

World Bank Administrative Tribunal

Reports

2000

No. 236

**[ED] (No. 3),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

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

World Bank Administrative Tribunal

**[ED] (No. 3),
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

1. The World Bank Administrative Tribunal has been seized of an application, received on May 3, 2000, by [the Applicant] against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of Francisco Orrego Vicuña (a Vice President of the Tribunal) as President, Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges. A jurisdictional objection having been raised by the Respondent, the exchange of pleadings at this stage has been devoted to this issue. The case was listed on September 13, 2000.

General background and the issue raised

2. This is the third Application lodged by the Applicant subsequent to his severance from the Bank. The first Application challenged the Bank's decision not to grant the Applicant redundancy severance in addition to his pension; it was rejected in [ED], Decision No. 219 [2000]. [The Applicant's] second Application challenged the Bank's decision to declare his position redundant. In [ED] (No. 2), Decision No. 227 [2000], the Tribunal concluded that the Bank abused its discretion, and ordered reinstatement or compensation equivalent to 18 months' net salary. (The Bank chose the latter, and the Applicant received compensation in the amount of \$115,110.) The present Application challenges a determination by the Appeals Committee that it was without

jurisdiction to entertain a claim by [the Applicant] that he had suffered unlawful discrimination in the Africa Technical Families, Human Development 3 Division (AFTH3), and that the handling of a complaint he lodged jointly with three other staff members was wrongful. The basis for the Appeals Committee's decision was that the Appeal was untimely. Taking the view that the Appeals Committee's dismissal of the Appeal was proper, the Bank maintains in consequence that this Tribunal as well lacks jurisdiction to entertain the Application due to the Applicant's failure to exhaust prior available internal remedies in a timely manner.

Circumstances and nature of the grievance

3. The Applicant was one of several staff members who in July 1998 made written allegations of systematic discrimination against staff from developing countries within AFTH3. As a result, the Managing Director of the Bank (hereinafter "the Managing Director") initiated an investigation through the Office of Professional Ethics (now renamed the Office of Business Ethics and Integrity). The investigation was conducted by an independent lawyer, who prepared a 130-page confidential report (hereinafter "the Lynk Report") concluding that the complainants had not demonstrated discrimination on the grounds of race or nationality. The Applicant (along with the other complainants) received a copy of the Lynk Report on July 12, 1999.

4. By a memorandum to the President of the Bank dated July 14, 1999, the Applicant and the other complainants requested an "administrative review of the outcome of the AFTH3 discrimination investigation conducted through [the Managing Director] ... and the Office of Professional Ethics." Requests for administrative review were at the time governed by Staff Rule 9.01. The pertinent paragraph of Staff Rule 9.01 (i.e., paragraph 2.02) then in effect (i.e., the November 1996 version) provided:

If an administrative decision was made by: (i) an individual whose direct manager is the Vice President, Human Resources; or (ii) the most senior person in a unit that reports directly to a Managing Director or the President, the staff member may request the person who made the administrative decision to conduct the administrative review or may proceed directly to the Appeals Committee without first seeking administrative review.... [On February 17, 2000, Staff Rule 9.01 (Administrative Review) was supplanted by Staff Rule 9.01 (Office of Mediation).]

5. In the request, the Managing Director's role in the investigation process was criticized, as were the findings of the investigation and the "practices" of the investigator.

6. The President of the Bank forwarded the request for administrative review to the Managing Director for his response. In a memorandum to the complainants dated July 30, 1999, the Managing Director, in pertinent part, wrote:

I have reviewed carefully your memorandum together with the [Lynk Report] Now, on behalf of President Wolfensohn, I must inform you that Bank management fully accepts the findings, conclusions and recommendations contained in the [Lynk Report].

....

Whatever claims you may still have should be taken before the existing Bank institutions for grievance alleviation, in conformity with existing rules and regulations available to all staff members. Bank management cannot undermine the Bank grievance processes and, in effect, apply to you a standard different from what is available to other staff who are limited to existing mechanisms for alleviation of grievances.

Therefore, Bank management is satisfied with Mr. Lynk's review and is not prepared to reconsider this matter further.

7. On August 12, 1999, in response to the Managing Director's memorandum, Ms. X, one of the complainants, sent on behalf of all the complainants an "urgent and confidential" e-mail message to the President captioned "Request for Administrative Review." Ms. X declared that she and the other complainants could not

“accept any response by [the Managing Director]” to their July 14, 1999 request for administrative review because it related to “actions taken, or not taken, by his office with respect to the AFTH3 investigation and its outcome for the affected staff.” Ms. X explained the complainants’ position as follows:

It is obviously a conflict of interest if [the Managing Director] conducts a review of his own actions.... This is in violation of [Staff Rule 9.01] which clearly indicate[s] that a person other than the manager (of last review) should conduct the Request for Administrative Review (in this case [the Managing Director]).

Given the fact that the review of July 30, 1999 by [the Managing Director] is not a legal review, we would appreciate an unbiased review by another senior staff by August 17 (the deadline for this review according to the Rule 9.01). Otherwise, we have no choice but to pursue this matter through the Appeals Committee and Administrative Tribunal inside the Bank and through various institutions outside the [B]ank which value and seek redress for abuses of power against human rights.

8. The complainants did not receive a response to the August 12, 1999 “Request for Administrative Review.” On October 26, 1999, the Applicant filed an appeal with the Appeals Committee. Before the Appeals Committee, the Applicant challenged “the outcome of the AFTH3 discrimination investigation conducted through [the Managing Director] and the Office of Professional Ethics.”

9. On November 4, 1999, the Respondent submitted a challenge to jurisdiction, arguing essentially that the Applicant failed to file his appeal with the Appeals Committee in a timely manner under Staff Rule 9.03, paragraph 5.01 (i.e., within 30 days of receiving the Managing Director’s July 30, 1999 administrative review). Following an exchange of pleadings on the question of jurisdiction, the Committee on March 17, 2000, issued a decision limited to that question, holding that it was without jurisdiction and dismissing the Applicant’s claim. The Appeals Committee reached the

following conclusions: (i) pursuant to paragraph 2.02 of Staff Rule 9.01, the Managing Director was the appropriate person to conduct the administrative review; (ii) the Applicant had the option under that Staff Rule to proceed directly to the Appeals Committee instead of requesting administrative review; (iii) the Bank's failure to respond to the August 12, 1999 "Request for Administrative Review" was not misleading and thus had no effect on the time limit that began to run from the Applicant's receipt of the Managing Director's July 30, 1999 administrative review; and (iv) the Applicant could have requested a 30-day extension of time for filing his appeal to the Appeals Committee. In the Committee's opinion, the Applicant's failure to request an extension, coupled with his delay until October 26, 1999 in filing his appeal, demonstrated "a lack of intent at the outset to pursue this matter through the Bank's formal grievance system."

10. On May 3, 2000, the Applicant submitted this third Application to the Tribunal. In it, he lists the "[d]ecisions contested ... and whose rescission is requested" as the following: (i) "[n]o response from Respondent to the request for Administrative Review dated August 12, 1999 ... in violation of the Bank's rules"; (ii) "[d]eliberate deception of Third World staff by protracting a biased investigation ..."; (iii) "[i]llegal Administrative Review of July 30, 1999 by the same manager [the Managing Director] whose decision had adversely affected staff in violation of the Bank's rules"; and (iv) "Appeals Committee refusal of March 17, 2000 to conduct a review of Applicant's Appeal on the wrongful ground that the Appeal was sent out of time."

The jurisdictional objection

11. The Bank observes (i) that it was the Managing Director who made the administrative decision to carry out the investigation that led to the Lynk Report, and (ii) that the Managing Director reported directly to the President. In the light of these two

facts, Staff Rule 9.01, paragraph 2.02, gave the Applicant a choice between seeking an administrative review from the Managing Director or proceeding directly to the Appeals Committee. The Bank asserts that the Applicant chose to request administrative review, with the consequences that the Managing Director was precisely the person to conduct the review, and that the Applicant had, pursuant to Staff Rule 9.03, 30 days (i.e., until August 30, 1999) to file an appeal with the Appeals Committee after receiving the Managing Director's review on July 30, 1999. It is the Bank's position that as the Applicant filed his appeal more than 30 days after July 30, 1999 (i.e., on October 26, 1999), his appeal was properly deemed untimely and inadmissible by the Appeals Committee.

12. By failing to invoke in a timely manner the internal procedures for "Appeals Committee review of Respondent's [Lynk] Report," the Applicant, in the Bank's view, failed to "exhaust all other remedies available" as required by Article II, paragraph 2(i), of the Tribunal's Statute.

The Applicant's arguments seeking to overcome the jurisdictional objection

13. First, the Applicant insists that the memorandum of July 14, 1999, should have been understood as directed against the Managing Director, and that therefore it was wrong for the latter to conduct the review.

14. The Tribunal accepts that the memorandum did contain criticisms of the Managing Director's role in connection with the Lynk Report. Nevertheless, the thrust of the complaint was directed against Mr. Lynk's methodology and conclusions. Under the Rules there was nothing wrongful about the Managing Director conducting the administrative review.

15. If the complainants were apprehensive about the Managing Director's alleged conflict of interest, they had the clear option under paragraph 2.02 of Staff Rule 9.01 (as it then was) to avoid him entirely by addressing themselves directly to the Appeals Committee. This they failed to do; the President of the Bank had no reason to consider that the complainants were seeking to go outside paragraph 2.02 – let alone to allow them to do so on the basis that he should somehow have understood that they were ill at ease with the Managing Director.

16. The Applicant invokes in support of his position paragraph 2.02 of the May 1995 version of Staff Rule 9.01, which read in pertinent part:

If the most senior person in a vice presidential unit made the [administrative] decision, the [administrative] review shall be conducted by that person, unless the staff member requests that the Senior Vice President, Management and Personnel Services, select another official at the level of Vice President or above to conduct the review.

It is by reference to this text that the Applicant argues that when the actions of a particular manager are in question, he or she should not conduct the requested review if the complainant requests that it be conducted by another official.

17. The first problem with this analysis is that the complainants (including the Applicant) made no such request; their position appears to have been that the President should implicitly have understood that the Managing Director should not be involved in the review.

18. But there is a second and more fundamental problem, which is that the May 1995 version of paragraph 2.02 simply was not in effect in July 1999; it had been supplanted by the November 1996 version quoted above in paragraph 4, under which the

option, simply put, was no longer “the Managing Director or another manager” but rather “the Managing Director or direct application to the Appeals Committee.”

19. It would therefore have been wrong for the President to have selected another official (including himself) to conduct the review. If the complainants considered that their grievance concerned the Managing Director, and they did not want him to deal with the matter, it was up to them to seize the Appeals Committee at that stage. If they did not do so, the Managing Director was precisely the appropriate person under the Rules to conduct the review, and an appeal from the Managing Director’s decision to reject the complaint could be made to the Appeals Committee, provided that it was exercised within 30 days, that is to say by August 30, 1999.

20. If the Applicant had done so, he could have not only obtained a review entirely free of the conflict of interests he attributes to the Managing Director, but indeed a further right of review before this Tribunal. Even if one considers the Managing Director to have been in a compromised position, the Applicant’s predicament had nothing to do with the Managing Director, and everything to do with his own failure to avail himself of the applicable mechanisms.

21. Staff members must be held to awareness of the Staff Rules. It scarcely needs to be recalled that the Tribunal has often emphasized the seriousness of the requirement of exhaustion of internal remedies *on a timely basis*. As stated in Setia, Decision No. 134 [1993], para. 23:

As regards, first, the issue of the timeliness of the Applicant’s appeal to the Appeals Committee, the Tribunal recalls that, in view of the utmost importance which attaches to the statutory requirement of the exhaustion of all other remedies available within the Bank Group, and in particular to the findings and recommendations of the Appeals Committee, the Tribunal has found in previous cases that

[W]here 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). (de Jong, Decision No. 89 [1990], paragraph 33)

This principle was reaffirmed in Romain, Decision No. 136 [1994], para. 27: “[F]ailure to invoke in a timely manner the internal procedures for administrative review within the Bank constitutes a failure to ‘exhaust all other remedies available’ that, in turn, results in [the] application being inadmissible before the Tribunal by virtue of Article II, paragraph 2(i), of the Statute.”

22. Secondly, the Applicant argues in his pleadings on the question of jurisdiction that the August 12, 1999, e-mail message to the President should have been considered an autonomous request for administrative review; in the absence of a response – viewed as a “decision” – to that e-mail, no time limit applies to his grievance.

23. The Tribunal notes that the Applicant took a contrary position in his Application, which describes the August 12 message as a “resubmission” of the July 14 complaint. The Tribunal considers that the Applicant was without any doubt right the first time in this respect. Complainants cannot infinitely neutralize the time requirements for taking matters to the Appeals Committee by submitting endless requests to reconsider disappointing administrative reviews and to consider that each “new” request introduces a new controversy subject to an autonomous process.

24. The August 12 e-mail clearly complained of the July 30 review conducted by the Managing Director. Reading the conclusion of the August 12 message, i.e., that unless another review were conducted the complainants “have no choice but to pursue

this matter through the Appeals Committee ...,” the Bank had no reason to doubt that this pertained to the Managing Director’s review, nor any reason to do anything at all in response to the August 12 e-mail as long as it was content to stand by what management had previously done and decided.

25. Given the fact that the complainants on whose behalf the August 12 e-mail was sent asked for “an unbiased review by another senior staff by August 17,” it moreover cannot be accepted that the Applicant, who was one of these complainants, could have concluded that he was entitled to await a “decision” with respect to this e-mail and that the failure to answer it was a “deceitful ... tactic as an excuse to kill this important case.” By the terms of the e-mail itself, it was obvious after a single week’s silence that the Bank was *not* acceding to the request.

26. Thirdly, the Applicant argues that a number of exceptional circumstances should be accepted as excuses for any failure to exhaust internal remedies in a timely manner. In particular, he contends that he was “in [a] state of total shock” in the months of August-September 1999 as a result of his wrongful redundancy in 1998, and he therefore “hardly could talk to his friends or write a short e-mail.”

27. The Tribunal is unwilling to make exceptions to orderly procedure based on applicants’ own descriptions of their emotional state without substantiation. Reliable contemporaneous proof is required. Moreover, as the Tribunal is well placed to know, during the relevant period the Applicant was vigorously pursuing other claims against the Bank. Indeed the Application to this Tribunal, and a request for provisional relief, were filed in [ED] (No. 2) on July 28, 1999. 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 with which the Applicant was well familiar. The present case is thus to be distinguished from Mustafa, Decision No. 195 [1998], where the Tribunal accepted an application notwithstanding untimeliness after the applicant provided evidence that he was ill and confined to bed for one month during the period in which he ordinarily should have acted upon his grievance.

28. As the Tribunal has held in previous cases, ignorance of applicable regulations is no excuse. (*See, e.g., Guya*, Decision No. 174 [1997], para. 7; *Setia*, Decision No. 134 [1993], para. 31; and *Mendaro*, Decision No. 26 [1985], para. 33.) In this case, with an Applicant already involved in two pending cases, such an argument is not only unacceptable in principle, but unpersuasive in fact.

29. The Tribunal has noted the Applicant's argument to the effect that "the subject matter of this Application is of great importance to the Institution and requires a Hearing by the Tribunal." The Tribunal has also taken cognizance of a letter written to its President, dated July 26, 2000, by the three other persons who had also sought to challenge the Lynk Report to the effect that "this case must be reviewed by the Tribunal" in order to establish and sanction that "biased and deceitful" investigation as conducted through the Office of Business Ethics and Integrity. It must be understood, however, that the Tribunal is not in a position to assert jurisdiction unless the requirements of the Statute are observed. As any decision-making institution, the Tribunal must ensure that it acts within the scope of its authority. Applicants who have failed to take the action necessary to open or preserve access to the Tribunal cannot hope that it will disregard its statutory limitations only because they are eager to be heard.

Decision

For the above reasons, the Tribunal unanimously decides that the application is inadmissible.

/S/ Robert A. Gorman
Robert A. Gorman
President

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

At Washington, D.C., November 10, 2000