

Decision No. 127

Eilert J. de Jong (No. 2),
Applicant

v.

International Finance corporation,
Respondent

1. The World Bank Administrative Tribunal, composed of A.K. Abul-Magd, President, E. Lauterpacht and R. A. Gorman, Vice Presidents, and F.K. Apaloo, F. Orrego Vicuña, Tun M. Suffian and P. Weil, Judges, has been seized of an application, received July 2, 1991, by Eilert J. de Jong, against the International Finance Corporation. The Tribunal ordered the Respondent to produce certain documents. There was the usual exchange of pleadings. The case was listed on April 5, 1993.

The relevant facts:

2. The Applicant, a national of the Netherlands, joined the Bank on September 2, 1969.

3. In August 1984 the Applicant transferred from the Bank, where he had worked since mid-1980 as Senior Loan Officer for Sudan, to the Africa II Department of the International Finance Corporation (IFC) as Senior Investment Officer. However, because of his limited experience as a financial technician, his reassignment was subject to one year's probation. In August 1985 his assignment was confirmed.

4. During the first three years in the IFC the Applicant reviewed nineteen investment proposals, of which one was approved by the IFC Board.

5. The Applicant was given an above-norm salary increase for the year 1985.

6. In July 1987 the Applicant came to know that his salary increases for 1986 and 1987 were both below the norm established for those years.

7. No Performance Planning and Review (PPR) forms were prepared by either the Applicant or the Respondent for 1985, 1986 or 1987.

8. In a memorandum, dated July 28, 1987 to the Applicant, the IFC Personnel Officer stated:

Almost three full years have elapsed since you have submitted a completed Anniversary Evaluation Review (PPR).

Your managers are concerned regarding this ... It is our recommendation and request that you give priority attention to this matter

9. Thereafter, the Applicant had discussions with his supervisors concerning his performance and career, and came to the conclusion that it was necessary that he be transferred from the IFC to the Bank as early as possible. He, nonetheless, made clear that his acceptance of the need for transfer did not signify acceptance of assertions of malperformance on his part.

10. On January 6, 1988 the IFC Personnel Officer gave the Applicant a draft separation agreement to consider, which the Applicant rejected on January 26, 1993.

11. In a memorandum, dated January 28, 1988 to the Applicant, his Division Manager stated:

As you have not submitted an Annual Performance Review since you have been in IFC despite a number of requests from us to do so, I am attaching my review of your performance.

As to the Applicant's performance he concluded that:

Mr. de Jong has not demonstrated the technical skills, initiative and business judgment in his work expected of an investment officer, and his productivity has been disappointing.

That memorandum was written on June 19, 1987 by the Applicant's Division Manager and sent on October 23, 1987 to the IFC Personnel Officer in accordance with the latter's request.

12. In a memorandum, dated April 5, 1988 to Personnel Files, the Applicant strongly disagreed with the evaluation of his supervisor and gave a detailed account of the circumstances surrounding his reassignment to the IFC in 1984, the strained relationship with his supervisors and the lack of viable work assignments given to him during that period. Furthermore, the Applicant stated that, although he did not contest the need to obtain a reassignment because of the conflict with his Division Manager, he did not accept that bad chemistry between himself and his Division Manager equated with malperformance on his part.

13. In response his Division Manager, in a memorandum dated April 12, 1988 to Personnel Files, stated that he disagreed with the Applicant's assertions in virtually every respect and characterized the Applicant's memorandum as being "22 pages of misrepresentations".

14. On April 25, 1988 the Applicant requested that his merit increases for 1986 and 1987 be adjusted retroactively to reflect the norms established for those years. However, his request was denied, and on June 8, 1988 he filed an appeal with the Appeals Committee.

15. On August 2, 1988 the Applicant learned through his personnel action form that his merit increase for 1988 was 1.8%, i.e. below the norm established for 1988. In a memorandum dated October 11, 1988 to his Director, the Applicant requested administrative review of that decision, stating, inter alia, that during 1988 he was de facto put on inactive duty status against his own volition, and, consequently, he should receive the norm increase awarded to staff not on active duty.

16. Meanwhile the Applicant was informed that starting January 1, 1989 he would be transferred to the Bank's Asia Region, Country Department V, Operations Division.

17. The Appeals Committee in its report dated October 28, 1988 concerning the Applicant's merit increases for 1986 and 1987 declared that it lacked jurisdiction in his case.

18. On November 8, 1988 the Applicant requested the Appeals Committee to reconsider its decision and, at about the same time, the IFC proposed that the Applicant agree on a "settlement" whereby he would be awarded the full norm increase for 1988 retroactively, provided he would agree to refrain from further litigation regarding his merit increases for 1986 and 1987. He declined the Bank's offer and on November 23, 1988 he filed an appeal with the Appeals Committee against the decision to award him a below-norm merit increase for 1988, and, on January 30, 1989 he filed an application with this Tribunal against the decision to award him below-norm merit increases for 1986 and 1987. On May 25, 1990 this Tribunal ruled that his application was not admissible because he had failed to exhaust internal remedies (de Jong, Decision No. 89 [1990]).

19. On March 7, 1991 the Appeals Committee rendered two reports concerning the Applicant's below-norm merit increase for 1988. The majority report concluded that the below-norm merit increase for 1988 reflected the Applicant's performance as a Senior Investment Officer and it was correct. Therefore, it recommended that the Applicant's request for relief be denied. The minority report concluded that the decision that the Applicant's performance was unsatisfactory was tainted and recommended award of compensation.

20. In a letter, dated March 12, 1991 to the Applicant, the Vice President, Personnel, accepted the recommendation of the majority report.

The Applicant's main contentions:

21. The Applicant is entitled to the standard merit increase for 1988, because during that period he was de facto put on inactive duty status as a result of his managers' vindictiveness. Indeed, since July 1987 when the Applicant raised the issues of his below-norm salary increases for 1986 and 1987, he was not given new assignments and his contribution to the work of his department was limited to the finalization of a number of tasks, which were not substandard.

22. The Applicant's low numerical record of investment proposals approved by the IFC Board cannot be equated with malperformance on the Applicant's part. The Applicant could not accept responsibility for the inadequate opportunities he had had to establish a numerical performance record.

23. The Applicant's Division Manager abused his discretion, because he equated his lack of empathy and professional compatibility with the Applicant to malperformance on the Applicant's part.

24. Before his transfer to the IFC, the Applicant had a solid record of achievements as Resident Representative and as Loan Officer and his skills in judgment, tact and effective diplomacy in dealing with clients and colleagues were consistently commended.

25. Despite the Applicant's repeated and urgent pleas since July 1987 that he be given the rationale for the below merit increases for 1986 and 1987, the only evaluation he ever received during his assignment in the IFC was on January 28, 1988, two days after he had refused to agree to a separation agreement.

26. Never before July 1987 had the IFC Personnel officer asked the Applicant to prepare a PPR form.

27. The Applicant did not refuse to participate in the IFC PPR process. In fact the PPR process in the IFC was inadequate due to dereliction of managerial duties and disregard of applicable procedures. As a result of this situation the Respondent failed to fulfill its obligation to provide the Applicant with an honest and timely feedback especially when the Applicant's performance were deemed to be unsatisfactory since 1986.

28. The Applicant requested the following relief:

- (i) retroactive adjustment of his merit increase for 1988 and payment of interests; and
- (ii) compensation for injuries sustained due to damaged:
 - career progression;
 - job satisfaction;
 - professional reputation inside and outside the Bank; and
 - personal and family life

The Respondent's main contentions:

29. The Respondent's decision to award the Applicant the below-norm merit increase for 1988 was fully justified by the Applicant's sustained level of substandard performance for 1988 as well as previous review periods. His inadequate performance was evidenced in the Applicant's not having successfully promoted nor processed a single project during a two-year period.

30. The Applicant's supervisors were not prejudiced and they did not assess his performance in an arbitrary and capricious manner. The Applicant received only a 1.8% salary increase for 1988 because his performance

was assessed, as it had been in 1986 and 1987, to be below the acceptable level for a Senior Investment Officer in IFC.

31. The Applicant was never placed in an "inactive duty status". His supervisors decided to reduce the Applicant's workload, because of his prolonged 1986 to 1988 inadequate performance and relative non-contribution to the work program of his department and with the objective of enabling him to secure a reassignment to another position as soon as possible.

32. The Applicant cannot credibly complain that the entire performance review process in the IFC was flawed, because he consistently refused to initiate the PPR process by completing the PPR forms, despite the repeated requests of the IFC Personnel officer.

33. The salary review process, which is distinct and independent from the PPR process, was carried out by the Applicant's managers, who assessed that the Applicant's contribution to the work unit, as compared to the contribution of others in the unit, was less than satisfactory.

34. The Applicant has not shown that his career has been harmed by the alleged shortcomings in the IFC performance review process, since he successfully transferred from the IFC to the Bank where he continues to work.

Considerations:

35. The Applicant was Senior Loan Officer in the World Bank. In August 1984 he transferred on probation to the IFC as a Senior Investment Officer. He was confirmed in 1985. The Applicant's merit increases for 1986 and 1987 were below-norm increases for such years. The Applicant sought administrative review of these decisions culminating in his appeal to the Appeals Committee. Finally the Applicant filed an application with the Tribunal which dismissed the application because he had not exhausted internal remedies.

36. For 1988 the Applicant again received a below-norm salary increase. The Applicant again requested administrative review, seeking retroactive adjustment of the merit increase for 1988 to reflect the norm increase for that year and other compensatory damages. The Appeals Committee's Report, dated March 7, 1991, by a majority recommended dismissal of the appeal. A minority report concluded that the decision that the Applicant's performance was unsatisfactory was tainted and recommended the award of compensation. By decision dated March 12, 1991, the Vice President, Personnel, accepted the majority recommendation. The Applicant received the decision on April 3, 1991.

37. The issue before the Tribunal is whether the Respondent's decision on the Applicant's merit increase for 1988 on the basis of his performance as a Senior Investment Officer was lawful. The Applicant contends that it was unlawful on the grounds set out in paragraphs 21 to 27 above.

38. In considering this application the Tribunal must recall the principle that it applied in, inter alia, Suntharalingam, Decision No. 6 [1981], para. 27, where it stated:

The determination whether a staff member's performance is unsatisfactory is a matter within [the Administration's] discretion and responsibility. The Administration's appraisal in that respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

39. The question then is whether the Respondent's decision was an abuse of discretion.

40. Although in 1985 the Applicant was given an above norm salary increase, thereafter his output and contribution to the work of the Africa II Department fell in his managers' opinion consistently below expectations. Despite the fact that the Division Manager and the Director recognized and took into account that to some extent the nature of the region and of the specific projects the Applicant was engaged in made his role

somewhat difficult to fulfill, they concluded that in the skills required of an investment officer (financial analytical skills, sound business judgment, initiative and energy, new business promotion) the Applicant's professional profile and output were inadequate.

41. In consequence the IFC Personnel Officer met periodically with the Applicant, encouraging him to apply for other positions and canvassing on a confidential basis within IFC for possible alternative employment better suited to his skills. Later, these efforts were extended to the Bank. The Applicant also made similar inquiries. In 1988 these efforts proved successful and the Applicant returned to the Bank.

42. The Applicant's situation throughout this period was further complicated by his refusal to participate in the established performance review and evaluation procedures as prescribed by Staff Rule 5.03, "Performance Planning and Review." Throughout 1987, and in prior years as well, the Applicant failed, despite repeated requests from management, to initiate the required performance review for the preceding review period by filling in Part I of the evaluation form.

43. In January 1988, on the IFC Personnel officer's advice, two specific actions were taken:

- (i) The Division Manager unilaterally gave his draft summary evaluation to the Applicant. This evaluation in fact had been prepared much earlier in 1987. It was withheld, however, because of the hope that the Applicant would respond and begin to co-operate by filling in Part I.
- (ii) The Director awarded to the Applicant the minimum below-norm 1.8% salary increase.

44. The Tribunal has examined the documents sought by the Applicant and produced by the Respondent as ordered by the Tribunal. While some of these documents show that the IFC was aware of certain deficiencies in the evaluation system, the Tribunal does not find these deficiencies to have caused injustice to the Applicant. One of the problems alluded to was the refusal of staff members to initiate the performance review and the consequent ability of staff to obstruct the entire process by refusing to complete Part I of the PPR, in which a staff member is to provide his own assessment of the extent to which he has achieved the objectives of his individual performance plan. The Applicant was responsible for just such a refusal throughout the three years of his employment with the Respondent.

45. Further, the Applicant's contention that his supervisor failed to inform him of the perceived weaknesses in his performance is not substantiated by the record. In particular, on January 28, 1988 his Division manager gave him a summary evaluation of his performance. The below-norm increase for 1988 was indeed the culmination and result of various attempts to have the Applicant fill in Part I of the PPR and subsequently to notify the Applicant of the unsatisfactory nature of his work and the need for improvement.

46. The decision here impugned was a management function and discretionary. The Tribunal is satisfied that it was not an abuse of discretion.

Decision:

For the above reasons, the Tribunal unanimously decides that the application be dismissed.

A. K. Abul-Magd

/S/ A.K. Abul-Magd
President

C. F. Amerasinghe

/S/ C.F. Amerasinghe
Executive Secretary

At London, May 21, 1993