

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 53
(10 August 2001)**

**Taina Toivanen
v.
Asian Development Bank
(Nos. 2, 3 and 4)**

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

1. These three Applications were considered together as they are intimately connected to the Applicant's first Application to the Tribunal filed on 11 December 1999 (Toivanen, Decision No. 51 [2000], V ADBAT Reports 67, hereinafter, "Decision No. 51").

2. In that Application, the Applicant impugned the Bank's decision of 8 February 1999 not to convert her three-year fixed-term appointment to a regular appointment, and not to extend it. By way of relief, she asked for -

- a. US\$600,000 as compensation for deprivation of employment;
- b. US\$300,000 as compensation for professional and moral injury, etc.;
- c. the issue of retractions;
- d. the removal from the Bank's records of prejudicial remarks concerning her;
- e. the issue of a proper certificate of employment; and
- f. costs.

3. In Decision No. 51 of 21 September 2000 the Tribunal held that there had 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 were likely to have been very seriously affected, and that she had suffered considerable moral injury. The Tribunal held that the impugned decision was invalid; awarded her US\$240,000 as compensation and US\$10,000 as costs; ordered the Bank to remove from its records all remarks of a prejudicial nature regarding her, which had not been disclosed to her; and directed the issue of a certificate of employment which reflected her "fully satisfactory" performance up to 31 December 1997 - but no further because the Applicant's performance evaluation for 1998 was by then the subject of pending proceedings (her third Application to the Tribunal). The Tribunal declined to order the issue of retractions.

Toivanen (No. 2)

4. In her second Application, filed on 23 August 2000, i.e., before Decision No. 51, the Applicant contested an administrative decision said to be contained in an Advice of Personnel Action ("APA") dated 28 July 1999, which notified her of the President's decision to allow her fixed-term appointment to expire. By way of relief, she asked (a) that the President's decision be quashed;

(b) that her fixed-term appointment be renewed or converted to a regular appointment, or, in the alternative, that she be awarded compensation in a sum of US\$900,000 and costs, together with interest at 12% per annum; and (c) that the Bank be directed to allow her the option to purchase discretionary pension benefits under the Bank's Staff Retirement Plan in order to supplement her future pension.

5. The Bank filed an Objection to Jurisdiction on 13 November 2000 pleading that the Application was not receivable because the APA did not constitute a new administrative decision, but merely confirmed the previous decision of 8 February 1999, its purpose being to determine the date on which the Applicant's separation from the Bank would take effect. The Bank pleaded that Decision No. 51 was *res judicata* and final, inasmuch as it had determined the amount of the compensation and other relief due to the Applicant in connection with the non-renewal of her fixed-term appointment.

6. The Applicant sought to draw a distinction between the decision of 8 February 1999 and the APA of 28 July 1999 on the basis that the former purported to convey the decision of "Management", while the latter was that of the President. Although the Applicant pointed out that the Bank did not disclose to her that it was the President's decision, nevertheless in Decision No. 51 the Tribunal held that the recommendation of the Director, BPMSD - that the Applicant's fixed-term appointment be allowed to lapse on 8 August 1999 - had been approved by the President on 8 February 1999. Hence both decisions were by the President, the only difference being that the latter specified a later date for the Applicant's separation from service - a matter which in no way prejudiced the Applicant, and about which she made no complaint. The latter decision was by no means a new decision, as the Applicant acknowledged in her memorandum of 15 September 1999 by which she requested administrative review "of the expiration of her fixed-term appointment confirmed to [her] in APA dated 28 July 1999" (emphasis supplied).

7. The resulting position is that the cause of action in the second Application is the same as in the first, i.e., the President's decision to let the Applicant's fixed-term appointment lapse; the parties are the same; and the reliefs sought are the same - except that in her second Application, the Applicant has also asked that her fixed-term appointment be renewed or converted. However, that relief can no longer be granted because Decision No. 51 has already awarded her compensation for deprivation of employment, and she cannot have both her employment as well as compensation in lieu of employment.

8. Article IX of the Statute of the Tribunal provides that all Decisions of the Tribunal shall be final and binding. The Tribunal holds that upon Decision No. 51 being rendered, it became *res judicata* in relation to the second Application, even though that Application was already pending before the Tribunal.

9. The Applicant has pointed out that the Bank had not fully complied with that Decision at the time it filed its Objection to Jurisdiction, but only several months later. That, however, makes no difference to the plea of *res judicata*.

10. The Applicant's claim to an option to purchase discretionary pension benefits was made for the first time in the Tribunal, and is not receivable for failure to exhaust internal remedies.

11. The Tribunal upholds the Objection to Jurisdiction and dismisses the Application.

Toivanen (No. 3)

12. The Applicant's third Application, filed on 31 August 2000, relates to her Performance Evaluation for 1998, wherein her overall performance for the period 1 January 1998 to 31 December 1998 was assessed as "generally meets the requirements of the position, but improvements are warranted in some areas."

13. The reliefs claimed by the Applicant are (a) the rescission of her 1998 PER; (b) the correction of that PER to show the highest overall performance assessment without any reservations, and the removal therefrom of "incorrect and/or prejudicial remarks" made by her Manager; (c) compensation in a sum of US\$900,000 and costs, and interest thereon at 12% per annum; and (d) a formal apology on behalf of the Bank.

14. If granted sufficient compensation in her first and second Applications, the Applicant claimed reduced compensation: (a) US\$200,000 for the damage "to the possibilities to continue her successful and highly recognized career in the Bank or in another international institution or corporation"; and (b) US\$150,000 for "professional injury outside of the Bank, prolonged moral injury, mental stress, humiliation and anguish."

15. Soon after Decision No. 51, by letter dated 13 November 2000 (quoted in para. 24 below), the Bank informed the Applicant that taking account of that Decision the Bank had decided to withdraw her 1998 PER. The Bank also issued a certificate of employment which certified her performance from 8 August 1996 until her separation from service on 23 September 1999 as "fully satisfactory" (that being the highest overall performance assessment), and later paid her a consequential salary adjustment of 2.75%.

16. The Applicant thereby obtained the rescission of her 1998 PER, as well as - in substance - the correction of that PER. Indeed, she obtained more than she had asked for, because a corrected PER for 1998 would have certified her performance only up to 31 December 1998, while the certificate of employment which the Bank issued acknowledged her performance up to 23 September 1999.

17. In support of her claim for compensation, the Applicant pleaded that the lack of a "fully satisfactory" PER for 1998 resulted in the non-renewal of her fixed-term appointment. Further, not only did it seriously hinder her search for alternative employment outside the Bank but it also affected her professional reputation outside the Bank. Finally, she claimed that the Bank had infringed her right to a fair and objective performance evaluation.

18. The 1998 PER was due for completion only on 19 March 1999, and in fact the Applicant completed her part of the PER only on 10 February 1999 - after the Bank's decision to let her appointment expire. That decision did not depend, one way or the other, on her PER for 1998. The Applicant contended that if a "fully satisfactory" PER for 1998 had been available before the APA of 28 July 1999, the President might have reconsidered the previous decision. Even on that assumption, the fact remains that Decision No. 51 has fully compensated her for the expiration of her appointment. She cannot now claim any further relief on that score.

19. Undoubtedly, the absence of a "fully satisfactory" PER for 1998 would have made it difficult for the Applicant to secure alternative employment, and would also have affected her professional reputation, right up to 21 September 2000 when the Tribunal delivered Decision No. 51, holding that there had been a grave and flagrant violation of her rights by the Bank and vindicating her fully. In assessing compensation, the Tribunal took into consideration the

damage and injury already suffered under those heads. The Applicant cannot now claim further relief for the same wrongs.

20. However, subsequent to the impugned decision to let her appointment expire, the Bank proceeded to evaluate her performance in 1998. The Bank acknowledged in its Answer that, in determining the Applicant's overall rating, much reliance had been placed on certain documents which the Tribunal had held in Decision No. 51 to have been tainted with serious flaws.

21. Although the Bank withdrew that impugned 1998 PER, it is clear that the procedure adopted by the Bank infringed the Applicant's substantive right to a fair and objective performance evaluation, for which she is entitled to equitable compensation (see Tay Sin Yan, Decision No. 3 [1994], I ADBAT Reports 47, para. 32, and Isip, Decision No. 9, [1996], II ADBAT Reports 16, para. 57). The Tribunal observes that in those two Decisions relatively high awards of compensation were made. That was because the Tribunal took into consideration the possible loss of merit pay increases and promotions. In this case, however, the Bank has made some salary adjustment (which the Applicant claims is inadequate), and the question of promotion does not arise as the Applicant is no longer in employment. Taking all these matters into consideration, the Tribunal awards the Applicant compensation in a sum of US\$6,000 for the infringement of her right to a fair and objective performance evaluation. .

22. The Tribunal rejects the Applicant's claim for an apology.

Toivanen (No. 4)

23. Decision No. 51 was communicated to the Bank on 31 October 2000. By two letters dated 7 November 2000 the Bank asked the Applicant to furnish particulars of her bank account in which the sum of US\$250,000 awarded to her should be deposited, and informed her that all prejudicial remarks contained in her personal record had been removed. The Bank also sent her a certificate of service which acknowledged her service up to 31 December 1997 to be "fully satisfactory."

24. By another letter dated 13 November 2000 the Director, BPMSD, told her:

action has been taken to remove all remarks in your files of a prejudicial nature which have not been disclosed to you. Moreover, taking account of the Tribunal's decision, we have decided to withdraw your last [1998] Performance Evaluation Report. We are also enclosing a certificate of employment which reflects your performance from the period 09 August 1996 until your separation from service as fully satisfactory. Accordingly, necessary adjustment to your salary consistent with fully satisfactory performance will be made and communicated to you separately.

25. The Applicant furnished, by courier, the required bank particulars which reached the Bank on 17 November 2000. The Bank was thereupon obliged to make payment without any further delay.

26. Not having received payment, on 15 January 2001 the Applicant filed her fourth Application, praying for the implementation of Decision No. 51. In addition to the compensation and costs awarded, she claimed damages for material financial loss (having regard to fluctuations in the exchange rate as between the US dollar and her home currency, the Euro), moral damages for the Bank's "blatant lies", penal interest at the rate of 34.6% (having regard to borrowing rates of

27.6% in Finland, her home State), an option to purchase discretionary benefits under the Bank's "Staff Retirement Plan", and costs.

27. The Applicant also sought clarification and interpretation of Decision No. 51 on two matters: the removal of prejudicial remarks and the precise wording of the employment certificate. By letter dated 14 March 2001 the Bank gave the Applicant details of all the prejudicial remarks removed from her personal record. The Bank issued a further certificate of employment in the precise terms requested by her, signed by the official who, according to the Bank, usually signs such certificates. The Applicant, however, insisted upon a certificate signed by the Treasurer and the Director, BPMSD. The Tribunal sees no reason to direct the Bank to depart from its usual practice. No further order is necessary in regard to these two matters.

28. The Bank explained that due to "an administrative error", it was only on 28 February 2001 that the Bank paid the sum of US\$250,000 due to the Applicant, together with interest at the rate of 6.7% per annum from 17 November 2000 to 28 February 2001 (amounting to US\$4,792). Although the Applicant contests the amount of interest due to her on account of the Bank's delay, the Tribunal considers that 6.7% per annum was not unreasonable, particularly in light of the Applicant's acknowledgment that the Bank was earning "close to 7%" per annum on its investments.

29. The Tribunal rejects the Applicant's claim that borrowing rates of 27.6% should be taken into account. Borrowing rates might have been relevant only if the Applicant had been compelled to borrow - but she has failed to prove that she did borrow any sum of money, and borrowed at that rate. That rate, in any event, was clearly inapplicable to the entire sum of US\$250,000.

30. The Applicant claimed US\$26,874 on account of material financial loss solely due to the decline in the value of the US dollar against the Euro. She cited *In re Djoehana* (No. 2), ILOAT Judgment No. 538 (1982). That was a case of a former staff member whose salary had been paid in US dollars; compensation awarded in *In re Djoehana*, ILOAT Judgment No. 359 (1978), was paid late, and was paid in French francs. It was in that context that the ILOAT held that the compensation paid ought to have been converted at the rates prevailing on the dates when payment fell due. In this case, the Applicant was entitled to salary in US dollars, and the Tribunal awarded her compensation in US dollars. The question of fluctuations in the value of the US dollar does not arise. Indeed, the Applicant herself asked for compensation in US dollars, and not in Euros.

31. Although the Applicant has been adequately compensated for the direct financial loss suffered by her, the Tribunal acknowledges that she probably did suffer some economic disadvantage by reason of the delay in payment, for which the Tribunal awards her compensation in the sum of US\$1,000. The Tribunal rejects her claim to any further interest or damages.

Other Matters

32. It was only after the Applicant made her third and fourth Applications that she obtained the withdrawal of the 1998 PER and the payment of the sums due under Decision No. 51. She is therefore entitled to reasonable costs and expenses. However, she persisted in other claims which were devoid of merit and/or had become moot. Besides, her pleadings were extremely prolix. The Tribunal awards her a sum of US\$2,000 on account of costs.

33. In her second and third Applications, the Applicant sought the same preliminary and provisional measures as in her first Application. For the reasons set forth in paras. 58-60 of Decision No. 51, these requests are rejected.

Decision

For the above reasons,

- a. The Tribunal dismisses Application No. 2;
- b. In regard to Application No. 3, the Tribunal directs the Bank to pay the Applicant compensation in a sum of US\$6,000, and dismisses her other claims;
- c. In regard to Application No. 4, the Tribunal directs the Bank to pay the Applicant compensation in a sum of US\$1,000, and dismisses her other claims;
- d. In regard to Applications Nos. 3 and 4, the Tribunal directs the Bank to pay the Applicant an aggregate sum of US\$2,000 on account of costs.