



World Bank Administrative Tribunal

2016

Decision No. 540

**BI (No. 4),
Applicant**

v.

**International Finance Corporation,
Respondent**

(Preliminary Objection)

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**BI (No. 4),
Applicant**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.
2. The Application was received on 18 March 2016. The Applicant represented herself. The International Finance Corporation (IFC) was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency.
3. The Applicant challenges: (i) her 2014 Performance Evaluation Plan (PEP) assessment; (ii) her Salary Review Increase (SRI) rating; and (iii) her placement on an Opportunity to Improve (OTI) plan.
4. On 3 May 2016, the IFC filed a preliminary objection. This judgment addresses the IFC's preliminary objection.

FACTUAL BACKGROUND

5. On 26 July 1999, the Applicant commenced employment with the World Bank Group at its headquarters as a Program Assistant, Level GC, in the Human Resources Vice Presidency.
6. In October 2010, the Applicant began working as a Program Assistant, Level GC, with the IFC. In mid-November 2012, as a result of the reorganization of work within her unit, IFC management assigned to her certain responsibilities for Systems, Applications and Products in Data Processing (SAP) transactions.

7. The record demonstrates a prolonged strained relationship between the Applicant and her colleagues and supervisor. The Applicant states that a major part of the difficulties arose in 2012 because she was uncomfortable processing SAP transactions because

[s]ome transactions were not in compliance with the procurement guidelines and therefore I intently refused to get involved. The situation spilled over to the FY14 PEP where they focused on my inflexibility and no teamwork issues. Throughout this period and beyond, I have experienced work stress symptoms and informed the FIG [Executive Assistant] about them.

[...]

Numerous visits to the medical specialists followed but still the manager and [Executive Assistant] would not address my concern to have my SAP profile removed. They insisted that it was part of my TOR and I must comply. I felt that continuing to process SAP transactions will make me push limits of my moral standards and eventually become ill, thus leaving my circle of safety jeopardized [...]. [I]n late January 2013 they subjected me to be interviewed by the EBC to determine the ethical nature of my refused SAP transactions. And since I was not dissuaded by the results, [my manager] subjected me to a Fitness for Duty (FFD) assessment upon consultation with HSD's Occupational Health Specialist [...] in early March 2013. This simultaneously prompted my treatment by an external specialist with medication and therapy.

8. On 11 April 2013, the supervisor was informed that the FFD assessment concluded that the Applicant was fit for duty, but recommended that she be excluded from SAP processing tasks. Management accepted the recommended accommodation. The Applicant started a new work program on 20 May 2013.

9. On 17 April 2014, the Applicant's supervisor met with her for the mid-year performance discussion.

10. On 17 and 18 June 2014, the management in the Applicant's unit met for the preliminary management review, in which they reviewed the performance of over 400 staff members. On 23 June 2014, management asked all staff members to submit the names of their proposed multi-raters. The Applicant submitted the names of her proposed multi-raters the following day.

11. On 23 July 2014, management met for a second management review meeting to evaluate staff members' performance and performance ratings. There was another management meeting about staff members' performance ratings on 5 September 2014. On 9 September 2014, final performance ratings for the unit were sent to the Bank Group's Human Resources system.

12. The Applicant claims that she was given new Terms of Reference in October 2014, under which, she alleged, she was required to perform "[m]enial tasks," including "arranging mission travels, scanning [Statements of Expenditure] and legal docs, printing and mailing clients' documents, mail sorting, requesting badges for guests, scheduling meetings, etc."

13. The Applicant had a discussion with her management with regard to her PEP and her SRI for Fiscal Year 2014 (1 July 2013 – 30 June 2014) on 7 October 2014. She received a performance rating of 2. She contends that "management discussed [her] PEP and SRI [...] as merely perfunctory action as their performance decisions had already been finalized and pre-determined since September 9, 2014." The Applicant's PEP contained the following comments by her supervisor:

[The Applicant] works well within her designated responsibilities.

However, she habitually limits herself somewhat rigidly to the job description and declines work outside of the description as she sees it. Over time this has led to a situation where staff in the group ask other ACS for help rather than asking [the Applicant], putting more pressure on other ACS staff.

14. With regard to "Client Focus," the supervisor made the following comments on the Applicant's PEP:

Within her job description, as she sees it, [the Applicant] acts in a timely manner.

As noted above, [the Applicant] demarcates her areas of responsibility fairly sharply and is not responsive outside this demarcated area.

15. Under "Teamwork & Communications" on the Applicant's PEP, the supervisor stated the following:

[The Applicant] is not particularly a team player. She prefers not to trade favors with other colleagues in order to get the groups work done. Her communication, while usually polite, can be brusque and on occasion bullying. This discourages colleagues asking her for help and increases the work load on other more congenial ACS colleagues.

16. The supervisor noted on the PEP that the Applicant's strengths included "detail orientation" but also remarked that he "would dispute [the Applicant's] statement [...] that she 'thrives under pressure' and can manage 'multiple tasks simultaneously.'" With regard to "Areas of Improvement," the supervisor suggested: "Greater flexibility to improve team work. Better modulation of communication. More focus on meeting the business needs of the group and less on defining the limits of her job description."

17. On 12 December 2014, management provided the Applicant with an OTI plan.

18. The director of the Applicant's unit requested another FFD assessment for her, and the results were transmitted to the Applicant on 20 March 2015. The assessment concluded that the Applicant was fit for duty with certain recommended accommodations, including "[t]hat she be provided the opportunity on her request to be absent from work for medical reasons [...] for a period of at least 1-2 hours on a weekly basis" and "[t]hat her management provide individual support in her daily activities such as a coach, mentor or design a re-education program to address behavior related to the defined performance dimensions noted in the fitness for duty request and the IFC Competency Framework."

19. The Applicant claims that, while the FFD assessment was being conducted, her OTI was suspended. According to the Applicant, the OTI was reinstated on 17 April 2015 with an effective date of 20 April 2015. The Applicant contends that due to a death in her family, she was out of the office from 20 April to 17 June 2015. During the time that she was out of the office, according to the Applicant, the OTI was again suspended, and it was reinstated on 18 June 2015 after she returned to work.

20. In the meantime, the Applicant filed a Request for Review No. 230 with Peer Review Services (PRS) in January 2015, challenging her 2014 PEP, her performance rating on her Fiscal

Year 2014 performance evaluation, and the institution of an OTI plan. The PRS Panel released its report on 28 August 2015. The Panel found

that management provided a reasonable and observable basis for the 2014 PEP, the subsequent performance rating, and the decision to place [the Applicant] on an OTI Plan. The Panel determined further, however, that management did not follow the applicable procedures during the performance management process. Specifically, the Panel concluded that management did not provide [the Applicant] with the opportunity to address management's concerns regarding her performance during the 2014 PEP period before the management review meeting when management set her 2 performance rating. Because of the lack of the opportunity to respond and to explain issues relevant to her performance assessment, the Panel concluded that management did not act consistently with [the Applicant's] contract of employment and terms of appointment.

The Panel recommended that the Applicant be awarded compensatory damages in the amount of one month of her net salary. The responsible Vice President accepted the Panel's recommendation on 16 September 2015.

21. On 12 November 2015, the director of the unit received a memorandum from the Portfolio Head of the Telecom, Media, Technology & Venture Capital D, Telecommunication, Media and Technology Portfolio following the Applicant's OTI, in which the Portfolio Head recommended that the Applicant's employment be terminated pursuant to Staff Rule 7.01, Section 11 on Unsatisfactory Performance. The memorandum also stated:

Even though [the Applicant] has demonstrated ability to generally perform tasks assigned to her, feedback has consistently pointed out lack of adherence and improvements in the highlighted behaviors that were pointed out in the April 17th OTI letter. In particular, we collected documented evidence that she failed to perform collaboratively with colleagues, with staff who were too intimidated to ask you for support, and with supervisors who claimed you continued to engage in unproductive discussions about narrowly defined scope of work. The outcome of the OTI period is therefore unsuccessful.

22. On 3 December 2015, the Applicant reached out to a Staff Association representative about certain talking points for an upcoming meeting by email, which the IFC claims contained "threatening language." The Applicant met with the Lead Human Resources Specialist in early December 2015 with regard to the email, after which she was placed on administrative leave.

23. While the Applicant was on administrative leave, she requested access to her work emails and was provided with a laptop that had her emails on it. She emailed a Human Resources Specialist on 20 January 2016 and told her that she would like to return the laptop. In the same email, she stated the following: "I decided not to pursue cases against my management in order to heal and prevent further undue stress."

24. The Applicant emailed the Human Resources Specialist on 5 February 2016 to request that she be forwarded a specific draft email from her work account, which contained her online accounts and passwords. She said that the laptop she had received the previous month did not contain that email.

25. In response, the Human Resources Specialist told her that if her account was reactivated, she was the only person who could access her account, and other staff, including IT staff, could not do so. She was also told that if her account were to be reactivated, it would be a new account and would not contain the emails in her previous account, and that if she wanted to review the emails in her previous account, she could use the laptop.

26. The Applicant insisted that the email she was searching for could not be obtained using the laptop and requested reactivation of her email account again. In response, the Human Resources Specialist repeated the information she had previously given the Applicant, including that her previous emails were on the laptop and could be reviewed, and that if her account were reactivated, it would not contain her previous emails. The Human Resources Specialist also stated that

in accordance with AMS 12.10, paragraph 32, staff on administrative leave may be granted an extension of their email account during the administrative leave period based on a business justification and approved by their Vice President. In your case, such an extension was not requested or granted. Currently, there is no business need for you to have access to WBG email.

27. During the above email exchange, the Applicant sent at least ten emails from 5 February 2016 to 2 March 2016.

28. The Applicant filed her Application on 18 March 2016. In the Application, she challenges the decision of the IFC to accept the PRS recommendation in Request for Review No. 230, which upheld management's actions and decisions with regard to her 2014 PEP, her 2014 SRI, and her placement on an OTI plan. She seeks the following as relief: (i) "compensation commensurate to the salary differential and to the continuing mental anguish, the physiological and physical damage caused by the evident hostility endured from this management and colleagues;" (ii) that "all managers undertake the Living Our Values courses and other online Ethics trainings offered by the Ethics and Business Conduct Office (EBC);" (iii) that "all managers with SAP approver profiles take a Bank procurement policy training/accreditation in order to fully perform the job;" (iv) that "all managers...attend a required Retaliation Prevention Workshop;" (v) that "all senior leadership in any Vice Presidential Unit (VPU) reprimand reported bad managers or even dismiss them permanently;" and (vi) "an open door policy [...] between managers and staff during the performance year."

29. The IFC filed a preliminary objection on 3 May 2016.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

Preliminary Objections

30. In its preliminary objection, the IFC argues that the Applicant's claim challenging the IFC's decision to accept the PRS recommendation in Request for Review No. 230 is not admissible because it was not filed in a timely manner. The IFC contends that since the Applicant received notice of the IFC's decision on 17 September 2015, she should have filed an Application within 120 days of that date, which would have been 15 January 2016. However, the Applicant filed her Application on 18 March 2016. Therefore, the IFC argues that her Application was not filed in a timely manner.

31. The IFC contends that there are no exceptional circumstances for which the Applicant's delay in filing her Application should be excused. Specifically, the IFC argues that the Applicant has used the internal justice system before and should be aware of the time limit for filing an

application with the Tribunal. In addition, according to the IFC, while the Applicant requested mediation on 2 October 2015, a request for mediation does not affect the time limit for filing an application with the Tribunal. The IFC also contends that none of the circumstances the Applicant alleged constitute exceptional circumstances in the present case that would excuse the Applicant's delay.

32. The Applicant admits that she filed her Application after the expiration of the 120-day time limit. However, according to the Applicant, certain circumstances made it difficult for her to submit her Application in a timely manner. The Applicant states that while she was placed on administrative leave, she had no access to her HR information and only limited access to some of her files. The Applicant states that she therefore could not "finalize any write-ups for [her] upcoming PRS FY15 PEP/SRI and Notice of Admin Leave cases and pending WBAT appeals on a timely basis." Furthermore, the Applicant contends that in early August 2015, she had multiple appointments with a chiropractor and ongoing visits with a psychotherapist, as well as intermittent "colds" and "cough" for which she was allegedly given sick leave in October and November 2015. The Applicant also contends that "the Office of Mediation Services helped initiate a mediated exit for her" in September 2015. She claims that she "declined the exit offer in early October 2015 but requested its reinstatement on January 12, 2016." The Applicant states that the events and circumstances above "consumed [her] the whole time since and so far, debilitated [her] to the point of being numb to further stressors," and prevented her from filing her Application in a timely manner.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

33. The legal basis of the IFC's preliminary objection to the Applicant's challenge to the IFC decision to accept the PRS recommendation in Request for Review No. 230 is that the claim is inadmissible because it was not filed in accordance with Article II(2) of the Tribunal's Statute. Article II(2) states:

No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless:
[...]

(ii) the application is filed within one hundred and twenty days after the latest of the following:

- (a) the occurrence of the event giving rise to the application;
- (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; or
- (c) receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty days after receipt of such notice.

34. On its plain language, Article II(2) imposes specific time limits within which applications to the Tribunal must be filed to be admissible. These time limits may only be departed from under exceptional circumstances as decided by the Tribunal. In determining whether to uphold the preliminary objection of IFC in this case, the Tribunal must consider two questions. These are, (i) whether the Applicant filed her claim in a timely manner and, if not, (ii) whether there are exceptional circumstances that would excuse the untimely filing.

Whether the Applicant filed her claim in a timely manner

35. The IFC contends that the Applicant had 120 days from the date she received notification that the IFC accepted the recommendation of PRS to file a claim before the Tribunal. According to the IFC, the Applicant received that notification on 17 September 2015 and should have filed an Application with the Tribunal by 15 January 2016 but did not do so until 18 March 2016. The IFC argues that the Applicant therefore did not file her claim challenging the IFC's decision in a timely manner.

36. The Applicant admits that she filed her Application "very late." However, she points to certain circumstances to justify the delay.

37. In its prior jurisprudence, the Tribunal has emphasized the importance of the time limits prescribed by Article II(2). In *Agerschou*, Decision No. 114 [1992], para. 42, the Tribunal explained that the prescribed time limits are "important for a smooth functioning of both the Bank and the Tribunal." *See also Tanner*, Decision No. 478 [2013], para. 45. The Tribunal has also observed that the "long-delayed resolution of staff claims could be seriously complicated by the

absence of important witnesses or documents, and would in any event result in instability and unpredictability in the ongoing employment relationships between staff members and the Bank.” *Mitra*, Decision No. 230 [2000], para. 11.

38. According to Article II of the Tribunal’s Statute, the Applicant had 120 days from the date that she received notice that the relief requested or recommended would not be granted to file her Application. That date was 17 September 2015, the date on which she was notified of the IFC’s decision to accept the PRS recommendation in Request for Review No. 230. Therefore, the Applicant should have filed an Application by 15 January 2016. She did not do so. Her Application was not filed until 18 March 2016.

39. The Applicant points to the fact that on 12 February 2016, she requested of the Tribunal an extension of time within which to file her Application and that the extension requested by her was granted by the Tribunal. The Tribunal notes, however, that the grant of the extension was given with the express reservation that it was “without prejudice to the position of the Respondent with respect to any defenses or objections of any nature.” This reservation unmistakably conveyed that the extension granted by the Tribunal did not affect the IFC’s right to make a preliminary objection that the Applicant’s Application was not filed in timely manner but was filed in contravention of Article II(2).

40. The Tribunal finds that the Applicant’s challenge to the IFC’s decision to accept the PRS recommendation was not filed in a timely manner. This finding is in no way attenuated by the fact that the Tribunal granted the Applicant an extension of time within which to file.

Whether there were exceptional circumstances in this case

41. As noted above, Article II(2) of the Tribunal’s Statute allows the Tribunal to render a claim or application admissible even if it was not filed in a timely manner, if the Tribunal decides that there were exceptional circumstances justifying the late filing. The question which must now be addressed is whether exceptional circumstances existed in this case.

42. In this regard, the Applicant points to certain circumstances to explain or justify the delay in filing her Application. She contends that while she was placed on administrative leave, she could only access a “static version of [her] (incomplete, unable to forward nor print) Outlook account” and was therefore unable to finalize her write-ups for her Tribunal case in a timely manner. She also argues that she suffered as a consequence of certain medical conditions since June 2015, including spinal issues, visits with a psychotherapist, and intermittent colds and cough leading to authorized sick leaves in October and November 2015. According to the Applicant, these medical conditions “slowed down the effort and enthusiasm during this depressive state.” The Applicant also mentions other circumstances that may have contributed to her delay in filing the Application, including the threat of a loss of employment and visa status, a death in her family, pressure due to the OTI plan, and her placement on administrative leave. The Applicant argues that: “These aforementioned events are difficult by themselves and to act on them by retrieving facts from memory and write them accurately and completely required a measurable amount of time.” She also contends that a mediated exit was initiated for her in September 2015, but she declined the offer initially and requested its reinstatement on 12 January 2016. She argues that she sought an extension of time from the Tribunal after she received confirmation in mid-February that management would not reinstate the mediated exit.

43. The IFC counters that there are no circumstances, exceptional or otherwise, that would excuse the Applicant’s delay in filing her Application. On the contrary, the IFC points to particular emails that the Applicant sent that indicate the Applicant’s knowledge of the 120-day filing requirement, as well as her initial desire not to pursue a case against her management. The IFC mentions the email that the Applicant sent to the Lead Human Resources Specialist on 9 December 2015, in which she stated that she needed to “access docs relative to my upcoming PRS case and pending Tribunal appeals to meet the 120 day filing requirements.” In addition, the IFC points to an email that the Applicant sent to a Human Resources Specialist on 20 January 2016, in which she stated: “I decided not to pursue cases against my management.” The IFC argues that if the Applicant were able to contact Human Resources during and after the time she should have filed her Application, then there were no circumstances preventing her from communicating with the Tribunal as well, in order to request an extension of time. The IFC contends that the exceptional circumstances that the Applicant alleges from August 2015 and before could not have affected her

ability to file the Application, as the decision based on the outcome of the PRS recommendation she is challenging had not been made at the time. Furthermore, the IFC argues that since the Applicant was able to communicate with Human Resources and management and draft some of the Application during the time she suffered some of the circumstances she alleges, those circumstances cannot constitute exceptional circumstances that would have prevented her from filing the Application or requesting an extension of time. Regarding the Applicant's mediation, the IFC contends that mediation would not have affected the time limit to file an Application with the Tribunal.

44. In *Yousufzi*, Decision No. 151 [1996], para. 28, the Tribunal stated that:

The statutory requirement of timely action may [...] be relaxed in exceptional circumstances. Such circumstances are determined by the Tribunal from case to case on the basis of the particular facts of each case. In deciding that exceptional circumstances exist the Tribunal takes into account several factors, including, but not limited to, the extent of the delay and the nature of the excuse invoked by the Applicant.

45. Furthermore, in *Nyambal (No. 2)*, Decision No. 395 [2009], para. 30, the Tribunal recalled that:

In all such cases the Tribunal has followed a strict approach so as to prevent the undermining of statutory limitations. Exceptional circumstances cannot be based on allegations of a general kind but require reliable and pertinent 'contemporaneous proof' (*Mahmoudi (No. 3)*, Decision No. 236 [2000], para. 27).

46. In *Mahmoudi (No. 3)*, para. 27, the Tribunal stated that it was

unwilling to make exceptions to orderly procedure based on applicants' own descriptions of their emotional state without substantiation. Reliable contemporaneous proof is required. [...] In the absence of evidence, such as medical reports, the Tribunal is unwilling to accept self-serving declarations by an applicant to the effect that he was unable to deal with this issue, especially since no more was required than the simple articulation of grievances.

47. In this case, the Applicant has not provided any "contemporaneous proof" of the various circumstances that she alleges prevented her from being able to file her Application in a timely

manner. The only proof that the Applicant has submitted for her alleged medical conditions is the result of a Fitness for Duty assessment, which discusses her need for medical accommodations. However, this result is dated 20 March 2015, which is several months before the Applicant was required to submit her Application, and cannot be considered contemporaneous proof of the Applicant's ability to file the Application by 15 January 2016. Similarly, the Applicant has not submitted proof of how events that took place before she was notified of the PRS decision in September 2015 prevented her from being able to file an Application several months later.

48. Moreover, the medical conditions and other circumstances that the Applicant listed did not prevent her from communicating with officials in Human Resources during the 120 days that she had to file her Application with the Tribunal. For example, she contacted the Lead Human Resources Specialist on 9 December 2015, requesting access to certain relevant documents and showed that she had knowledge of the 120-day time limit. She also contacted a Human Resources Specialist shortly after the 120-day time limit expired, on 20 January 2016 and several times starting from 5 February 2016. She filed a request with the Tribunal for an extension of time on 12 February 2016, almost one month after the 15 January 2016 deadline to file her Application.

49. The Applicant alleges that she was not provided full access to her emails during the time that she was on administrative leave and thus could not finalize her Application for the Tribunal. The record indicates that the IT Department provided the Applicant access to her emails on a laptop. A Human Resources Specialist with whom she communicated told her she could have access to the laptop on multiple occasions. On at least one occasion, the Applicant kept the laptop overnight. When the Applicant expressed concern that she could not locate a particular email, a Human Resources Specialist informed the Applicant that she could review the emails on the laptop again. Therefore, the record shows that the Applicant had access and ample opportunity to review her emails and could take her time in doing so.

50. The Applicant also relied on the events surrounding the potential mediated exit as a circumstance that prevented her from filing her Application on time is also misplaced. The Applicant has, however, submitted no proof of how the circumstances regarding the mediated exit may have contributed to her delay in filing her Application. In any case, the Tribunal has

previously established that mediation does not automatically suspend the time limit for filing an application. In *Alrayes*, Decision No. 520 [2015], paras. 122-23, the Tribunal held:

Accordingly, even were it the case that the Applicant had also requested mediation in respect of the claim regarding the validity of the MOU, this would not automatically stay the 120 day term for filing that claim with the Tribunal.

[...]

Where an applicant requests mediation in respect of claims which, in the event that mediation does not succeed, must be brought directly to the Tribunal, he or she can communicate with the Tribunal as soon as possible after requesting mediation, either to request an extension of the time-limit for filing a prospective claim with the Tribunal, or to file such a claim and then request a stay of Tribunal proceedings pending mediation.

51. In light of the foregoing, the Tribunal finds that there are no exceptional circumstances that excuse the Applicant's late filing.

DECISION

The Application is inadmissible.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 4 November 2016