the HR Officer's efforts on her behalf, arguing that he did no more than mention the Applicant's problems to his own Manager and to the Director of the Department, but did not pursue the matter. The HR Officer did suggest a meeting between the Manager, other officers and the Applicant, but the Applicant was reluctant to meet because she felt that it could lead to further confrontation. She had further contact with HR in the first half of 2002. She claims that she sent various e-mails asking about her confirmation because if she was not going to be confirmed, she wanted to know as soon as possible in order to have time to find another job. HR told her that it could not intervene in the confirmation process and that she would just have to be patient.

17. During the months of March and April 2002, the Applicant met with the Director of her Department and other officers. The Applicant appears to have been very distressed during this period. It also appears that the backlog in her work was exacerbated. The six-month extension of her confirmation was further extended to July 2002, when it would coincide with her annual performance review and the end of her contract. The Applicant argues that these extensions, particularly the last one (to July 2002) were unfair because they exacerbated her anxiety. The Respondent retorts that far from being evidence of unfairness this was a final opportunity for the Applicant to improve her performance.

18. The HR Officer testified that he knew of management's decision not to confirm the Applicant at the end of her first year. He said that if he became aware that confirmation was "still at issue," it was his practice to make contact with the affected staff member and offer reassurance that if they needed any help he "would definitely be willing and able to talk to them." As regards the Applicant, he "sought to contact her repeatedly" to see how she was doing and to reassure her that he would be available if she needed assistance, but he understood the Applicant's response to be that everything was fine.

19. The HR Officer testified that some time later, one of the Applicant's colleagues came to see him and

expressed concern about the Applicant, saying that she appeared to be under severe stress. The HR Officer sensed that the Applicant was anxious about her inability to keep up with her work and felt this was exacerbated by being “micro-managed.”

20. The record shows that at the start of the Applicant’s employment a backlog of work had been accumulated by her predecessor. It grew considerably during her employment. The Applicant testified before the Appeals Committee that towards the end of January 2002, after the decision had been made not to confirm her appointment at least for the next six months, she met with her Manager to discuss her workload and to make changes for improvement. Whereas in January 2002 she acknowledged her problems in writing and did not protest any unfairness, she testified later that she saw the resulting changes in her work arrangements in a very negative light and claimed that her Manager “was constantly changing targets, changing priorities, changing her requests.”

21. The Applicant further claims that the decision not to confirm her in October 2001 at the end of her first year “appeared to be retaliation following the displeasure expressed about what was a very basic, factual article about the work of the IFC Insurance Unit.” This is a reference to an incident that occurred towards the end of the Applicant’s first year. She was invited to write an article for an Argentine insurance periodical. There was some disagreement between the Applicant and her Manager about the article. The Applicant claims that at about that time – in October 2001 – the Manager had decided not to confirm her. Before then, the Applicant asserts that her Manager had thought that her performance was satisfactory and she had had an increase in salary. The record shows, however, that there had already been two performance reviews – in March and July 2001 – which had already pointed to problems. The IFC denies that it retaliated or that the Applicant’s article was a factor in the decision not to confirm her appointment. The Manager contends that the circumstances surrounding the article show, yet again, that the Applicant was unable to prioritize her work. She had had a generous deadline of several weeks but waited until the last minute to write the article. It was a rushed job and left little time for checking, and it ultimately went out without having been properly verified.

22. The Bank’s probationary system provides that a person on probation can be confirmed at any time within a two-year period. The Applicant was hoping to be confirmed at the end of her first year of service. Another staff member joined the Insurance Unit at approximately the same time as the Applicant and was confirmed about a year later. The Applicant claims that whereas she was assigned to Latin America and the Caribbean, the areas with the greatest workload, the colleague who was confirmed had a far lighter load and dealt with less complex matters. That colleague’s evidence before the Appeals Committee was that he was surprised that he was confirmed because he had not had a happy time in the Unit. He testified that there was a climate of fear in the Unit and he has since resigned from the IFC.

23. The IFC claims that, despite adequate training, by June 2002 the Applicant still needed to improve her knowledge and understanding of certain aspects of insurance. Moreover, she exhibited a continuing inability to manage her workload. Her supervisor prepared her second annual performance review and concluded:

If [the Applicant] is confirmed, it could be on the understanding that her current responsibilities will need to be reduced considerably, so that she has a work program she is better able to manage. ... I think it would not be fair to Beatriz to continue to set expectations that have so far been a challenge to fulfill. It is not an easy decision, but to be fair to both Beatriz and the Corporation, I am recommending that we not confirm her.

24. The Director concurred. He testified that he had concluded that the Applicant was simply not suited to the Insurance Unit, which required people to cope in a fast-paced, high-volume environment. She had been repeatedly counseled and offered assistance. In early 2002, in a last attempt to assist the Applicant, her workload had been reduced, but the problems persisted. He considered the Applicant to be a dedicated, conscientious and energetic professional. He assessed her as “a highly capable insurance specialist but the current role and her specific skills and interest were not well matched.”

25. The Applicant also complains that she had wanted to resign, but after receiving poor advice from HR, she

simply allowed the two-year contract to run out. After she left the IFC, she claims, she was offered a World Bank Consultancy but this was withdrawn by application of Staff Rule 4.01. That rule provides that a Regular staff member who has resigned and whose performance is fully satisfactory may be rehired. The Applicant apparently draws an *a contrario* inference from this rule. The HR Manager testified at the Appeals Committee that she had told the Applicant that her staff file would remain a matter of record whether she resigned or not.

26. On October 24, 2002, the Applicant filed an appeal with the Appeals Committee. On May 8, 2003, the Committee recommended the rejection of the Applicant's claims. On May 14, 2003, the Vice President of Human Resources accepted the Appeals Committee's recommendations.

Considerations

27. Although the Tribunal has jurisdiction to rule on the Applicant's claim of discrimination in the establishment of her initial salary, the claim consists of a wholly unsubstantiated assertion and is rejected without further discussion.

28. The Tribunal considers that the Applicant has not succeeded in establishing that the IFC abused its discretion in deciding not to confirm her appointment. Her performance problems were not trivial. They were relevant to the operational requirements of the IFC. They were brought to her attention. She was given an opportunity to respond. She was apprised of the seriousness of the performance issues and of what was expected of her. She had sufficient opportunity to improve. The Applicant herself acknowledged the performance problems. The Tribunal is satisfied that the IFC fairly concluded that although the Applicant was competent, she was not up to the demands of the post for which she was hired.

29. The IFC was entitled under the Staff Rules to make a decision not to confirm the Applicant's employment at any time during the probationary period. It was in the interest of fairness that, after discussion with the Applicant, her Manager gave her the opportunity to improve her performance. When this did not lead to any material improvement, management was entitled to conclude that it was not in the interests of the IFC to confirm the Applicant's appointment.

30. The Applicant claims that she was not given adequate feedback. On the contrary, the Tribunal considers that the performance reviews and discussions were clear and substantively justifiable. The reviews in March and July 2001 and the September-December 2001 review complied with Staff Rule 4.02.

31. One aspect of the review of September-December 2001 warrants comment. The Tribunal notes the Applicant's complaint that there were differences between the draft version given to her in September and the final version in December 2001. The differences do not appear to have been material. Even if they had been, they would not in themselves have created a cause of action. The Applicant's complaint suggests that she does not appreciate the nature of the evaluation process. The Staff Rules establish a managerial responsibility to conduct reviews; the opportunity which the Manager gave the Applicant to comment on the draft and to return it was a consultative process to assist the Manager to make an informed assessment and to apprise the Applicant before finalizing the document. Although it would be desirable for a supervisor and a staff member to agree on an evaluation's contents, the evaluation is not a process of negotiation or joint determination.

32. The Tribunal also considers that the final review in July 2002, which triggered the notice not to confirm, was effected in accordance with Staff Rule 4.02, paragraph 2.02(c). That Rule states that the designated supervisor shall "at the end of the probationary period, complete a performance review in accordance with provisions of Rule 5.03, 'Performance Management.'" Further, Staff Rule 4.02, paragraph 3.03, provides:

At any point during or at the end of the probationary period, a decision to end a staff member's employment by non-confirmation of appointment shall be made by the staff member's vice president taking into account the recommendation of the staff member's manager and a senior manager, and with the concurrence of the Human Resources Account Manager.

33. The Tribunal considers that the problems were drawn to the Applicant's attention in a careful and considered way. Furthermore, they were accompanied by constructive suggestions for corrective actions. There is no evidence that the Applicant's managers demeaned or belittled her. There is no evidence of any standard of performance applied that was biased or that any feedback given was based on her sex or another irrelevant factor. As to whether the standards imposed upon her were unfair, the fact that one or another of her colleagues may have had different work assignments is not a ground to complain about an unequal allocation of work. However, it does appear that the Applicant and her Manager had different approaches to work.

34. The Applicant has not established that the IFC, whether through her direct supervisors or otherwise, created a hostile work environment. The Applicant may well have felt stress that, despite her own best efforts, her managers still considered her performance wanting. But this stress is not an actionable hostile environment. Managers have a responsibility to make business decisions that are not always favorable to individual employees. Criticism or adverse decisions about performance or work assignments does not in and of itself constitute harassment, discrimination or retaliation.

35. The claim that the Applicant's rights were violated because HR may have erroneously described the Staff Rule relating to probationary periods is not justified. The Applicant is correct that at the relevant time the Staff Rules appeared to allow for an extension beyond two years, while the present rule clearly does not. It does not, however, matter whether HR was correct or not. The evidence shows that the IFC was not even considering an extension. This is not a case in which, but for a misreading of the rules, the IFC would have offered to extend the probationary period.

36. The Tribunal does not consider that HR was unhelpful or unresponsive. The Applicant rejected the HR Officer's attempts to set up a meeting with her Manager and the HR Manager. There is no basis for her complaint that he was unhelpful.

37. As to the question whether it was in the Applicant's interest if she were to resign, the Tribunal finds that there is no substance in her complaint. The Applicant's staff file would remain a matter of record whether she resigned or not.

38. There is no factual basis for concluding that the IFC's decision not to confirm was retaliatory for her having written the article discussed above. The correspondence relating to this incident raises genuine performance concerns and does not prove any personal animus.

39. The Applicant's claim that the IFC invaded her privacy is unjustified. Nor is there evidence that the IFC revealed confidential personal information relating to the Applicant. But it is also clear from the record that it was common knowledge in the Unit that the Applicant was under considerable (and probably increasing) stress during the latter part of 2001 and in the months leading up to the notification in July 2002 that her employment would not be confirmed.

40. The Applicant cannot have it both ways by claiming that management is intrusive if it responds to apparent distress but neglectful if it does not make efforts on behalf of an employee who has declined help. The test is not whether the managers handled this matter perfectly but whether the IFC violated the Applicant's rights under the terms of her employment.

41. The fact that – as is not disputed – the Applicant's Manager was new to the job and may have “done everything by the book” does not mean that she was unfair to the Applicant or created a hostile environment. The Applicant herself admits that she and her Manager “have totally divergent cultural backgrounds.” She does not specify how they differ and what, in particular, she deemed insensitive, hostile or unpleasant. There is nothing in the record which rises to the level of impropriety that would give rise to liability on the part of the IFC. While the Tribunal is sensitive to the needs of a subordinate, the Applicant herself must have known she was moving into a world of a wide diversity of people where she would be exposed to a variety of methods and styles, and would need to adjust accordingly.

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 London, England, June 18, 2004