

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 51
(21 September 2000)**

**Taina Toivanen
v.
Asian Development Bank**

**Mark Fernando, President
Robert Gorman
Thio Su Mien**

1. The Applicant joined the Respondent-Bank ("the Bank") on 9 August 1996 as a Treasury Officer (Level 4), on probation, on a fixed-term appointment for three years. She worked as a portfolio manager in the Investments Division of the Treasurer's Department ("TDID"). It was the responsibility of the portfolio managers to manage the Bank's investment portfolio, which in 1998 was about \$10 billion and generated about 70% of the Bank's net income. On 30 June 1997 her appointment was confirmed with effect from 9 August 1997. Her principal complaint relates to the Bank's decision of 8 February 1999 not to convert her fixed-term appointment into a regular appointment, and not to extend it.

2. The parties having agreed to dispense with the Bank's administrative review procedure, the Applicant appealed to the Appeals Committee which, on 16 September 1999, recommended the rejection of that appeal. The President of the Bank having accepted that recommendation, the Applicant applied to the Tribunal on 11 December 1999. It is not disputed that she has exhausted her internal remedies and that her Application is receivable.

3. The Applicant claims that the decision not to renew her appointment and the decision-making process were both flawed. The Bank contends that the Applicant did not have a legal expectancy of renewal of her appointment; that the skills-mix requirements of TDID had changed, and that she no longer met the changed requirements – and that was the main reason for the non-renewal; that an accurate reading of her performance evaluation ratings (PER) showed that her performance was at best average; that she was not suitable for further employment; and that the Bank had fully complied with due process and had given her ample opportunity to be heard as per the applicable Administrative Orders.

I. Non-renewal of Applicant's Appointment

4. The Bank's Administrative Order ("A.O.") No 2.01 makes the following provisions in regard to the regularization, extension and non-renewal of fixed-term appointments:

13.1 The Bank is under no obligation to extend or convert a fixed-term appointment of a staff member. Such appointment may be extended or converted to a regular appointment, when the following criteria are met:

- a. The Bank decides that it will continue to require the staff member's particular blend of skills and experience for the foreseeable future; and

- b. The Bank is in all respects fully satisfied with his/her performance and suitability for further employment.

13.2 Heads of Departments/Offices are required to make a recommendation to the Director, BPMSD, not later than seven months prior to the expiry date of a staff member's fixed-term appointment, as to its regularization, extension or non-renewal, which shall be copied to the staff member. In cases where the extension or non-renewal of the staff member's fixed-term appointment is recommended, such recommendation shall be discussed with the staff member, who shall be given five working days to submit comments. The Director, BPMSD, in consultation with the concerned Vice- President, will make a recommendation to the President, to which the staff member's comments are to be attached. Whenever feasible, the staff member will be informed of the Bank's decision at least six months prior to the expiry date of his/her fixed-term appointment. (emphases added)

5. Accordingly, the Bank had a discretion to renew the Applicant's appointment if three criteria were satisfied:

- a. that the Bank was fully satisfied with the Applicant's past performance;
- b. that the Bank was fully satisfied with her suitability for further employment; and
- c. that the Bank required her particular blend of skills and experience for the then foreseeable future.

6. The Applicant had no legal right to, or expectancy of, renewal. However, while the Bank had a wide discretion whether or not to renew, yet the Bank was under an obligation to the Applicant to exercise that discretion in the best interests of the Bank and in accordance with the Bank's staff rules and regulations.

7. The Bank's decision not to renew the Applicant's appointment must be scrutinized in the light of its declared personnel policy. In A.O. No. 2.02 the Bank stated that it seeks to maintain excellence of performance, will actively assist staff to upgrade skills and broaden experience, and will ensure that career development is an integral part of personnel administration; and that it would review the work of staff in order to obtain the most effective use of their services and expertise, and would identify their training and development needs. In Improving Performance, A Guide for Staff (issued by the Director, BPMSD, in August 1998), the Bank acknowledged that staff need to be clearly told of their strengths and deficiencies, and given an opportunity to overcome shortcomings; and that if problems arise from inadequate skills and job knowledge, supervisors must take remedial action, including the development of performance improvement plans. That Guide stressed that the main elements of the Bank's Staff Performance Management System included "managing performance of staff on fixed-term appointments", and extended beyond the formal yearly performance evaluation process to "continuous monitoring and managing through performance improvement plans designed for staff" whose performance was less than satisfactory. In regard to fixed-term appointments, the Bank's Handbook for Professional Staff emphasized that the performance review process was crucial to decisions on extension of appointments, while the Guide cautioned that if there was evidence

that a staff member might not be effective or suitable in the longer term, the supervisor and the head of the department should prepare a performance improvement plan for six months.

The Facts

8. On 9 November 1998, the Head of the Central and Administrative Support Unit ("CASU"), of the Human Resources Division ("BPHR") in the Bank's Budget, Personnel and Management Systems Department ("BPMSD"), reminded the Treasurer that the Applicant's fixed-term appointment was expiring on 8 August 1999, and requested him to forward his recommendation "preferably by 9 December 1998." He added:

If you would like to discuss the Department's future skill mix and requirements, please contact the Manager, BPHR, before finalizing your recommendation... (emphases added)

9. The Treasurer's recommendation ("the Recommendation") to the Director, BPMSD, was that the Applicant's appointment should not be extended, for the following reasons set out in his memorandum dated 17 December 1998:

[The Applicant's] portfolio management skills are considered adequate for the present level of portfolio management. However, [she] has chosen to adopt a very narrow interpretation of her duties and responsibilities as an Officer in TDID and her suitability for assignments beyond day-to-day portfolio management is limited. [She] has shown little interest in getting involved in such tasks and in undertaking work of a policy-related nature. At the same time, TDID currently has to deal with a number of important policy matters relating to the review of the investment authority, and the implementation of new investment policies and a new risk management infrastructure. In view of the foregoing and in order to be able to successfully complete these tasks, it is essential that TDID Officers are prepared and able to make a substantial contribution to the overall output of the Division concerning these matters. The need for greater involvement and being proactive has been communicated to [her] during performance evaluation discussions. Based on our experience with [her] since August 1996, we are of the opinion that she possesses limited potential for further professional growth in TD and that she does not possess sufficient flexibility and necessary skills to operate successfully in the far more challenging environment that TDID will face in the coming years.

The Treasurer thereby acknowledged that her portfolio-management skills were adequate but alleged that she had been found wanting in three respects: insufficient involvement in policy-related matters, an unduly narrow interpretation of her duties, and inadequate pro-activity.

10. According to the Applicant, a copy of that memorandum was handed to her the same evening by her Manager, the Assistant Treasurer, who remarked "it might come as a surprise to you but we are not recommending an extension to your appointment." After she had read the memorandum quickly, her Manager "suggested to discuss the recommendation"; but she was "shocked and, under the effect of the surprise, said [she] did not think there was anything left to discuss but that [she] needed to think about it first." In its Answer, the Bank - while not denying the remark attributed to her Manager - stated that her Manager "invited her for a discussion on the Treasurer's recommendation . . . however, the Applicant declined to discuss that matter with him and immediately left [his] office stating 'What is there to discuss?'"

11. The Applicant was never invited for a discussion with the Treasurer about the Recommendation, either on 17 December 1998 or at any time thereafter.

12. The Applicant was due to go on annual leave on the evening of 22 December 1998. The Head, CASU, informed her that she had to provide her comments before going on leave, without waiting till her return on 4 January 1999. Since there was an intervening weekend between 17 and 22 December 1998, the Applicant had only three working days (instead of five) to submit her comments, which she did on 22 December 1998, as directed.

13.

- a. In her response the Applicant described her involvement in four policy-related projects and proposals. During her first year, she had evaluated "cross-currency spread trading opportunities", and had prepared a proposal for that trading function; and she had also coordinated with the Risk Management Unit on "municipal and non-bank financial institution debt", and circulated guidelines for such investments. In November 1997 she had carried out an assignment to prepare a report with recommendations for "the inclusion of new investment instruments in the investment guidelines." In 1998 the Bank had selected a consultant to pursue that project, and had established a special task force for that project (to which she had not been appointed); she had, nevertheless, attended meetings and discussions, etc, on that issue, and had provided brief comments to her Manager - whose only response was, "I agree with your points."
- b. She denied a narrow interpretation of her duties, observing that what she had been employed to do was to manage portfolios; that at the beginning of 1998 she had been assigned the Bank's two largest portfolios; that managing roughly half of the OCR (Ordinary Capital Resources) portfolio was a full-time job; and that her main concentration had been on maximizing returns, which she believed was what the Board of Directors was emphasizing to be increasingly important.
- c. She pointed out that the reference to "pro-activity" had been made in her PER for the first six months, "with special reference to spread trades and arbitrage opportunities", and that there had been no further comment about pro-activity in her 1997 PER. Indeed, she claimed, she had done "more inter- and intra-market spread trades than any of the other portfolio managers and - more importantly - [had] made money on them."
- d. She also made very serious criticisms about her Manager, particularly that he had failed to engage in the kind of discussions required by A.O. No. 2.03 "regarding work accomplishments, performance goals, future work plans, training requirements, or, especially, areas of strengths and potentials or areas of performance requiring further development."
- e. Although the Treasurer had given no particulars at all of the nature of "the challenging environment" which TDID would face in the future, and of the skills which would become necessary, the Applicant also responded to his opinion that she lacked flexibility, skills and potential:

I have shown interest in the development of my portfolio management and related (e.g., risk management) skills. I have applied for courses and presentations on relevant issues and constantly read about new investment ideas and instruments. I attended a one week seminar on 'Advanced Fund Management' in September 1998 and find it quite baffling

that I would be chosen to attend the seminar if I do not appear to possess correct skills for the future. For the expansion of investment guidelines I believe the consultants are recommending extension of portfolio duration, which will put more emphasis on bonds rather than on money markets . . .in fact, of the 5 existing portfolio managers, I believe I have the most suitable background. My degree in Economics, work experience as a credit risk analyst, trader and portfolio manager of mostly bonds, but also equities and derivatives, gives me the diversity, insight, flexibility and knowledge the Bank needs in the future. Of the other 4 portfolio managers, two joined this year without experience in bond portfolio management and the other two have only worked as portfolio managers in the Bank.

14. On 11 January 1999, the Applicant expressed concern to BPMSD that there had been no response to her comments. She said that her PERs had not shown any deficiencies in her work, and asked for copies of adverse comments, if any, which had been made either by the Treasurer or her Manager. She was told that the matter had been referred to the Head, CASU, who would contact her on her "individual queries." On 13 January 1999, at a meeting with the Head, CASU, she repeated her assertion that the vague and general claims about her performance and skills were not supported by her PERs. That was not contradicted by the Head, CASU, who only told her that "her Manager had been given a copy of her memo and had been asked to reply since the memo contained remarks about him", and that he had been reminded about replying. She was never given copies of any adverse comments.

15. However, it was not her Manager but the Treasurer who responded, by his memorandum dated 14 January 1999 to the Director, BPMSD:

We focus on two points. First, the principle that extension or regularization is contingent on both strong performance . . . and continued relevance of and need for the staff member's particular blend of skills and experience. The second point relates to matters that were raised [by the Applicant].

Regarding the first point, the central issue is that [TDID's] skills-mix requirements have changed and that [the Applicant] does not possess the skills and experience that would be necessary to contemplate her further employment. In this connection, we wish to point out that major changes have been accomplished recently in TDID or are under way, such as the introduction and implementation of a new back- office automation system, introduction of the Bloomberg Portfolio Trading System in 1998, and the ongoing review of the investment strategy and risk management infrastructure, which will include enhanced performance measurement and attribution. Such changes make it necessary for staff members [of TDID] to be involved also in policy matters.

[The Applicant] has neither the required experience and skills to make a significant contribution in this regard, nor has she made efforts to acquire such skills. While the portfolio management [of the Applicant] overall is deemed satisfactory, she showed little initiative to propose improvements and interest to get involved in policy matters.

Regarding the second point . . .the four texts [referred to by the Applicant] were prepared not at [her] initiative, but at the explicit instruction of the Manager. They are of limited depth and not very detailed and do not contain new ideas. In the case of [two texts] close consultation/supervision by a senior colleague and/or the Manager was required....

Discussions about [her] performance and work plans were held on 24 March 1997, 6 June 1997, 10 February 1998 and 15 July 1998. On these occasions it was communicated to [her], either in writing or verbally, that she was expected to do more than only managing portfolios. [She] submitted a work program for 1998 in her memo of 3 April 1998. However, she did not respond to a request from her Manager dated 9 July 1998 to update her work program for 1998. Such a request was repeated during the conversation with her on 15 July 1998, to which no positive response was received from [her].

After a careful review of [TDID's] future staffing and skills-mix requirements, we have concluded that [she] is not suitable to meet [TDID's] future work and skills-mix requirements. We, therefore, reiterate our recommendation that [her] fixed-term appointment not be extended.

16. The discussions on 24 March 1997, 6 June 1997 and 10 February 1998 related to the Applicant's three PERs. The Bank did not produce any record of those discussions in support of its contention that some adverse comments had been communicated to her.

17. The Applicant responded on 27 January 1999:

- a. She reiterated that the Recommendation had not been discussed with her.
- b. She dismissed the criticisms of her past performance as undocumented opinions, unsupported by verifiable facts; her three PERs (which covered the period 9 August 1996 to 31 December 1997) had contained no adverse comments whatsoever; her appointment had been confirmed in terms of paragraph 11.4 of A.O. 2.01, which authorizes confirmation only "if the staff member's performance is fully satisfactory in all respects and the staff member is considered suitable for further employment"; and the overall assessment in her latest PER, for 1997, was "Performance fully meets or exceeds the requirements of the position."
- c. Her policy-related work had been favorably noted in her PERs, without any negative comment.
- d. None of the Applicant's PERs had made any reference to any deficiencies or any need to acquire new skills; the biggest and most important portfolios had been assigned to her in 1998; changing job requirements had never been discussed with her; and even the Treasurer's two memoranda did not describe the skills and experience in which she was alleged to be deficient. She complained that she had never been offered an opportunity to develop such new skills, and requested an appropriate opportunity to bring her skills into line with changing job requirements.

18. The Manager, BPHR, and the Head, CASU, after having discussed the matter with TD officials, met the Applicant on 1 February 1999 to discuss the Recommendation, and the three subsequent memoranda. Even at that discussion, neither the Treasurer nor the Applicant's Manager participated. The Note to File prepared by the Head, CASU, records that the Applicant explained that she had been performing her responsibilities as portfolio manager in a fully satisfactory manner; that out of the three major changes mentioned in the Treasurer's memorandum of 14 January 1999 she had been performing, for over a year, functions involving two of them (the new back office automation system and the Bloomberg portfolio system); that she had prepared the investment guideline report; and that she had written four policy papers,

so that it did not seem right to say that she could not do policy work. Without countering anything she said, the Manager BPHR then inquired about her lack of initiative, which he said had been highlighted in one of the PERs and seemed "to be at the core of the main issues": she replied that it had not been highlighted in her recent PERs and had never been raised by TD with her as an issue.

19. Thereafter by a memorandum dated 4 February 1999 the Director, BPMSD, recommended to the President of the Bank that the Applicant's fixed-term appointment be allowed to lapse on 8 August 1999, and that she be relieved from her duties (but with full pay) until that date in order to facilitate her search for other employment. The Tribunal notes with regret that a copy of that memorandum - despite its obviously crucial importance to the fair resolution of the Applicant's grievance - was not made available to the Applicant at any stage of the internal proceedings; and that even in these proceedings it was produced only belatedly, with the Bank's Rejoinder, being virtually compelled to do so when the Applicant submitted in her Reply that there was no evidence as to what materials were put before the President and as to whether he had approved the impugned decision.

20. That memorandum, having referred to the Applicant's previous employment, gave the following reasons:

1. For [the Applicant's] six-months PER, the Assistant Treasurer indicated "[she] will be expected to be pro-active and to display more initiative with regard to her project assignments and portfolio management'. She was confirmed in her appointment at the end of the one-year probationary period. However, the Treasurer indicated in the overall assessment that [her] contribution to other areas within TDID is expected to expand as further experience is gained." The 1997 PER did not give an overall assessment of the quality of [her] performance. The 1998 PER is under completion and is expected to be submitted some time in March 1999.
2. The Treasurer indicated that while [her] portfolio management skills are overall adequate for the present level of portfolio management activities at TDID, professional staff in TDID are increasingly required to go beyond their portfolio management activities to undertake work on several important policy matters. Moreover, it is the Treasurer's view that [she] has demonstrated a narrow outlook of her position's responsibilities and has shown little interest in assignments that are beyond the scope of simple trading and placement of bank deposits....
3. During the past several weeks, BPMSD has met separately with [her] and TD senior staff on several occasions and has carefully reviewed the case and given full attention to [her] arguments. [Her] main argument is that the Treasurer's negative view of her performance, specifically in respect of the quality of the output of policy-related assignments given to her, is not supported by her performance evaluation reports.
4. The nub of the matter is that major changes have been accomplished or are under way in TDID, such as the introduction and implementation of a new back-office automation system, introduction of the Bloomberg Portfolio Trading System, and the implementation shortly of a new investment strategy, which necessitates new skills-mix requirements. The Treasurer has concluded that [she] does not possess the skills nor has she shown any interest to acquire such skills for TDID's changing work environment.

5. 7. On the basis of the evaluation of TD,[she] meets minimum performance standards and lacks initiative and potential. Moreover, the overriding issue is that a different set of skills is required to implement the initiatives under the new strategy. (emphases added)

The four memoranda submitted by the Treasurer and the Applicant were annexed.

21. The President approved the recommendation of the Director, BPMSD. The Director, BPMSD, by his memorandum dated 8 February 1999, informed the Applicant that "Management concurs with the recommendation of the Treasurer for the following reasons." However, he only set out some of the reasons stated in his memorandum of 4 February 1999 - namely, those portions emphasized in the preceding paragraph.

22. In Lindsey, Decision No. 1 [1992], I ADBAT Reports 1, the Tribunal stated certain principles which it would follow in regard to the review of the exercise of discretion by the Bank:

[T]he fact that the Tribunal may review the exercise of a discretion by the Bank does not mean that the Tribunal can substitute its discretion for that of the management. The Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. (id., at 5, para. 12)

Where the continuation or not of a staff member's livelihood is involved, it is not sufficient to rely on unexplained or unsubstantiated beliefs or vague recollections. (id., at 4, para. 10)

[I]f the risk of arbitrariness is to be avoided, performance evaluation should be recorded in written form after an exchange of views between those concerned and concluding in a clearly defined statement of the performance objective to be attained by the employee and communicated to him. (id., at 15, para. 38)

23. For the purpose of such review, it is necessary for the Tribunal to ascertain the facts - as at 8 February 1999 - in relation to the Applicant's job description, work plans, and performance, as well as the skills required for her further employment.

24. The 1995 edition of "Staff Appointments with the Asian Development Bank" stated that:

Treasury Officers, in the Treasurer's Department, are responsible for arranging, negotiating and administering the Bank's borrowings in capital markets; arranging, implementing and administering the Bank's capital increases and Asian Development Fund replenishment; preparing financial plans and projections; managing the Bank's investment portfolio; handling the collection and custody of funds due to the Bank; making authorized operational and administrative payments; and advising on a variety of general financial issues.

25. The work plan given to the Applicant on 14 August 1996 required her in the forthcoming year to familiarize herself with the procedures and policies of TD, TDID, and the Bank as

appropriate; to manage the US dollar money market portfolio and other portfolios assigned to her; to undertake preparatory work for and to report on the establishment of a cross currency spread portfolio, to be managed by her; and to participate in the Bank's orientation and training courses.

26. In the Applicant's first PER (for the six-month period 9 August 1996 to 9 February 1997), her Manager stated in his "brief evaluation":

During her second 6-month period with the Bank [she] will be asked to take on responsibilities additional to her portfolio management assignments. This will include responsibility for implementing cross currency spread trading and for introducing an operational infrastructure for transacting in municipal and non-bank financial institution debt.... Both are viewed as ways of enhancing OCR investment income. [She] will be expected to be pro- active and to display more initiative with regard to her project assignments and portfolio management activities (e.g., by exploiting intra-market spreads, inter-market spreads, Euro-strips and other arbitraging opportunities, as appropriate).

27. The Applicant's second PER (for the period 9 August 1996 to 9 August 1997) showed that she had satisfactorily carried out the tasks specified in her August 1996 work plan, as well as the "additional responsibilities" set out in her first PER. On 6 June 1997, her Manager stated in his "narrative evaluation":

[She] adequately managed the Bank's investment portfolio of money market instruments in US dollars. In this capacity [she] participated actively in the investment activities of TDID, and gave her opinion also about investment strategy for the non-money market portion of the portfolio. In addition [she] evaluated cross currency spread trading opportunities, prepared a proposal for dedicated cross currency spread trading function and circulated guidelines for investments in municipal and non- bank financial institution debt. [Her] contribution to other areas within TDID is expected to expand as further experience is gained.

28. The Applicant's third PER (for the period 1 January 1997 to 31 December 1997) confirmed that there was no change in her work plan. On 10 February 1998, her Manager stated in his "narrative assessment":

[She] adequately managed the investment portfolio of money market instruments in US dollars, as well as at times the Canadian dollar portfolio and the French franc portfolio. In addition [she] followed spread trading opportunities, and entered into a number of spread transactions. [She] presented her market views clearly.

[She] prepared an outline of recommendations for the inclusion of new investment instruments in the investment guidelines, and circulated investment guidelines for municipal and non-bank financial institution debt.

Her Manager's overall assessment of her performance was "Performance fully meets or exceeds the requirements of the position", the highest rating.

29. In her second and third PERs (which covered the entire period from 9 August 1996 to 31 December 1997), the Applicant's Manager did not make any negative comment about any aspect of the Applicant's work, her interpretation of her duties, or her lack of initiative; nor did he

even hint at any possibility that she might need new skills in the future. On the other hand, in those two PERs, under "actions proposed to enhance effectiveness", the Applicant proposed: "To keep pace with the developments in the financial markets and portfolio management, further training by attending courses and obtaining literature, as appropriate." To that suggestion, her Manager failed to respond.

30. Throughout the period 23 February to December 1998, one post of portfolio manager was vacant. Although there were five portfolio managers, the Applicant was asked to manage about one-third of the Bank's portfolio.

31. On 1 April 1998 the Applicant's Manager made the following request:

Bearing in mind the increasing focus within the Bank on maximizing the amount of investment portfolio income, please provide me by c.o.b. 6 April 1998 with a draft work plan for yourself for the remaining part of 1998 which includes projects that contribute to maximizing current investment income.

She responded on 3 April 1998:

Manage the non-money market portion of the USD portfolio and the whole CAD portfolio. Try to strike a balance between holding US Treasuries (for liquidity) and Eurobonds (for yield enhancement). Also actively switch positions for higher yield. Act as the training coordinator for TDID.

32. Although there was no written response from him, it is not disputed that the Applicant's Manager did accept that work plan, without any reservation as to its inadequacy although a formal work plan was never issued to her.

33. On 20 June 1998 her Manager made some changes in the duties assigned to the Applicant. On 9 July 1998 he sent an e-mail message to all portfolio managers requesting an update of their work programs for 1998. The Applicant claims that she did not react to that message "as [she] considered [her] portfolio management duties assigned to [her] only two weeks earlier valid." She says that her Manager did not pursue the matter.

34. Although the Treasurer later claimed that the Applicant's Manager repeated that request for an updated work plan in the course of a conversation on 15 July 1998, no such request is mentioned in the e-mail which the Applicant's Manager sent her on 16 July 1998 for the express purpose of recording the main points of that conversation. In that e-mail he stated:

In the coming year(s) I expect TDID to go through large changes relating to developments such as the review of our Investment Authority, implementation of a new risk management infrastructure, and the use of external asset managers.

Against that background my expectations of portfolio managers in TDID are that they show interest to learn more about a broad range of work-related topics and developments, that they demonstrate initiative and are pro-active, that they are willing to manage a number of large portfolios at the same time, that they are capable of writing papers for our various projects, that they can give verbal presentations on different subjects e.g. to the Board, that they are good team players, approachable and, ideally, look enthusiastic when asked to take an additional assignment.

I gave you feedback about how I perceive your contribution in some of these fields. I believe that you have a solid interest rate outlook, that you could do much more work, show a wider interest in the work of our Division in general, attend presentations and lunches (even if the topic does not directly relate to the portfolios for which you are currently responsible), show more initiative e.g. in getting new ideas from counterparts for (spread-)trades, trade with more different counterparts, and look to come up with constructive ideas about how to improve the way in which the portfolios are managed at the Bank.

I asked you what you could do in addition to what you are doing already to meet those expectations, what project work you propose to undertake in the second half of this year, and to let me know soon after your return from holiday. I expect you to attend the presentations that are given for the benefit of portfolio managers, to visibly increase the number of different houses over which you spread your securities transactions, and to make efforts to integrate more into our team.

35. The Applicant replied to her Manager's e-mail after her return from home leave, setting out in detail the comments she had made in regard to more securities lending, increasing the number of counter-parties, and attending more presentations. She also asked her Manager to assign her a project. She reiterated that she was handling a disproportionately large part of the Bank's portfolio - more even than that handled by the portfolio managers senior to her. Since her Manager did not even reply to her, let alone assign a project or define performance objectives, the Tribunal cannot but assume that he did not dispute what she had said. Indeed, there was no further communication from him about her work, skills or attitudes right up to the impugned Recommendation - which, consequently, took her by surprise.

36. After the impugned decision, the Applicant submitted her 1998 PER form, with a detailed list of "accomplishments", to which her Manager responded with equally detailed comments, some adverse. His overall assessment was: "Performance generally meets the requirements of the position, but improvements are warranted in some areas." It is unnecessary for the Tribunal to examine the statements in the 1998 PER as it was not available, and not taken into account, when the impugned decision was made. Besides, the Applicant has challenged that PER in another application now pending before the Tribunal.

37. On 7 August 1998 the Treasurer recommended the Applicant's participation in an "External Learning Event", namely a Seminar on "Advanced Funds Management" to be held in Singapore from 21 to 25 September 1998. The main objectives of the Bank's "External Learning Events Program" were stated to be:

- to help expand staff skills and competencies particularly in specialized and technical areas which cannot be addressed effectively through in-house training; and
- to prepare staff to assume more complex and larger responsibilities.

The selection criteria for nominating staff included the following:

- the staff must be performing at a satisfactory level of performance and be contributing significantly to work unit performance;

- the learning opportunity must be relevant to the staff's present job responsibilities or anticipated future work assignments; and
- staff participation in the learning opportunity should be clearly linked to the objectives of the work unit.

The Applicant was selected for, and attended, that Seminar.

38. The Treasurer issued a memorandum dated 22 September 1998, copied to the portfolio managers, creating an "Investment Authority Project Team" to facilitate the ongoing work in relation to the review and enhancement of the investment authority. Although the Applicant was not included in that Team, she participated in its work (as noted in para. 13(a) above.

39. Shortly thereafter the Treasurer established a Working Group, again not including the Applicant, to identify a mechanism to ensure the most efficient maintenance of the cash portfolio. By a memorandum dated 16 October 1998 the Deputy Treasurer convened a meeting of that Group, and the minutes show that the Applicant participated in that meeting.

40. In its Answer, the Bank submitted that from August through December 1998 the Bank's consultants had been reviewing the Bank's investment policies and strategies; that they had recommended changes to the Bank's investment authority and investment policies; that a first draft of a Board Paper had been prepared in January 1999; that a Working Paper had been circulated to the Board in March and discussed in April 1999; and that the final Board Paper had been approved in May 1999. Consequently, according to the Bank's Answer:

"The implementation of the new investment strategy approved by the Board of Directors in 1999 has led to a radical change in the way ADB's investment portfolios are managed . . . [and made] it indispensable for TDID to change the skills-mix of its staff. There has been a shift away from the original focus on directional portfolio durational positioning. . . a much more quantitative approach towards portfolio management is now required [which involves], among other things, undertaking scenario analysis, evaluating the risk characteristics of various bench mark components, using portfolio simulation and optimization models . . . , and identifying relative-value opportunities for return. In this context TDID requires staff with excellent conceptual and analytical skills in order to be able to meet its objectives." [emphasis added]

41. The Bank goes on to claim in its Answer that "the changed skills-mix requirements of TDID were reflected both in the internal and external advertisements of the Applicant's position" (which were published in and after April 1999), and that "the Applicant did not meet the requirements of the redefined position." The Applicant disputes that claim, but it is unnecessary for the Tribunal to rule on that issue. It is clear that the changes in the Bank's investment policies and strategies had not been defined when the impugned Recommendation was made, or even when the impugned decision was made. Even if the Tribunal were to assume that the new skills-mix requirements had been anticipated during the period December 1998-February 1999, no reference was made to them at any stage of the process leading up to the non-renewal of the Applicant's appointment. The Tribunal recalls that on 9 November 1998 the Head, CASU, had invited the Treasurer "to discuss the Department's future skill mix and requirements": either no such discussion took place, or that discussion did not result in identifying the new skills-mix requirements. The net result is that the Applicant was denied any opportunity of showing that she did meet "the requirements of the redefined position."

42. The impugned Recommendation and decision cannot now be retrospectively justified on the basis of subsequent changes and requirements. The Tribunal must therefore summarily dismiss any suggestion that the impugned Recommendation and decision were made because the Applicant did not meet the Bank's changed skills-mix requirements.

43. Section 13.2 of A.O. No. 2.01 requires the following steps: a recommendation by the Head of a Department for the non-renewal of a staff member's appointment must be discussed with him; the staff member must be given five working days to submit comments; and the Director, BPMSD, must make a recommendation to the President, attaching the staff member's comments.

44. The purpose of a discussion is to give the aggrieved staff member an opportunity, on the one hand, to obtain clarifications as to the basis of the adverse recommendation, and, on the other hand, to controvert misstatements and to dispel misapprehensions. That purpose will not be satisfied by means of discussion with other officials in the same Department or in BPMSD. Further, section 13.2 contemplates only one such recommendation. However, if circumstances make a materially amended recommendation necessary, the purpose of the rule will not be satisfied unless there is a further discussion with the staff member. As for the staff member's comments, the phraseology of section 13.2 indicates that the discussion must precede the comments. Obviously, the staff member can make more meaningful comments after a discussion with the official concerned.

45. The safeguards provided in section 13.2 were denied to the Applicant. She was not offered an opportunity to discuss the Treasurer's Recommendation with the Treasurer himself. Neither her Manager's offer on 17 December 1998 to discuss the Recommendation with her Manager, nor the discussion with officials of BPMSD, satisfied section 13.2. Moreover, the insistence by the Head, CASU, that she should submit her comments on 22 December 1998 resulted in her having only three (instead of five) working days to submit her comments. The Tribunal acknowledges that a stipulated time period may, in appropriate circumstances, be shortened; but when it is so short as five days, and affects the continuation of a staff member's livelihood, it must be regarded as mandatory - especially considering that the Treasurer took over five weeks to make his Recommendation and over three weeks to respond to the Applicant's memorandum of 22 December 1998.

46. The Applicant's memorandum of 22 December 1998 resulted in the Treasurer maintaining his recommendation, but emphasizing the need for new skills rather than past performance. While that highlights the value of an exchange of views, it also suggests that a face-to-face discussion might have been even more productive for the Applicant. Accepting that the Treasurer was entitled to make what in substance was an amended Recommendation, section 13.2 by necessary implication entitled the Applicant to a further discussion before she made her comments. That too was denied to her.

47. In lieu of an opportunity to discuss the Recommendation with the Treasurer the Applicant was only allowed a discussion with BPMSD officials on 1 February 1999. However, the comments which she made on that occasion were not forwarded to the President by the Director, BPMSD.

48. The Tribunal must now turn to the memorandum which the Director, BPMSD, submitted to the President on 4 February 1999.

- a. In regard to the Applicant's past performance, that memorandum falsely stated that "the 1997 PER did not give an overall assessment of the quality of [her] performance", and that she "meets minimum performance standards." In truth, her 1997 PER did contain an overall assessment that she met the highest standard, "Performance fully meets or exceeds the requirements of the position." The BPMSD memorandum also quoted an extract, taken out of context from her second PER, thereby incorrectly giving an adverse impression of her performance during her first year.
- b. In regard to her suitability for further employment, the memorandum belittled her work as a portfolio manager, by stating that she only handled "simple trading and placement of bank deposits." Likewise the quality of her "policy-related assignments" was criticized, but the memorandum failed to disclose that those assignments had been positively assessed in her PERs. Two matters which were relevant to the Applicant's alleged lack of interest in work other than portfolio management were the disproportionate workload assigned to her, and the Bank's increasing emphasis on maximizing returns on its portfolio: those facts too were not disclosed.
- c. That memorandum reiterated the Treasurer's opinion that the nub of the matter was that the Applicant did not meet the new skills-mix requirements which the three "major changes" at TDID would necessitate, and that she had not shown any interest in acquiring them. It not only suppressed the fact that for over a year the Applicant had been performing functions in relation to two of those changes (as referred to in para.18), but even failed to annex the Bank's Note to File of 1 February 1999 in which that fact was recorded. It also failed to disclose that the Applicant had never been informed of the need for any new skills, and that there had been no response to her requests for further training through which such skills might have been acquired.
- d. The memorandum gave the impression that the Applicant had been given a proper opportunity to respond to the Treasurer's Recommendation, but failed to disclose that she had never been afforded the opportunity to discuss that Recommendation, or the amended Recommendation (which was euphemistically termed a "clarification"), and that she had been denied the minimum period of five days for her comments. It also implied that there had been several meetings between the Applicant and BPMSD officials during a period of several weeks, although in truth there had been only two meetings: the first on 13 January 1999, at which the only problem discussed was how to expedite the Treasurer's response, and the other on 1 February 1999 at which the Applicant made two important clarifications, both of which were suppressed.

49. The Tribunal observes that when the Director, BPMSD, informed the Applicant of the President's decision not to renew her appointment, his memorandum of 8 February 1998 reproduced the substance of his memorandum to the President dated 4 February 1998, but omitted those portions which contained false or misleading statements - in particular:

- a. that the 1997 did not give an overall performance assessment, and that she met "minimum performance standards";
- b. that the Applicant lacked "new skills" necessitated by the three major changes at TDID; and
- c. that there had been several meetings between BPMSD and herself during the preceding several weeks.

Consequently, the fact that the President had been misled in three important aspects (pertaining to past performance, lack of skills, and due process) was concealed from the Applicant.

50. As a result of these serious defects in procedure subsequent to the impugned Recommendation, and the gravely misleading recommendation of the Director, BPMSD, the President's decision was flawed and therefore invalid, because it was not taken according to the procedures laid down by the Bank's rules, regulations and Administrative Orders. Moreover, it was based not on facts accurately gathered, but rather on unsubstantiated beliefs, and was induced by suppression and misrepresentation of material facts, as to the Applicant's past performance, her suitability for further employment, and her skills.

II. Other Decisions

51. In connection with the decision not to renew the Applicant's appointment, the Bank took several other decisions and actions (between 8 and 12 February 1999) which too the Applicant contested:

- a. the issue of a notice dated 12 February 1999 to banks and securities houses with which the Bank entertained securities trading activities, stating "Effective 10 February 1999, the authority of [the Applicant] to transact business on behalf of the Bank is hereby withdrawn";
- b. her immediate transfer from TDID to the Office of the Treasurer (TDOT), and her assignment to a new office outside TDID; and
- c. her release from duties with the option of leaving the Bank even before 9 August 1999, with the right to full salary up to that date (payable in advance in a lump sum).

With respect to these contentions, the Tribunal finds no violation of the rights of the Applicant.

52. The Bank pleaded that portfolio managers bear responsibility for the investment of billions of US dollars and could bind the Bank in respect of transactions involving hundreds of millions of dollars by simply making a telephone call. Reference was made to a recommendation made in April 1996 by the Bank's Office of the General Auditor ("OGA"), that the:

Treasurer's Department establish a policy to conform with the standard industry practice of terminating trading authority for . . . individuals who are leaving the Bank for any reason.

Given the emotional tension when a decision of involuntary separation is communicated to an employee, and given the Bank's great financial vulnerability, the Bank contended that withdrawal of portfolio management functions was a matter of prudence. Immediately terminating trading authority, and informing those concerned, were reasonable consequential steps.

53. The Applicant submitted that termination of trading authority was not always the norm or industry practice, that in any event OGA's recommendation was not implemented until December 1999, and that the action taken by the Bank was highly irregular and prejudicial.

54. The Tribunal holds that even though the Bank was not obliged to do so, the withdrawal of portfolio management functions, the termination of trading authority, and the notification thereof

to those concerned were by no means an unreasonable exercise of its discretion; and that the language used in the notice dated 12 February 1999 did not in any way reflect adversely upon the integrity or reputation of the Applicant.

55. The transfer of the Applicant and her release from her duties were consequential upon the decision to terminate her portfolio management duties, and were neither intrinsically improper nor prejudicial.

III. Preliminary and Provisional Measures

56. In her Application the Applicant requested the Tribunal:

- a. to order that the case be considered by a Panel consisting of all the Members of the Tribunal, "due to its serious nature and complexity; the multitude of violations . . .; the severity of the outcome and damage caused by the contested decisions; the importance of the Tribunal's decision in the application of the Staff Performance Management System; and due to the importance of the issues which are being presented before the Tribunal . . .";
- b. to order the Bank to produce a mass of statistical data relating to the total number of professional staff who joined the Bank in 1994-1999, broken down by type (i.e., regular, short-term, fixed-term) and length of appointment; and, in regard to those on initial three-year fixed-term appointments, the numbers of those who resigned during that period, whose appointments were regularized, extended, and not extended, together with a breakdown by reference to the:
 - i. reasons given (i.e., those related to performance and those related to skill-mix);
 - ii. gender; and
 - iii. overall relative performance ratings up to 1996;
- c. to withhold her name in the decision of the Tribunal, because of "the delicate nature of [her] profession . . .; [her] professional reputation has already been tarnished [so much so] that as of now [she has] not managed to secure other employment"; "[and] in financial markets even the slightest suspicion of misconduct - although unfounded - effectively terminates one's career."

57. On 5 April 2000, the Tribunal ruled that the pleadings as at that date did not justify (a) consideration of the case by a full panel; (b) the request for confidentiality, which in any event would be ruled upon finally only after the pleadings are closed; and (c) an order that the Bank should disclose information about other staff, although the Tribunal would order disclosure of such information if it later became necessary for the determination of the case.

58. Although the Applicant's pleadings, exhibits and submissions were voluminous - and indeed, unnecessarily so - the issues involved in this case are relatively straightforward: whether the decision not to renew her appointment and the antecedent decision-making process were flawed. The principles applicable to performance evaluation and renewal of appointments have been clarified in a number of decisions, commencing with the very first decision of the Tribunal in Lindsey, *supra*, at para. 22 above (see also Tay Sin Yan, Decision No. 3 [1994], I ADBAT Reports 35; Isip, Decision No. 9 [1996], II ADBAT Reports 1; Behuria (No. 2), Decision No. 11

[1996], II ADBAT Reports 27; Cabal, Decision No. 22 [1996], II ADBAT Reports 163; Chan (No. 2), Decision No. 36 [1997], III ADBAT Reports 111; Chan (No. 3), Decision No. 38 [1998], IV ADBAT Reports 1; and Alexander, Decision No. 41 [1998], IV ADBAT Reports 41). The Tribunal was of the opinion that there were no circumstances, of novelty or complexity, which made it necessary or desirable that the case be considered by a panel consisting of all its Members.

59. The statistical data requested by the Applicant would have provided general information about the number and gender of professional staff whose initial fixed-term appointments were not regularized, or not extended. That data would have had no relevance to the issues arising in this case. The fact that regularization or extension was refused in the case of x staff members, or y women staff, for one reason or another, and their performance ratings, would have had absolutely no bearing upon the question whether the refusal of the Applicant's extension, in the circumstances of her case, was flawed for any reason.

60. As for the Applicant's request for confidentiality, the Tribunal holds that the disclosure of the names of parties and the relevant facts in its Decisions must be the rule, and confidentiality the exception. The publication of allegations and findings would in every case cause some loss, damage or prejudice to the party affected, and that would not be sufficient to claim confidentiality: the burden lay on the Applicant to establish the likelihood of serious loss, damage or prejudice. That is not the case here, having regard to the Tribunal's findings and decision.

IV. Relief

61. The relief which the Applicant claimed was:

- a. \$600,000 as compensation for deprivation of employment at a high salary, and pension benefits, and severe damage to her prospects for future employment;
- b. \$300,000 as compensation for professional injury, moral injury, mental stress, humiliation and anguish;
- c. The issue of retractions to all institutions informed by Bank staff by telephone, post or facsimile in circumstances suggesting she was the object of disciplinary measures;
- d. The removal of all remarks in the Bank's records of a prejudicial nature regarding her;
- e. The issue of a certificate of employment which properly reflects her period of service with the Bank and fully satisfactory performance; and
- f. Legal and other costs.

62. The Tribunal considers that there has been a grave and flagrant violation of the Applicant's rights; that the nature of her duties was such that her prospects of alternative employment are likely to have been very seriously affected; and that she has suffered considerable moral injury. The Tribunal will therefore order the payment to the Applicant of compensation in the sum of \$240,000.

63. For the reasons stated in para. 60 above, the Tribunal declines to order the issue of retractions to those who were informed of the withdrawal of the Applicant's trading authority.

64. The Applicant's PER for 1998 is the subject of pending proceedings, and the evaluation of her performance for 1998 as well as the contents of a final certificate of employment in relation to 1998 must await the conclusion of those proceedings. Subject thereto, the Tribunal orders the Bank to remove all remarks in its records of a prejudicial nature regarding her which have not been disclosed to her, and to issue a certificate of employment which reflects her fully satisfactory performance up to 31 December 1997.

65. The Applicant has given full details of her legal and other costs, with supporting documents, totaling \$24,205, of which \$3,350 is the cost of a computer, which the Tribunal does not allow. The Applicant's pleadings were extremely prolix; besides she took undue advantage of the permission extended by the Tribunal for her to file an additional statement by tendering a further statement running to 127 pages and extending far beyond the scope of her own request. Accordingly, the Tribunal limits the amount of costs to \$10,000.

Decision:

For these reasons, the Tribunal:

- a. directs the Bank to pay the Applicant the sum of \$240,000 as compensation;
- b. declines to order the issue of retractions to those who were informed of the withdrawal of the Applicant's trading authority;
- c. orders the Bank to remove all remarks in its records of a prejudicial nature regarding her which have not been disclosed to her, and to issue a certificate of employment which reflects her fully satisfactory performance up to 31 December 1997; and
- d. directs the Bank to pay the Applicant the sum of \$10,000 as costs.