

Decision No. 89

Eilert J. de Jong,
Applicant

v.

International Finance Corporation,
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A. K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F. K. Apaloo, R. A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received January 30, 1989, by Eilert J. de Jong, against the International Finance Corporation. The Respondent filed a request, which was granted, to separate jurisdictional issues from the merits, and to file an answer limited to the jurisdictional issues. Thereafter the usual pleadings were exchanged on the jurisdictional issues. The case was listed on January 17, 1990. The Tribunal decided to make part of the record the additional statements filed by the parties.

The relevant facts:

2. The Applicant, at the time of the events that form the cause of action in this case, was a Senior Investment Officer with the International Finance Corporation. As a result of the 1986 and 1987 annual salary reviews, he was given a salary increase of 0.5% and 1.8% effective May 1, 1986 and May 1, 1987 respectively. Both of them were below the norm increases established for those years.

3. The Personnel Action Forms relating to the annual salary reviews for 1986 and 1987 were printed on June 26, 1986 and June 5, 1987, respectively, and were distributed to all staff shortly thereafter. The 1986 annual salary review was announced to all staff on June 11, 1986 and the 1987 salary review on May 8, 1987, both through the "For Your Information" Bulletin.

4. The Applicant came to know of the amount of the merit increase he was awarded for the year 1987 through his payroll statement for the month of June 1987. Being dissatisfied with the low merit increase he had received, he made arrangements to meet and discuss that issue with his Personnel Officer. Early in July he met with his Personnel Officer who told him that his 1986 salary increase was below norm as well.

5. 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 International Finance Corporation 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.

6. On January 6, 1988 the Applicant's Personnel Officer gave the Applicant a draft separation agreement to consider.

7. On January 28, 1988 the Applicant's Division Manager in a memorandum addressed to the Applicant 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.

8. In a memorandum to Personnel Files, dated April 5, 1988, the Applicant strongly disagreed with the evaluation of his supervisor and gave a detailed account of the circumstances surrounding his reassignment to the International Finance Corporation in 1984, the strained relationship with his supervisors and the lack of viable work assignments he was given 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.

9. In response his Division Manager in a memorandum to Personnel Files, dated April 12, 1988, 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".

10. 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.

11. In response on May 9, 1988 the Applicant's Director stated that, although the Applicant's request did not comply with the time requirement of Staff Rule 9.01, he, nevertheless, had reviewed the administrative decisions and found that there was no basis for adjusting the salary increases he had received for the years 1986 and 1987 since they reflected the evaluation of the Applicant's performance by his Division Manager and by himself.

12. On June 8, 1988 the Applicant filed an appeal with the Appeals Committee to obtain a retroactive adjustment of the merit increases he had received for 1986 and 1987 to reflect the norm increases established for those years. On August 3, 1988 the Respondent requested the Committee to dismiss the case as time-barred.

13. On October 11, 1988 the Applicant filed a request for an administrative review of the decision awarding him a merit increase below the norm for the year 1988.

14. 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.

15. The Appeals Committee in its report dated October 28, 1988 declared that it lacked jurisdiction in this case. In particular the Committee stated:

[T]he Appellant has failed to comply with Rules 9.01 and 9.03, paragraph 5.01, since the Personnel Action Forms relating to the Salary Review Increases for 1986 and 1987 were prepared on June 26, 1986 and June 5, 1987, respectively, and distributed to staff members shortly thereafter.

16. On November 8, 1988 the Applicant requested the Appeals Committee to reconsider its decision on jurisdiction and, at about the same time the Bank 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. However, the Applicant 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 merit increase below the norm for the year 1988.

17. On January 25, 1989 the Chairman of the Appeals Committee informed the Applicant that the Committee's decision on the issue of jurisdiction concerning his merit increases for 1986 and 1987 should remain unchanged, since the Applicant had not presented any new facts that would require review of the Committee's decision on jurisdiction.

18. The Applicant in his February 26, 1989 memorandum to the Chairman of the Appeals Committee again expressed the opinion that no provisions precluded reconsideration of the panel's findings on the ground that the Committee had made vital errors and omissions in dealing with his case. In response, on March 10, 1989

the Chairman confirmed to the Applicant that the panel had considered both his Statement of Appeal and the Respondent's Answer before deciding that it lacked jurisdiction in his case.

The Respondent's main contentions on the Jurisdictional issue:

19. The Applicant failed to exhaust internal remedies as required by the Tribunal's Statute.

20. The Applicant became aware at the very latest by early July 1987 of the amount of the salary increases he had received for 1986 and 1987 and with which he was dissatisfied. Yet, only on April 25, 1988 did he request an administrative review of the decisions to award him below norm merit increases for the years 1986 and 1987. Although his request for administrative review could have been rejected because it was time-barred, the Applicant's Director examined his request and informed the Applicant that he had found no basis for overturning the impugned decisions.

21. The Applicant failed to comply with the time limits set forth in Staff Rules 9.01 and 9.03 and the Appeals Committee rightly found that it lacked jurisdiction over his case. Consequently, the Applicant failed to exhaust the internal remedy provided by review by the Appeals Committee which is a prerequisite for an application to the Tribunal, unless there are exceptional circumstances or a special agreement allowing submission of the claim directly to the Tribunal. None of the above had occurred or existed. Therefore his application is inadmissible.

The Applicant's main contentions on the jurisdictional issue:

22. The Applicant did observe the time limits applicable to administrative review and his appeal before the Appeals Committee was filed in time. Consequently, he had exhausted the internal remedies available to him and his application is admissible.

23. The delays in submitting his application were caused by the Respondent's managers failing to fulfill obligations under the Staff Principles, the Staff Rules, the Guidelines for Managers, and common standards of conduct. Only in January 1988 did the Applicant's supervisor give him the reasons for the below norm merit increases for 1986 and 1987.

24. Despite the apparent existence as of June 26, 1986 of a Personnel Action Form regarding the Applicant's 1986 merit increase, such form was never given to him nor was he ever advised at that time of the reasons for the low merit increase. Moreover, in 1986 his overall salary increase was 5%, ironically 2.6% in excess of the 2.4% average increase announced in the bulletin "For Your Information" and during that year there was no performance feedback or any indication that his performance could be judged unsatisfactory.

25. Conversely, in 1987 because of the deterioration of his working relationship with his supervisors the Applicant had reason to believe that he had not been awarded the norm merit increase for 1987. Therefore, upon learning through a monthly payroll statement that his 1987 merit increase was below the norm, the Applicant immediately raised the matter with his Personnel Officer even before receiving his Personnel Action Form dated June 5, 1987, received in mid-July, i.e. after he had raised the matter with his supervisors and his Personnel Officer. Moreover, it was only at that time that he was advised that his 1986 merit increase was also below norm.

26. The Respondent's offer that, if the Applicant were to refrain from further pursuing litigation with respect to his 1986 and 1987 merit increases, he would receive the full norm merit increase for 1988, illustrated the Respondent's readiness to abuse procedures as well as its lack of confidence in its own arguments concerning the non-validity of his application.

Considerations:

27. By his application, received on January 30, 1989, the Applicant contests the below normal merit increases

awarded to him in 1986 and 1987. He maintains in essence that these low merit increases constitute an abuse of managerial discretion, since the accusations of malperformance put forward by the Respondent in order to justify them “stem basically from parochial prejudices and resentment on the part of (his) supervisor”. According to the application, it is the performance review received by the Applicant from his Division Manager on January 28, 1988 that should be regarded as the decision contested. The Applicant requests retroactive adjustment of his merit increases for 1986 and 1987 to reflect the norm increase percentages established for those years, payment of interest and compensation for various injuries allegedly sustained by him. Although the application also mentions the appeal filed by the Applicant with the Appeals Committee against the merit increase awarded to him for 1988, the application, nevertheless, is not directed against the 1988 but only against the 1986 and 1987 merit increases.

28. Against this application the Respondent has raised a jurisdictional issue, based on the alleged non-compliance by the Applicant with the statutory requirement of exhaustion of internal remedies. The Respondent’s request to separate the jurisdictional issue from the merits having been granted, the present judgment will address this issue without going into the merits.

29. According to Article II, para. 2 of the Statute of the Tribunal:

No ... 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 respondent institution have agreed to submit the application directly to the Tribunal; and

(ii) the application is filed within ninety days after ...

(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...

30. As already noted, the application was received by the Tribunal on January 30, 1989. Whether the time limit of ninety days is computed from November 8, 1988, when the Applicant received the Appeals Committee’s decision rejecting his appeal, or from January 25, 1989, when the Applicant was advised of the rejection by the Appeals Committee of his request for reconsideration of the Committee’s decision, the application has been filed within ninety days of “receipt of notice ... that the relief asked for ... will not be granted”. The timeliness of the application to the Tribunal, therefore, is beyond question.

31. The jurisdictional issue raised by the Respondent relates to the other condition of admissibility laid down by Article II, para. 2, i.e., the exhaustion of “all other remedies available within the Bank Group”. The Respondent objects to the admissibility of the application on the ground that, since the Applicant failed to observe the time limits for seeking administrative review, his appeal to the Appeals Committee was rejected as time-barred and that, consequently, the statutory requirement of exhaustion of internal remedies is not met.

32. The importance attached by the Statute of the Tribunal to the exhaustion of “all other remedies available within the Bank Group” prior to filing an application before the Tribunal is highlighted by the fact that, having been laid down in sub-paragraph (i), this condition is again referred to in sub-paragraph (ii) in relation to the determination of the dies a quo of the ninety day time-limit. The Tribunal has declared:

(The) statutory exhaustion requirement is of 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. In addition, the pursuit of internal remedies, in particular the findings and recommendations of the Appeals Committee, greatly assists the Tribunal in promptly and fairly disposing of the cases before it. The Appeals Committee permits a full and expeditious development of the parties’ positions, including the testimony of witnesses, and often results in the announcement of recommendations that are satisfactory to both the Bank and to the aggrieved staff members (Berg, Decision No. 51 [1987], para. 30; Dhillon, Decision No. 75 [1989], para. 22).

33. On this basis the Tribunal has concluded that, where 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 (Dhillon, Decision No. 75 [1989] paras. 23-25; Steinke, Decision No. 79 [1989], paras. 16-17).

34. The Respondent maintains that this is just how the situation presents itself in the present case. The Respondent's argument runs as follows. The 1986 salary increase was announced to all staff on June 11, 1986, and the 1987 salary increase on May 9, 1987. The Applicant must have become aware of the amount of his merit increases at least at the time these increases were reflected in his pay check, i.e., on July 31 for 1986 and June 30 for 1987. By his own account (i.e., according to his Memorandum to Personnel Files dated April 5, 1988 and his Memorandum to the Secretary of the Appeals Committee dated June 8, 1988), he was aware at the latest by early July 1987 of the size of the merit increases awarded to him for 1986 and 1987. Nevertheless, he delayed over nine months, until April 25, 1988, to challenge his 1986 and 1987 merit increases with a formal request for administrative review. Hence, his request was rejected by the Respondent on May 9, 1988, as time-barred. Consequently, his appeal to the Appeals Committee, filed on June 8, 1988, ended with a decision by the Appeals Committee on October 28, 1988 that the Committee lacked jurisdiction over the case owing to the Applicant's failure to comply in a timely fashion with Staff Rule 9.01, "Administrative Review", and Staff Rule 9.03, "Appeals Committee". The application before the Tribunal, so the Respondent concludes, coming as it does 1 1/2 years after the occurrence of the events complained of, should be dismissed for failure to observe the time-limits for administrative review and, consequently, failure to exhaust internal remedies as required by the Tribunal's Statute.

35. The Appeals Committee's decision of October 28, 1988 rejecting the Applicant's appeal as time-barred reads in pertinent part as follows:

The Committee has reviewed the papers filed by the parties and the relevant provisions of Staff Rule 9.01 and Rule 9.03. It finds that the Appellant has failed to comply with Rule 9.01 and Rule 9.03 paragraph 5.01, since the Personnel Action Forms relating to the Salary Review Increases for 1986 and 1987 were prepared on June 26, 1986 and June 5, 1987, respectively, and distributed to staff members shortly thereafter. Accordingly, the Committee finds that it lacks jurisdiction in this case.

36. Insofar as Rule 9.03, para. 5.01 is concerned, the Tribunal is unable to share the Appeals Committee's view. Rule 9.03 governs the appeals to the Appeals Committee. Paragraph 5.01 provides as follows:

After the Administrative Review has been completed, a staff member who wishes to appeal the decision to the Appeals Committee must submit the appeal in writing... within 30 calendar days following receipt by the staff member of the written decision from the highest level in the applicable administrative channel ...

The record shows that the Applicant's formal request for administrative review had been rejected on May 9, 1988. So, in filing his appeal before the Appeals Committee on June 8, the Applicant clearly complied with the provisions of Rule 9.03, para. 5.01, and his appeal should not have been held inadmissible by the Appeals Committee on that ground. Had the alleged non-observance of Rule 9.03 been the only ground on which the Appeals Committee's decision rested, the Tribunal would have concluded that the Applicant cannot be regarded as not having exhausted internal remedies.

37. But the Appeals Committee's decision rests on yet another ground. The appeal before the Appeals Committee was rejected not only because it was held untimely in itself but also because it followed upon an administrative review which had itself ended in a decision dated May 9, 1988, rejecting the Applicant's request for administrative review as time-barred because of non-compliance with Rule 9.01 governing "Administrative Review". The legal situation is, therefore, the following. If the decision of May 9, 1988 was correct, then there existed a legal basis for the Appeals Committee's decision based on non-compliance with Rule 9.01, "Administrative Review"; the Applicant should then be regarded as not having exhausted all internal remedies available to him prior to his application before the Tribunal. If, on the other hand, the May 9, 1988 decision rejecting the Applicant's request for administrative review as time-barred was wrong, then the Applicant should

be deemed to have complied with the requirement of exhausting internal remedies. The question before the Tribunal thus boils down to whether the Applicant's request of April 25, 1988 for administrative review was timely or not.

38. The decision of May 9, 1988 rejecting as time-barred the Applicant's request for administrative review of April 25, 1988 reads as follows:

With reference to the above memorandum [dated April 25, 1988], your request for an Administrative Review of the decision regarding your merit increases for the years 1986 and 1987 does not comply with Staff Rule 9.01, which requires that such requests be made within 30 days of notification of decision. Nevertheless, I have reviewed the decisions and reiterate that the merit increases awarded to you in 1986 and in 1987 reflected [the Division Manager's] and my evaluations of your performance. I therefore, regret that there is no basis for adjustment.

Obviously, the first ground was the decisive one, the second having been added more or less as a kind of moral reassurance. It is the first ground that the Appeals Committee was to refer to in its own decision some months later in order to determine that it had no jurisdiction because the administrative review had itself been time-barred.

39. As already mentioned, the Applicant's written request for administrative review was filed on April 25, 1988. That is the memorandum to which the decision of May 9, 1988 referred and responded. The April 25, 1988 memorandum is as follows:

With reference to my memorandum of April 5, 1988 to Personnel Files, this is to confirm my request that my merit increases for 1986 and 1987 be adjusted retroactively to reflect the norms established for those years.

April 25, 1988, therefore is the date to be taken into account in order to ascertain whether the request for administrative review complied with Staff Rule 9.01 or not.

40. Staff Rule 9.01, "Administrative Review", provides as follows:

2.01 If a staff member wants an administrative decision taken in his own department to be reviewed, the steps set out in paragraphs 2.02 through 2.04 shall be followed...

2.02 Step 1. Promptly, but no later than 90 calendar days after being notified of the decision, the staff member shall first raise the issue with his immediate supervisor.

2.03 Step 2. If dissatisfied with the outcome of Step 1, or if no response has been received within 21 calendar days, the staff member shall bring the matter to the attention of his next-in-line supervisor within 30 calendar days.

2.04 Step 3. If dissatisfied with the outcome of Step 2 or if no response has been received within 21 calendar days, the staff member shall raise the issue in writing with his department director within 30 calendar days. The department director shall respond in writing within 21 calendar days of receipt.

41. What, then, is the date of notification of the decision the administrative review of which the Applicant requested? The announcement of the salary increases in the "For Your Information" bulletin on June 11, 1986 and May 8, 1987, respectively, can be disregarded in this respect since these announcements were of a general character and did not allow the individual staff member to know the amount of the merit increases awarded personally to him. On the other hand, the Applicant must have become aware of the size of his individual merit increases at the latest when he received his pay check, i.e., on July 31 for 1986 and on June 30 for 1987. The Applicant accepts this view in respect of the 1987 increase, since both in his memorandum of April 5, 1988 and his appeal to the Appeals Committee of June 8, 1988 he writes: "Through my payroll statement of end June 1987, I learned that I had been awarded a low merit increase for 1987". As for the 1986 increase, the Applicant states in the same documents that he learned of its below level size only during his meeting of early July 1987 with his personnel officer.

42. Although the Applicant thus concedes that “(he) was advised factually of (his) 1986 and 1987 merit increases in early July 1987”, he does not, however, accept that early July 1987 should be taken as the dies a quo for the purposes of ascertaining whether Rule 9.01, para. 2.01, has been complied with. He was not in a position, he maintains, to respond meaningfully to the assertions of malperformance and to challenge the low merit increases awarded to him until he received the explicit performance review by his Division Manager, i.e., until January 28, 1988. Accordingly, he says, this has to be regarded as the decision contested in the present procedure. His request for administrative review of April 25, 1988, he concludes, therefore, complied with the requirements of Staff Rule 9.01, para. 2.01.

43. The Tribunal does not share the Applicant’s view on this issue. Not only did the Applicant, according to his own admission, know that the size of his 1986 and 1987 merit increases was below normal level by early July 1987 at the latest, but by then he also had knowledge of the reasons for this low level. It appears clearly from the Applicant’s memorandum to Personnel Files of April 5, 1988 and from his appeal to the Appeals Committee of July 8, 1988 that he was aware for some time before July 1987, or alternatively that he became aware at the latest during his discussions with his superiors in June-July 1987, of the negative views of his Division Manager on his performance, and that he ascribed these views to the “untenable relationship”, the “bad chemistry”, which had evolved between his Division Manager and himself. He explicitly states, for example, that in early July 1987 his personnel officer explained to him that his low 1987 increase “implied a low performance assessment by (his) supervisor”. He admits also that he had previously discussed with his Division Manager the latter’s assessment. The situation was such, he explains, that as early as in July 1987 one of his supervisors advised him to seek reassignment in the Bank. To all this the performance review of January 28, 1988 did not add much that the Applicant was not already aware of from his June-July 1987 discussions with his supervisors. In effect, the performance review did not go much further than ascribing the low merit increases awarded to the Applicant in 1986 and 1987 to his poor performance. “I told him the reasons for this action in June last year”, the Division Manager added.

44. In the light of the preceding, the Tribunal determines that end June-beginning July 1987 is the latest date conceivably to be taken as the dies a quo for the purpose of compliance with Rule 9.01, para. 2.01. It remains, therefore, to be seen whether the administrative review has been requested within the time limits prescribed by this Rule.

45. Even assuming that the Applicant’s discussions with his supervisors in 1987 are to be regarded as complying with the provisions of paragraph 2.02 defining “step 1” of the administrative review procedure, the fact of the matter is that the formal written request for administrative review was filed only on April 25, 1988, i.e. , 9 months after the dies a quo defined in the most liberal way. Rule 9.01, para. 2.01, it may be recalled, provides for a maximum of 132 days, i.e. less than 5 months from the date of the decision the administrative review of which the Applicant requests.

46. In any event, the record does not substantiate any claim for exceptional circumstances which might condone the Applicant’s request for administrative review not within 5 months but more than 9 months after the moment he most certainly became aware of the low level of his merit increases and the reasons therefor. The Tribunal concludes that, even conceding to the Applicant his most optimistic views or arguments, his request for administrative review of April 25, 1988 can by no stretch of imagination be held as having been filed within the prescribed time limits. It follows that the Appeals Committee was right in deciding that it lacked jurisdiction because of non-compliance with Staff Rule 9.01 at the administrative review stage. It follows also that the Applicant did not exhaust “all other remedies available within the Bank group” before applying to the Tribunal. Hence, the application is not admissible.

Decision:

For these reasons the Tribunal unanimously decides that the application is not admissible.

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, May 25, 1990