

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 7
(31 March 1995)**

**Peter J. Nelson
v.
Asian Development Bank**

**E. Lauterpacht, Chairman
F.P. Feliciano, Member
M.D.H. Fernando, Member**

A. Facts

1. The Bank, by letter dated 29 July 1982, offered the Applicant a fixed-term contract for a period of three years as Financial Analyst in the Bank's Agriculture and Rural Development Department. The letter stated that the appointment may be extended at the option of the Bank for a further fixed term. The Applicant accepted that offer and commenced employment with the Bank from 8 October 1982.
2. On 12 July 1985 the Applicant addressed a complaint to the President of the Bank, captioned "Staff Morale", alleging victimization consequent upon his refusal to accede to requests from senior Bank officials to falsify data regarding projects in order to induce the Board of Directors to approve loans.
3. The Applicant alleged in particular, that instructions had been given to him to falsify data on an Edible Oil Project in Burma; that he had refused, and that the Project had not been approved in 1984; that in January 1985 his performance had been unfavourably appraised and the renewal of his fixed-term contract had not been recommended; and that in April 1985 after a Mission to Burma, on the instructions of the Mission Leader, the Applicant had modified the financial data relating to the Project so as to support a favourable appraisal.
4. On 2 September 1985 the Bank informed the Applicant that a formal inquiry would be conducted into his complaint, that pending conclusion of that inquiry his contract was extended with effect from 7 October 1985, and that he was temporarily transferred to the Post-Evaluation Office. No inquiry was held. However, in December 1985 the Bank authorized a Technical Review of the Burma Edible Oil Project, but this was not stated to be as a result of the Applicant's complaint. The Applicant submitted his comments to the persons reviewing the Project.
5. In February 1986 the Board of Directors approved the loan for the Project.
6. The Bank informed the Applicant on 10 April 1986 that, having considered the extension of his original fixed-term appointment, the Bank was unable to find a position suitable for him, and that his contract could only be extended until 7 October 1986.
7. On 5 May 1986 an article appeared in the Wall Street Journal on the Burma Edible Oil Project. It quoted Bank officials as having said that the Applicant had been transferred because of "performance weaknesses" and not for his negative project appraisal. Despite the Bank's denial that such a statement had been made, the Applicant informed the Bank that if he had to

leave the Bank without an inquiry being held into his complaint he would be compelled to give an interview to the press.

8. Articles critical of the Burma Edible Oil Project appeared in the Far Eastern Economic Review of 27 November 1986, and in an Australian magazine, Triple A, in February 1987. Both commented approvingly on the Applicant's conduct in relation to that Project.

9. The Applicant further alleged that after he left the Bank, the Bank held an inquiry, of which he had no notice, and found him guilty of giving information to the press; and that the Bank informed him - he does not say how - that this would be held against him. He claimed that the Bank thereafter prevented him from securing employment by giving unfavourable references to international organizations to which he applied for employment. He alleged (without providing details) that the Commonwealth Secretariat withdrew an offer of employment, made in or about July 1987, because the Bank furnished an unfavourable reference. He did not specify the other international organizations to which the Bank gave unfavourable references.

10. In February 1989, the Australian Parliamentary Joint Committee on Foreign Affairs, Defence and Trade, while reviewing Australia's International Aid Program, inquired into allegations made by the Applicant regarding "Accountability of International Agencies for Staff Management." The Committee reported that it had no authority to call for evidence from the Bank and recommended the establishment of an appropriate forum to inquire into such allegations.

11. On 18 October 1993 the Applicant addressed a letter to the President of the Bank as follows:

"In welcoming you to your new important post, I would ask you to assume your responsibilities and with a clean sweep to right any wrongs which have gone before you. In this instance I would ask you for a review of the treatment I received while employed in the [Bank] between October 1982 and October 1986."

After referring to various acts by which he alleged that he had been victimized by his then superiors, he requested the President

"to correct the past injustice which at the same time could only help to elevate the status of the Bank and the morale of the staff working in the Asian region I ask you to clean the slate and at the same time demonstrate your impartiality.

The best way to do this would be to reengage me in the Post-Evaluation Office where I last worked since then no one would ever doubt [the Bank's] sincerity in accurately post-evaluating its projects by someone who had always remained loyal to [the Bank] but could not be bought and refused to be intimidated."

12. The Director, Budget, Personnel and Management Systems Department ("BPMSD"), replied to this letter on 25 February 1994:

"While I was not in the Bank when the alleged wrongful treatment occurred, I have had the opportunity to carefully review the files and have discussions with concerned staff. I am aware that the Government of Australia, as well as its Parliamentary Committees, took note of your allegations, and therefore the Bank had considerable discussions with the then Executive Director for Australia to the Bank. After considering the information, I am of the view that your allegations were amply publicized, examined, and sufficiently

dealt with by all concerned, not only within the Bank but also by member governments, and that there is no need to re-open the case. It was the Bank's managerial decision not to renew or extend your contract at the end of the fixed-term contract.

Concerning your specific request for re-employment in the Post-Evaluation Office, regrettably I am unable to consider your application. The Bank's overall strategic agenda and operational needs, coupled with country-focussed strategies geared toward each developing member country, has resulted in a different type of organization you left several years ago. We are in process of major changes in the skill-mix of our present staff and accordingly it is not possible to offer any prospects for employment at the Bank."

B. Relief claimed

13. Treating this letter of the Director, BPMSD, as notice that the relief asked for would not be granted, on 23 March 1994 the Applicant applied to the Tribunal seeking relief which can be classified broadly as follows:

- a. a direction that adverse findings recorded in his personal file be expunged after a fresh inquiry, with his participation, and that retractions be issued to the appropriate institutions;
- b. damages for the Bank having blocked his employment elsewhere;
- c. reinstatement at a level appropriate to his current qualifications and experience or compensation ("for the Bank's criminal action") in a sum equivalent to salary from termination until age of retirement; and
- d. disciplinary action against staff members responsible for misrepresentation to the Bank and to member Governments of facts affecting him.

C. Application for separation of issues

14. In its Answer of 15 July 1994, without replying to the merits, the Bank pleaded that the Application was inadmissible *ratione temporis* and that the claim for re-employment was outside the jurisdiction of the Tribunal. The Bank made an application to the Tribunal "in the exercise of its inherent power to regulate its own procedure in the interests of justice, to separate the merits of the case from the jurisdictional issues [as] the issue of admissibility is quite distinct from the issues on the merits and separation is highly likely to lead to a speedy resolution of the case and a substantial saving in time and costs." The Bank submitted that other Administrative Tribunals had recognized such an inherent power to determine jurisdictional issues before considering the merits of a case.

15. On 1 August 1994 the Tribunal invited the Applicant to comment on this application.

16. The Applicant, while accepting that it was an established principle that tribunals may separate jurisdictional issues from the merits of a particular case if it would be in the interests of justice to do so, contended that:

- a. it was for the Tribunal to decide whether to separate the jurisdictional issues and that the Bank was not entitled to request separation;

- b. by transmitting the Application to the Bank for its Answer the Tribunal had determined that there appeared to be a case to answer and had impliedly decided that it did have jurisdiction;
- c. in any event, the Rules of the Tribunal did not provide for such separation, and by failing to reply on the merits within the prescribed time the Bank was in breach of the Rules and had no right to file a further Answer; and
- d. his Application related to a continuing state of things, and his grievance was that he was denied relief by the BPMSD letter of 25 February 1994; thus the issues of jurisdiction and the merits were linked.

17. The Tribunal adopted an amendment to Rule 7 of its Rules of Procedure, with effect from 9 September 1994, permitting the Respondent to seek separation of the jurisdictional issues of a case before consideration of the merits (Rule 7(6)). The Applicant was informed that the amendment as such did not apply to this case.

18. On 12 September 1994 by virtue of its inherent power to regulate its own procedure, the Tribunal allowed the application of the Bank, "[h]aving regard to the nature of the matter, the time that has lapsed since the events mentioned in the Application and the fact that the issues arising on the substance of the Application appear to be distinct and separable from jurisdictional issues."

19. The Tribunal gave the Applicant a further opportunity to supplement his previous submissions on the substance of the jurisdictional issues.

D. Admissibility

20. The Applicant pleaded that:

- a. although he had been informed that the amendment to Rule 7 did not apply to his case, in allowing the application made by the Bank, that amendment was being applied retrospectively. He submitted that the Tribunal could not change its procedure with retrospective effect;
- b. the Tribunal had prejudged the issue by holding that "the events mentioned in the Application" had occurred long before the Application, although the event on which the Applicant was relying took place in February 1994;
- c. the application was admissible *ratione temporis* as it related to a current state of affairs arising from the BPMSD letter because the Bank's records contain adverse findings against the Applicant which have been communicated to other international institutions, and because re-employment in the Bank was currently being denied, unreasonably and vindictively; and
- d. in any event, and without prejudice to his position above, the application was admissible under Article II, paragraph 3, of the Statute as being one involving "exceptional circumstances." "Exceptional" in common usage means "something out of the ordinary." The extraordinary nature of the allegations made against the Bank, the Bank's non-compliance with the Rules of Procedure applicable at the time the Application was filed

and the Tribunal's decision to permit separation of the jurisdictional issues constituted exceptional circumstances.

21. The Bank responded that:

- a. although the Applicant seeks to found his Application on the letter of 25 February 1994 from the Director, BPMSD, he is really challenging decisions taken long prior to that date, over which the Tribunal had no jurisdiction because they were taken before 1 January 1991. The Applicant could not avoid mandatory time limits simply because the Bank was courteous enough to reply to his letter, written more than seven years after he left the Bank;
- b. the mere existence of records relating to the Applicant's employment at the Bank cannot be used to overcome the time-bar; in any event, the Applicant failed to produce any evidence to substantiate his allegations (which the Bank denied) that the contents of those records were communicated to other international institutions;
- c. the decision of the Bank not to re-employ the Applicant is outside the jurisdiction of the Tribunal (under Article II) as it does not constitute a non-observance of the Applicant's former contract of employment or terms of appointment. In any event, the Applicant derives locus standi before the Tribunal by virtue of being a former member of the Bank's staff; he cannot resurrect any time-barred claims relating to his former employment by filing a new application for employment; and
- d. Article II, paragraph 3, of the Statute concerns procedural and temporal conditions which must be satisfied, save in exceptional circumstances, for an Application to be admissible. "Exceptional circumstances" are circumstances relating to the delay in the filing of the Application, and not the extraordinary circumstances of the case itself. The Applicant has failed to prove any "exceptional circumstances."

22. The Applicant is mistaken in thinking that the Tribunal ordered the separation of the jurisdictional issues by applying the amended Rule 7(6) retrospectively. The Tribunal acted in the exercise of its inherent jurisdiction, consistently recognized in decisions of Administrative Tribunals (such as Mendaro, WBAT Reports 1985, Decision No. 26). The fact that the Tribunal has thought it desirable to make a rule specifying how its inherent jurisdiction may be invoked does not mean that it did not previously have that jurisdiction.

23. The Applicant is also mistaken in his claim that in making that order the Tribunal prejudged the case in any way. One important consideration was that several issues of fact arose in respect of events mentioned in the Application which were alleged to have occurred while the Applicant was in the service of the Bank and shortly thereafter. These issues of fact were entirely distinct from the issues of jurisdiction which arose from the cause of complaint set out in the Applicant's letter of 18 October 1993. Both convenience and the interests of justice justified the Tribunal in ordering their separation.

E. Findings

24. Article II of the Statute of the Tribunal provides:

"1. The Tribunal shall hear . . . any application by which an individual member of the staff of the Bank alleges non-observance of the contract of employment or terms of appointment of such staff member. . . .

2. [T]he expression 'member of the staff' means any current or former member of the Bank staff

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

- a. the applicant has exhausted all other remedies available within the Bank . . . ;
and
- b. the application is filed within ninety days after the latest of the following:
 - i. the occurrence of the event giving rise to the application;
 - ii. receipt of notice, after the applicant has exhausted all other remedies available within the Bank, that the relief asked for or recommended will not be granted;"

Article XIV provides:

"Notwithstanding Article II, paragraph 3 of this statute, the Tribunal shall be competent to hear any application concerning a cause of complaint which arose subsequent to 1 January 1991, provided, however, that the application is filed within ninety days after the entry into force of this statute."

The Statute entered into force on 1 April 1991.

25. The Applicant's claim for re-employment is based on treatment between October 1982 and October 1986 culminating in an alleged unfair refusal to renew his contract in October 1986. Under Article II, read with Article XIV, of the Statute, the Tribunal has no jurisdiction to entertain an application in respect of grievances arising before 1 January 1991. Since this claim relates to a grievance arising before that date, the Tribunal has no jurisdiction to entertain it.

26. The Applicant's submission that the letter of 25 February 1994 from the Director, BPMSD, was the event giving rise to the Application or was notice that the relief asked for will not be granted is untenable. What the Applicant sought on 18 October 1993 was a review of the treatment allegedly meted out to him while in the employment of the Bank as well as relief by way of re-employment. The refusal of such review and relief on 25 February 1994 did not constitute a different cause of complaint arising after 1 January 1991. His complaint continued to be that he had been unfairly treated over the Burma Edible Oil Project. Where a complaint is time-barred or otherwise not within the jurisdiction of the Tribunal, a complainant cannot seek a review of such complaint and attempt to found the jurisdiction of the Tribunal upon a refusal of such review. The Tribunal holds that the application is inadmissible *ratione temporis*.

27. The Tribunal has power under Article II, paragraph 3, of the Statute to entertain an application in "exceptional circumstances", notwithstanding non-compliance with subparagraphs (a) and (b). "Exceptional circumstances" are those which prevent compliance with the requirements as to time and internal remedies. They do not include the extraordinary nature

of the grievance. In any event, Article II, paragraph 3, of the Statute does not empower the Tribunal to entertain applications concerning a cause of complaint which arose before 1 January 1991, even in "exceptional circumstances."

28. The Applicant contends that the Bank is guilty of a continuing breach. He argues that the Bank continues to maintain incorrect personnel records relating to him and to furnish unfavourable references to potential employers.

29. There is no doubt that there are adverse comments in the personnel records of the Applicant which the Bank continues to maintain. The Applicant had knowledge while he was still in the employment of the Bank of unfavourable observations made in his Performance Evaluation Reports for the years 1984 and 1985, including a recommendation against the renewal of his fixed-term contract.

30. The Applicant's complaint as to the correctness of his personnel records was thus a grievance which arose, and of which he had knowledge, prior to 1 January 1991. It is not a complaint arising subsequent to 1 January 1991 within the meaning of Article XIV of the Statute. It is true that while the Applicant was in employment there was no procedure available to him for administrative review, but this did not entitle him to bring a matter to this Tribunal other than within the time limits set by the Statute. Even assuming, hypothetically, the validity of the Applicant's claim of a continuing state of things, such as to make it the basis of a complaint otherwise qualifying for filing under the Statute, the Applicant, knowing of it as he did before 1 April 1991, failed to file the Application within ninety days thereafter. The Tribunal has therefore no jurisdiction to entertain this claim.

31. In regard to the allegation that the Bank furnished unfavourable references, the Applicant has given particulars, although inadequate, of only one such instance, said to have occurred in July 1987. Any complaint in that respect is clearly time-barred. As to the other unfavourable references, not only does the Applicant give no details of them, he does not even specify when they were furnished. Since he does not state that these were given after 1 January 1991 the Tribunal has no jurisdiction to entertain this claim.

32. The request for disciplinary action against staff members responsible for alleged misrepresentation to the Bank and to member Governments of facts affecting him was not raised by him in his appeal for review of 18 October 1993 and is therefore inadmissible under Article II, paragraph 3(a), of the Statute. The request is also inadmissible under Article II, paragraph 2, of the Statute as it does not arise from the non-observance of his contract of employment.

Decision:

Although amendments made to the Statute of the Tribunal on 22 December 1994 (effective 1 January 1995) increased the number of Members of the Tribunal to five and also permit the Tribunal to adjudicate in panels of three, the Board of Directors of the Bank have not yet appointed the additional Members of the Tribunal foreseen in those amendments. The Tribunal has, therefore, decided that the present case should be considered and determined by reference to the Statute of the Tribunal as it stood prior to the adoption of the above mentioned amendments.

For these reasons the Tribunal unanimously decides that the Application is inadmissible.