

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 65  
(28 July 2004)

Naoka Yamagishi  
v.  
Asian Development Bank

Robert A. Gorman, President  
Shinya Murase  
Flerida Ruth P. Romero

## Factual Background

1. The Applicant contends that the decision not to confirm her appointment after a one-year probationary period was a violation of her contract of employment and terms of appointment. She contends, principally, that she was given inadequate information and guidance by her supervisors about her work, that there were violations of pertinent Administrative Orders in the administration of her Performance Improvement Plan (PIP), that her negative performance evaluation and the decision of non-confirmation can be traced to acts of intimidation and sexual harassment on the part of her immediate supervisor, and that the investigation of her sexual harassment claims was not carried out fairly. Her prayers for relief are detailed below.

2. The Applicant in early 2001 answered an advertisement for a position as an Administrative Assistant at the Asian Development Bank Institute (ADBI), a research and training institute that is a subsidiary of the ADB and is located in Tokyo. The advertisement stated that the position involved "perform[ing] general assistant jobs including secretarial tasks for professional staff." After an initial contract of a two-month duration, the Applicant was given a contract as an Administrative Assistant, Level 5, to begin in June 2001 and to continue for three years "subject to a one-year probationary period." Her immediate supervisor was the Senior Administrative Officer (SAO), and his supervisor in turn was the Director, Administration, Management and Coordination (Director, AMC). Shortly before the Applicant began her probationary period at ADBI, the staff member whom the Applicant was replacing gave her a twenty-page description in Japanese of the work that she would be expected to do, including ordering stationery and operating a fax machine.

3. The Performance Evaluation Report (PER) given to the Applicant after six months at her post, at the end of December 2001, was prepared at the first stage by her immediate supervisor. The PER identified several significant weaknesses in the Applicant's performance, including prioritization of work, timeliness of accomplishing assignments, demonstrating initiative and volunteering to assist others, and communication with other staff. The Director, AMC, for whom the Applicant sometimes worked directly, also pointed out in the six-month PER such needs as initiative and proactive assistance. The Applicant noted in detail her disagreement with most of these negative assessments.

4. Pursuant to ADB Guidelines titled "Improving Performance," a supervisor and department head, if a staff member's performance is "clearly deficient", are to "prepare a performance improvement plan (PIP) for the remaining period of probation but not exceeding six months." The SAO, the Administrative Officer, and the Director, AMC, met with the Applicant on two occasions in the first week of February 2002 to discuss her PIP for the period 4 February to 22 June 2002. The PIP work program listed eight areas of responsibility on which the Applicant's

performance would be evaluated, when the work was to be done, and a list of 24 different work assignments as well as other work that might be assigned to her. In a contemporaneous memorandum to the Applicant, her immediate supervisor stated that he would supervise and monitor her work and would evaluate her performance each month, as well as provide coaching and guidance. He noted that there would be monthly review meetings with the Applicant at which she would be given ongoing reviews, and that these monthly evaluations would ultimately be used in assessing her entire performance after twelve months on the job.

5. At another meeting, on 26 February 2002, her immediate supervisor and the Director, AMC, responded to the Applicant's questions about her PIP and reiterated their criticisms of her recent work. On 28 February, when her immediate supervisor told the Applicant to send a fax relating to computer equipment, she refused on the ground that it was not her job; she and the Senior Administrative Officer raised their voices, apparently tempers flared, and there is a dispute as to whether the SAO punctuated his remarks by pounding on his desk. (Other support staff members overheard or witnessed the altercation, about which more later.)

6. When, on 5 March, the Applicant's immediate supervisor requested that she meet with him to have their first monthly discussion under the PIP, concerning her performance in February 2002, the Applicant failed to do so. When the Director, AMC, set a later date (March 13), the Applicant wrote back that "I will attend the meeting only if [her immediate supervisor] and/or you were to attend the meeting. If [the Administrative Officer] tries to come to that meeting, it is a violation of sanctuary, dignity, and human rights." The Applicant failed to come to the meeting of 13 March, later explaining that she had urgent work to do. When she suggested a meeting be held the next day, and her immediate supervisor agreed, she in fact sent an email: "No. I still have things to do. So I will e-mail you I am ready."

7. The Applicant did appear for the PIP meeting on 15 March. However, she declined to discuss her performance and claimed that the two supervisors (SAO and Director, AMC) were in violation of certain of the Bank's Administrative Orders (A.O.), particularly Nos. 2.01 and 2.03, which she later was to invoke on several occasions as justification for her refusals to discuss the merits of her performance under her PIP. Even so, her immediate supervisor sent the Applicant a memorandum assessing her February 2002 performance and offering to discuss the evaluation whenever she might wish. The Applicant retorted that her immediate supervisor had violated A.O. 2.01 by not establishing a work program for her, and A.O. 2.03 by not discussing differences regarding her performance "freely and frankly." Her immediate supervisor, in a memorandum of 5 April 2002, took issue with those charges.

8. The monthly PIP review meetings for March, April and May 2002 never took place, for much the same reasons as just described. The Applicant's immediate supervisor set the pertinent monthly dates for such meetings, the Applicant failed to respond by email and failed to attend the review meetings without proffering an explanation, and the supervisor each time sent her his monthly evaluations along with detailed instructions and hints about how to improve her work. When summoned by her immediate supervisor to a meeting in late June, the Applicant responded that she would "attend the meeting. On the other hand, I always have been saying before, this is the violation of Administrative Order 2.01 and . . . 2.03. You, as a supervisor, are not following the rules . . . ." When her supervisor asserted that these charges "are without any basis," the Applicant demurred and failed to attend the scheduled June meeting.

9. On 25 June 2002, the Applicant's immediate supervisor sent to her the PIP evaluation for the entire review period, 4 February to 22 June 2002. When the Applicant filled out her full-year PER in July, she assessed her performance simply as "Satisfactory." Her supervisors, on the

other hand, reiterated several areas for improvement, for example, that "the ratee is strongly expected to complete works timely and to take more initiative"; they referred to the frequent occasions on which they had communicated her work program to her; and they pointed out that their efforts to secure clarification of her comments and concerns were frustrated by the fact that "the ratee declined to attend the monthly meeting every time from March to June 2002. You should understand the spirit of PIP and cooperate with supervisors." In the section of the PER (Part 2.3) allowing for comments in response, the Applicant on 26 July 2002 simply wrote "None."

10. Soon after, on 6 August 2002, the Director, AMC, gave the Applicant a copy of his proposed recommendation to the Dean of ADBI advising him not to confirm the Applicant's appointment. In her comments of 12 August, the Applicant referred to "such unexpected sudden notice" and asserted once again that she had not been given specific instructions, had not been told what in her work needed improvement and how to do so, and had not been given training. She requested an extension of six months in her probationary appointment, during which she would improve her work under the guidance of the SAO, and she further stated:

I can absolutely not accept your current judgment on non-confirmation of my appointment status. I, fundamentally, have the basic right to work and be protected as an employee in all and every organization regardless or domestic and/or international entity protected by the relative Labor Act, but not limited to, the International Labor Standard Act.

11. One day later, the Applicant added a new paragraph to her written comments of 12 August. Rather than address the criticisms of her performance and the resulting imminent recommendation that her appointment end at the conclusion of her probationary period, the Applicant attempted to explain why she had not attended the monthly PIP meetings beginning in early March: she "could not attend because of harassment in the office," which allegedly took the form of threatening and frightening behavior by her immediate supervisor by his shouting, screaming and striking his desk in the alleged incident of 28 February described above. She continued in her written comments: "I was extremely scared and afraid to be alone with him in one room. That is the reason why I could not attend the PIP monthly meeting from March to June 2002."

12. In his response of 15 August 2002, the Director, AMC, reiterated the weaknesses in the Applicant's performance as noted in her PER, recited the several PIP meetings she did not attend, and informed the Applicant that he had investigated the new allegations "raised for the first time" two days before: "There was no evidence of contemporaneous complaints by you. After speaking with the Senior Administrative Officer, I find no merit in the allegations and they are without substance."

13. On 16 August, at a meeting with the Director, AMC, to discuss his recommendation that her appointment not be confirmed, the Applicant left prematurely, claiming to be ill, when the Administrative Officer entered the room. But later that day, she wrote a memorandum to the Director, AMC, seeking to explain why she wrote "None" in Part 2.3 of her July 2002 PER. She set forth for the first time two additional incidents of what she termed "harassment" by her supervisor – a criticism "in a ridiculous manner" on 1 April 2002 about her age, and his comments on 5 July 2002 in which he had "malignantly expressed that his intention was not going to write down the good comments about [her] performance from the beginning regarding [her] PER" – and she stated that had she explained in her PER that such harassment was at the

root of her supervisor's criticisms of her performance it would have been a form of employee criticism of the immediate supervisor "not common in Japan."

14. The Applicant met with the Director, AMC, on 19 August, at which time she asked for an investigation of her three harassment claims. The Director responded that he had already interviewed her immediate supervisor and found her accusations to be unsubstantiated. When he asked the Applicant whether she had any further charges against her immediate supervisor, she said there were none. On 20 August, the Applicant brought a co-worker to meet with the Director, AMC, and to confirm her version of the "violent" events of 28 February 2002; but this was contradicted the same day by another staff member who had observed the alleged incident.

15. On 21 August, however, through yet another co-worker, the Applicant communicated to the Director, AMC, that she would be willing to withdraw her accusations of harassment by her immediate supervisor if her appointment were to be extended. Two days after that, on 23 August, the Applicant sent the Director, AMC, a memorandum requesting a six-month probationary extension, charging her immediate supervisor with only a failure of instruction and training, and attributing her failure to attend PIP monthly meetings simply to a lack of "smooth communication" between the two of them; the Applicant made no mention at all of any of the three incidents of "harassment" which were so central to her complaints only a week before.

16. On the same day, the Director, AMC, recommended to the Dean of ADBI that the Applicant not be continued in her appointment, and the Dean agreed. The Director, AMC, thereupon informed the Applicant, pursuant to the relevant administrative order dealing with the length of probationary appointments, that she would be "separated from the Institute at the end of [her] 15th month of service." This was to be on 22 September 2002.

17. Upon returning from two weeks of leave in late August and early September 2002, the Applicant learned that the Dean of ADBI had decided not to confirm her appointment. She thereupon wrote to him, on 9 September, a memorandum requesting reconsideration, and including once again the harassment allegations previously directed against her immediate supervisor. Treating this as a request for administrative review, the Dean turned the matter over to the Director, AMC (by an interpretation of A.O. No. 2.06), and he in turn informed the Applicant of his rejection of her request for reconsideration. He concluded that the Applicant was fully informed of her performance weaknesses, that regular procedures were followed, and that there was no reason to believe her accusations of "lack of smooth communication" or of "harassment" leveled by her against her immediate supervisor. He particularly pointed out that her most serious claims did not emerge until "your amended written comments substituted on 13 August 2002 after you had been advised of my draft recommendation not to confirm."

18. On 17 September, the Applicant wrote to the Dean requesting further review, and directing altogether new charges against her immediate supervisor, including the assertion that her difficulties in communicating with him (a native Japanese) were because of his poor spoken English and his insistence on speaking Japanese to her (also a native of Japan). The following day, 18 September – three working days before the termination of her service – the Applicant transmitted to the Dean an altogether new charge that her immediate supervisor had sexually harassed her. She asserted that this charge was "separated from but related to" her complaint about non-confirmation because the alleged supervisory behavior impeded her performance on the job. The Applicant mentioned no new incidents, but simply re-characterized as sexual harassment the three instances of harassment mentioned by her earlier – the altercation of 28 February 2002, the remarks of 1 April 2002 about her age, and the 5 July 2002 warning that the immediate supervisor had no intention to write good PER comments about her performance.

19. On her next-to-final working day, the Applicant on 19 September 2002 submitted to the Dean another memorandum in which she made two additional claims against her immediate supervisor for the first time: (1) that he constantly asked her to go out with him and told her she could improve her job if she did so; and (2) that he questioned her about her three-day absence in July 2002 and at one point asked "Isn't that usual woman's particular symptom of physiological phenomenon?" which caused her great embarrassment. In that memorandum, the Applicant also stated that she had been informed by an attorney that her employment could not be terminated so long as she had a claim of sexual harassment pending, that her supervisors would be liable for compensatory and punitive damages, and that ADBI could also be charged before Japanese ministries for violations of Japanese law.

20. On 20 September, her final working day, the Director, AMC, informed the Applicant that her first three claims (of 12 and 13 August) of so-called sexual harassment were ones that she had made before, that they lacked sexual content, and that his earlier investigations had shown them to be baseless. As to the two new allegations – dinner invitations and innuendos about the Applicant's absences – the Director, AMC, met with the Applicant to get further details; among other things, she stated that she knew of no witnesses to these remarks, and when asked whether she had fully disclosed all allegations against her supervisor, she responded "Maybe there is more. I have to look through my memos."

21. On the same day, 20 September, the Director, AMC, also gave the Applicant's immediate supervisor an opportunity to respond to the two new sexual harassment accusations. The supervisor acknowledged having invited several of his support staff colleagues to dinner shortly after he had assumed his post, as was customary in Japan, but he denied making repeated overtures to the Applicant or promising her a better job in return. He also asserted that once having gotten an unembarrassing response from the Applicant ("an anemic condition since childhood") to his question about the cause of her absence, a standard question on his part, he dropped the matter and did not persist in his questioning.

22. Also on that day, the Director, AMC, informed the Applicant that that was her final day of work and that henceforth she would have no permission to enter the premises of the Institute. The Applicant on the same day filed her appeal with the Appeals Committee, in which – in a somewhat unclear formulation – she challenged the non-confirmation of her appointment as a product of unfair performance evaluation and sexual harassment. Soon after, ADBI raised a jurisdictional objection to the Appeals Committee with respect to the sexual harassment charges, because they had been raised for the first time on 19 September 2002 and had not been subjected to the processes of exhaustion of internal remedies.

23. Despite that, the ADB advised the Institute that it would be prudent to take the initiative under A.O. No. 2.11 – which deals with the processing of sexual harassment charges – to appoint a neutral investigator to travel to Tokyo to conduct interviews with the key parties. Upon the request of ADBI, a female staff member from the Human Resources Division (BPHR) at the ADB Headquarters, who was an expert in matters of sexual harassment, traveled to Tokyo along with a female Japanese colleague who could, if necessary, translate and provide information about Japanese customs. The special investigator and the translator could not make the trip until 15 December 2002.

24. Ten days before, the Director, AMC, notified the Applicant by registered mail of the scheduled visit on December 16 and 17, and asked her to "please make the time to meet them privately"; reference was made to A.O. 2.11. The letter was in fact delivered to the home of the

Applicant's parents, where she was living at the time; the Applicant did not contact the Director, as requested, or respond at all. The Director then telephoned the home of the Applicant's parents, and he claims to have spoken with the Applicant's mother at length and to have been told that the Applicant was out and expected home soon and that she would return the call that evening or the next day. In fact, however, the Applicant never returned the call, or contacted ADBI to meet with the special investigator. The investigator and translator also tried to reach the Applicant by telephone during their stay in Tokyo, between December 15 and 17, with no response from the Applicant or her parents to the several messages left on an answering machine.

25. During her visit to Tokyo, the special investigator questioned the Applicant's immediate supervisor and the Director, AMC. Because the Applicant had previously identified no other staff member who had overheard the alleged sexually harassing statements, or any other third person to whom she had mentioned them, and because of the Applicant's unavailability on December 16 and 17, no other interviews were conducted.

26. On 18 December, the special investigator filed her report with the Director, AMC. Among other things, she noted the extensive amount of documentation to which she had had access, including many written communications from Ms. Yamagishi. She found that the Applicant had made no accusations against her immediate supervisor until early August, after she had been informed that her appointment would not be confirmed; and that those three accusations were characterized by the Applicant as sexual harassment only on 18 September 2002. The central two accusations being investigated – the alleged dinner invitations and the alleged comment concerning the Applicant's absences – were not made until 19 December, her next-to-final day at work. The special investigator concluded her report as follows:

The mission considered [that the immediate supervisor] was consistent, credible and sincere and his statements were corroborated by various documentation. On the other hand, Ms. Yamagishi's non-cooperation with the investigation, the timing of her allegations, and her inconsistency, all contribute to a conclusion that her allegations are not credible.

27. The following day, 19 December 2002, the Applicant – apparently back home after what she asserts was an out-of-town trip – sent an email to the Appeals Committee complaining about the interviews set up by ADBI and held in her absence without her consent and without confirming her schedule. On 24 December 2002, the Director, AMC, wrote to the Applicant and her immediate supervisor a letter setting forth his conclusions pursuant to the sexual harassment provisions of A.O. 2.11. He referred to his own earlier investigation on 20 September and to the 16-17 December 2002 investigation in Tokyo, and he stated:

I have decided to dismiss the complaint because Ms. Yamagishi's allegations are not credible due to (i) inconsistencies, and not being supported by contemporaneous evidence, and (ii) the timing of their appearance on her second last day in the office following a series of prior allegations, which were not proved either, and in spite of earlier opportunities and invitations to come forward with them.

28. In the proceeding that was pending before the Appeals Committee, it was not until 21 February 2003 that ADBI furnished to the Committee a copy of the 18 December 2002 report of the special investigator, accompanied by the admonition that "It should not be copied at all, and should be returned in a sealed envelope to Director, AMC. Its contents should not be viewed by anyone except the Appeals Committee members" for the Applicant's appeal, and "Its contents

should not be directly divulged or indirectly divulged or disclosed to anyone else." No copy of the 18 December 2002 report was furnished at that time to the Applicant or to her immediate supervisor, and it appears that neither was given a copy until it was filed as part of the Respondent's Answer in this proceeding before the Tribunal, in March 2004.

29. The Appeals Committee – which had earlier concluded that no oral hearing was necessary in light of the extensive documentation before it – filed its report to the President of the Bank on 6 October 2003. The Committee's conclusions were as follows:

[T]he Committee finds that there was no violation of Administrative Orders, policies and procedures in the Appellant's entire 12-month probation period with ADBI. This includes the period when Appellant was placed on a PIP and during implementation of the PIP. The Committee also finds that the [Appellant] has not shown that such actions were based on improper motivation, represented an abuse of discretion, and was not discriminatory nor arbitrary. The Committee recommends that the President reject all of the Appellant's claims and the relief sought by her as they are without merit.

30. The President accepted the recommendation of the Appeals Committee, and the Applicant filed this application with the Tribunal. She asks that the decision of the President be rescinded, that the Tribunal initiate another sexual harassment investigation mission, and that ADBI be directed to pay some 80 million yen (approximately \$780,000) in compensation for the non-observance of her employment contract, for injury for sexual harassment and for career damages, and an additional 5 million yen to cover her litigation expenses. The Respondent made a request that the Tribunal decide this case in plenary rather than by a panel, and that an oral hearing be held for the taking of testimony from the Applicant and her immediate supervisor. The Tribunal rejected both requests as unnecessary. On 22 June 2004, the Applicant's immediate supervisor filed an application for intervention, and the Tribunal concludes that, because the immediate supervisor has a right which may be affected by the judgment, his application is admissible under Rule 18 of the Tribunal's Rules of Procedure.

### **Non-Confirmation of Appointment**

31. The Applicant's basic contention appears to be that the decision of the ADBI Dean not to confirm her appointment at the end of her one-year probationary period was based upon unfair and biased evaluations by her supervisors. In particular, she asserts that her relationship with her immediate supervisor, the SAO, was tainted by his sexually harassing attitudes and behaviors, and more generally by his inability to communicate and his failure to guide her in her work. She also appears to contend that she was misled as to the low level of skills required in her position and that this contributed to the quality of her work as an Administrative Assistant.

32. A number of these assertions can be summarily disposed of by the Tribunal. Any claim that the Applicant was surprised by the secretarial and support nature of her tasks is not credible. The advertisement to which she responded described her job function as "performs general assistant jobs including secretarial tasks for professional staff." Shortly before the Applicant assumed her post, her predecessor furnished her with a twenty-page memorandum containing a detailed list of the tasks that the job entailed (including how to order stationery and stamps and to operate the fax machine). Although the Applicant suggests that she was led by her ADBI supervisors to believe that she would be doing economic research and analysis, and that she would not have left her previous job at a private company had she known the true nature of her ADBI work, the record makes clear that, in that previous job, her work included filing and the handling of routine correspondence and billing records. Her ADBI supervisors in fact in their

initial job interview with the Applicant and their frequent meetings with her early in her probationary period asked questions and gave instructions that made it clear that she would be doing administrative and support work there. The fact that the Applicant never raised this contention until she filed her Application with the Tribunal – not to her supervisors, not through administrative review and not before the Appeals Committee – tends to cast heavy doubt upon its credibility. It also comes to the Tribunal much too late, and without timely exhaustion of internal remedies. (See Article II, para. 3 of the ADB Administrative Tribunal's Statute.)

33. The same is true regarding the Applicant's claims of "miscommunication" between her and her immediate supervisor. She appears to claim that her ability to do her work and to get along with her supervisor were inhibited by his inability to express himself in English, which she asserts led to feelings of inferiority on his part. Curiously, however, the Applicant at the same time admonishes her immediate supervisor for consistently speaking with her in their native tongue, Japanese, rather than in English, the official language of the ADB and of the Institute. Although ADBI's official language is indeed English, it is not surprising – and was apparently quite common – that Japanese nationals working together in a Tokyo venue would in daily activities speak with one another in Japanese. But whether or not communication in English should have been the norm, the documentation in the record before the Tribunal shows that the Applicant and her supervisors consistently engaged in their written workplace communications in English – in their letters, emails, memoranda, PIPs and PERs. In any event, the Applicant has failed to demonstrate that interacting in Japanese caused her any injury, tangible or intangible. Once again, this complaint was not mentioned by the Applicant until her 17 September 2002 memorandum to the ADBI Dean, more than a year after she had started her work there. Had she believed there was a violation of Bank or ADBI rules or policies, or a disadvantage to her, she should have so stated, particularly to her supervisors, in a much more timely fashion. (The Tribunal would add that, on the basis of the many documents in the record that were written by the Applicant's immediate supervisor to her, to the Director, AMC, and to others, his English was not remotely deserving of the Applicant's criticism.)

34. More central to her Application is the Applicant's contention that the decision not to confirm her appointment after her probationary year was a violation of her employment contract. The Tribunal has held, in Haider, Decision No. 43 [1999], V ADBAT Reports 5, that "[t]he main objective of probation is to enable the organization to find out whether the probationer is suitable for employment. It is clear in this context that the Respondent has the discretion to decide whether or not to confirm a probationary appointment" and that, as with any evaluation of employee performance, "the Tribunal may intervene only when there is an abuse of discretion or if the decision is arbitrary, discriminatory or improperly motivated or if it is one that could not reasonably have been taken on the basis of facts accurately gathered and fairly weighed." Indeed, in probationary situations most particularly, the Tribunal's authority is limited. "It should be noted that the discretionary power of the managerial authority in probationary cases is generally broader than usual as a result of the very nature of probation. . . . [I]n the case of the probationer the organization must indeed be granted the broadest possible measure of discretion . . . and its decision will be upheld unless some particularly serious or glaring flaw can be shown." The burden lies with the Applicant to prove these elements of her case.

35. At the same time, as the Tribunal also stated in Haider, "the probationer's interest in being definitively employed should not be ignored nor deprived arbitrarily, if he has satisfied the obligations and standards required of him. Thus, for example, his duties must be well-defined, and he should be given a fair chance to demonstrate his suitability with adequate guidance and supervision in order to qualify for employment." The question for the Tribunal is therefore



whether the Respondent treated the Applicant fairly, as just defined, and whether its non-confirmation decision was or was not an abuse of its discretion.

36. The Applicant contends that her duties were not well-defined, that she was not given appropriate instructions and guidance, that she was provided with inadequate supervision, and that she was not informed of any alleged failings or how to rectify them. The Tribunal must reject these contentions.

37. Even before the Applicant began to work at ADBI, her predecessor provided a most detailed statement, in some twenty pages, of the tasks that she was soon to undertake. The Applicant's two supervisors – the SAO and the Director, AMC – met with the Applicant on several occasions to discuss her duties in the early months of her probationary period. Even more to the point, the Director, AMC, on 3 August 2001 – little more than a month after the Applicant began her job – distributed to all members of the support staff a memorandum listing in great detail all of the tasks to be done within the departments and specifically identifying which staff members were assigned which tasks; the Applicant was explicitly given 15 assignments, and 5 more were added within two months. In February 2002, she was informed that her performance was inadequate in several stipulated areas, so that she was given a PIP, which listed in detail the precise tasks in which she would have to improve, along with instructions about what to do. The Applicant was informed that there would be similar instructions given to her on a monthly basis for the following five months of the probationary period, and that there would be monthly meetings with her immediate supervisor to discuss her progress, to answer any of her questions, and to set forth projected tasks with specific directions for improvement. She was expressly informed that her performance over the following months would influence the decision whether she would be confirmed at the end of her probationary year.

38. The Applicant was summoned to PIP discussions in early March, early April, early May, and early and late June of 2002. She declined to attend most of those meetings, typically stating that she was too busy to do so. (As an example, the Applicant declined to make herself available for meetings suggested on March 1, 5, 11, 13 and 14.) She also consistently asserted that she would not attend meetings because of management's failure to comply with Administrative Orders 2.01 and 2.03 relating to work programs and performance. Month after month, her immediate supervisor nonetheless prepared a detailed PIP evaluation form, listing in detail the work she had to complete, pointing out her performance improvements and flaws and setting precise goals to be met over the next month.

39. A.O. 2.01, para. 11, provides inter alia that the supervisor should meet with the probationary staff member "as soon as possible" after the entry on duty to establish the work program, a copy of which is to be provided and discussed with the staff member. Performance is to be reviewed after six months of service, and again at the end of the 13th month. "The staff member's appointment will be confirmed if the staff member's performance is fully satisfactory in all respects and the staff member is considered suitable for further employment." A.O. 2.03, para. 2, provides that the six-month performance review "allows the staff member the opportunity to formally discuss with the supervisor" matters such as work accomplishments, performance goals and areas of performance requiring further development.

40. The Tribunal is convinced that the Respondent fully measured up to its responsibilities to inform, guide, supervise and constructively criticize the Applicant's work throughout her probationary period, and particularly during the PIP period from February through June 2002. Although the Applicant asserted at the time, and still does in her pleadings, that her supervisors failed in these responsibilities and that in particular her immediate supervisor failed to discuss

differences regarding her performance "freely and fairly," this is altogether inconsistent with the very substantial documentary record, principally the monthly PIP reports sent to her by her immediate supervisor. It also goes without saying that free and fair discussion by her supervisor is hardly possible when the Applicant herself consistently is "too busy" to attend these very important meetings on which her future employment depends or declines to do so because of her supervisors' alleged – and unsubstantiated – failures to communicate. Communicating with a staff member assumes that there is a staff member who is interested in listening.

41. In view of the fact that the Applicant's supervisors complied with the Bank's pertinent administrative orders in monitoring her work, it remains to determine whether they abused their discretion in ultimately deciding against confirmation of her appointment. As noted above (para. 34), the Tribunal has in the Haider case endorsed the view that the Bank's decision will be upheld "unless some particularly serious or glaring flaw can be shown." Far from there being such a flaw in the Respondent's decision not to confirm the Applicant after her year of probationary service, such non-confirmation could not be viewed as an abuse of discretion even if a far more demanding standard were employed in reviewing the decision of the Respondent.

42. Indeed, apart from the Applicant's claims that she was not given proper instructions and supervision (already discussed), and that her immediate supervisor was biased against her and that his judgment was tainted by harassment (to be discussed below), the Applicant appears to make no claim in her pleadings that her performance actually merited confirmation.

43. The record is replete with statements by her evaluating supervisors that the Applicant's work needed improvement in many basic respects, and her half-year and end-of-year PERs – along with her monthly PIP evaluations – reiterated her performance weaknesses. At the time the Applicant was placed on a PIP, her supervisors gave her a brochure titled "Improving Performance," which explicitly pointed out that being placed on a PIP was only for staff members whose work was "clearly deficient." In the Applicant's PER completed by her supervisors on 12 July 2002, they noted in great detail the areas in which she had improved over the past months and those in which she had not, and evaluated her performance as either "weak" or "fair" in essentially all areas. To these and other statements about her weaknesses in quality, accuracy and timeliness of her work, productivity and initiative, and analytical, technical and conceptual skills, the Applicant's total response on the PER form was "None." The Applicant did attempt to explain this laconic response in a memorandum to the Director, AMC, dated 16 August 2002, but this was all in terms of the allegedly harassing behavior by her immediate supervisor, and she in fact admitted to weaknesses in the areas just mentioned.

44. It was also appropriate for her supervisors to give weight, in evaluating her performance, to her evasion and obstinacy in connection with the monthly PIP meetings in the early half of 2002, as to which she was either absent or altogether uncooperative. As has been stated by the World Bank Administrative Tribunal, Buranavanichkit, Decision No. 7 [1982], WBAT Reports, para. 26: "Probation has as its purpose the determination whether the employee concerned satisfies the conditions required for confirmation. These conditions may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members."

45. In sum, the Applicant's performance was seriously weak in a variety of important areas, such that non-confirmation cannot be found to be an abuse of discretion. That conclusion, however, assumes that the negative comments by her supervisors were reliable and in good faith, and were not the product of prejudice or ill-will, and that the relationship between the

Applicant and her immediate supervisor was not grounded in his harassment, particularly sexual harassment, of her. It is to that central issue that the Tribunal now turns.

### **Harassment and Prejudice in the Non-Confirmation Decision**

46. Pursuant to the Bank's rules on probationary service, the Applicant was entitled to work for three months beyond her probationary year, i.e., until 22 September 2002 (a Sunday). After the Applicant had already been notified of the recommendation of the Director, AMC, not to confirm her appointment, she on 12 and 13 August 2002 for the first time accused her immediate supervisor of "harassment" by shouting at her and pounding on the desk in his office on 28 February 2002 – half a year before. She stated that this harassment was the reason she did not attend her PIP meetings, a claim that the Director, AMC, was quick to point out was not voiced by the Applicant at the time of those meetings. Just days later, on 16 August, she alleged, also for the first time, that her immediate supervisor on 1 April 2002 (four and a half months previously) told her that she was too old and should work harder; and that he on 5 July told her that he from the outset intended not to write good comments about her performance in her PER. She also characterized these latter two incidents as "harassment." On 22 and 23 August, the Applicant informed the Director, AMC, of her withdrawal of her harassment allegations against her immediate supervisor, and she apologized to the latter, while at the same time making a request for a six-month extension of her probationary period.

47. On 18 September 2002, however, the Applicant wrote to the Dean of ADBI and, reviving the three "harassment" charges just noted, she characterized them as "sexual harassment." On 19 September, the Applicant's next-to-final working day, she wrote to the Director, AMC, that she had been advised by an attorney that her employment could not be terminated while charges of sexual harassment were pending; and she also stated that she could, as a victim of sexual harassment, complain to Japanese ministries. To the three "sexual harassment" charges already noted by her the day before, she added two more: the immediate supervisor "throughout the year" (after the dinner of co-workers in July 2001) "persistently mentioned that he wanted me to go out with [him]," and he also closely questioned her about the cause of the Applicant's absence from work between 22 and 24 July 2002, including his question (as stated in the Applicant's words) "Isn't that usual woman's particular symptom of physiological phenomenon?"

48. On 20 September, the Director, AMC, wrote to the Applicant that he had already investigated the first three claims when originally made in August 2002, that they were not subject to the special investigatory procedures concerning sexual harassment under A.O. No. 2.11, and that he was "not convinced on the balance of probabilities of the credibility of your allegations." Also on 20 September, the Director, AMC, separately interviewed the Applicant and her immediate supervisor about her two new accusations, which the Director had decided did fall within the definition of "sexual harassment" under A.O. 2.11. Her immediate supervisor denied making these comments, and had an otherwise benign explanation for the July 2001 office dinner invitation and his conversation upon the Applicant's return to work after an absence.

49. Although the Director, AMC, believed that the Applicant's allegations were unfounded, he concluded that A.O. 2.11 required an independent investigation. As recounted above, this led to the designation of the two-person team, including a sexual harassment expert from Manila headquarters, coming to Tokyo on 16 and 17 December 2002; their inability to contact the Applicant despite repeated efforts; the special investigator's interviewing of the immediate

supervisor and the Director, AMC; and her forwarding a report on 18 December to the Director, AMC, who dismissed the Applicant's complaint of sexual harassment.

50. Although the Appeals Committee, to which the Applicant had appealed on 20 September 2002, decided on 26 December that it had no jurisdiction to address the sexual harassment claims as such because of the Applicant's failure to exhaust her internal remedies, it proceeded to consider those claims as part of the issue of the validity of ADBI's decision not to confirm the Applicant's appointment. The Tribunal similarly concludes that because the non-confirmation decision is said by the Applicant to have been tainted by her immediate supervisor's harassing conduct, it is necessary and appropriate to consider that alleged wrongful conduct.

51. If the misconduct that is charged by a staff member is truly "sexual harassment," then the Bank has a specific administrative order, A.O. 2.11, that governs the situation. Most pertinently, the A.O. defines "sexual harassment," it makes clear the Bank's condemnation of such conduct, and it creates a procedure for investigating such charges, with assurances of fairness to both the accuser and the alleged harasser. A.O. No. 2.11, para. 4.1, provides in pertinent part:

Sexual harassment is conduct of a sexual nature which is unwanted by the recipient and which the perpetrator knew or should have known was offensive to the recipient. Sexual harassment is defined as any unwelcome sexual advance, request for sexual favors or other verbal or physical conduct of a sexual nature . . . which is made a condition of employment, promotion or other personnel action or creates an intimidating, hostile or offensive environment. The following forms of conduct, if unwelcome, may be considered sexual harassment: . . . Verbal conduct of a sexual nature which may include unwelcome sexual advances, propositions or pressure for sexual activity, suggestions for social activity within and outside of the workplace, offensive flirtations, suggestive remarks, innuendoes or lewd comments or noises . . . .

52. If there is a signed complaint of sexual harassment, then A.O. 2.11, para. 6.7, provides, inter alia, that:

- a. The alleged harasser is to be advised and given a copy of the complaint and any related report.
- b. The alleged harasser is given the opportunity to respond in writing to the allegations. . . .
- c. An investigation is to be conducted by a staff member(s) or an expert(s) designated by BPMSD, in consultation with the aggrieved individual and the alleged harasser, to determine the facts in the case as well as whether a prima facie case exists of sexual harassment.
- d. The alleged harasser is to be informed of the results of the investigation and given the opportunity to respond in a meeting with the staff member(s) or expert(s) conducting the investigation.
- e. The facts determined in the initial investigation and fact-finding exercise, including the response of the alleged harasser, are to be reviewed by the Director, BPMSD [in ADBI, it is the Director, AMC, who has this responsibility], who decides whether to:
  - i. dismiss the complaint; or
  - ii. orally counsel the alleged harasser; or

- iii. commence formal disciplinary proceedings pursuant to A.O. No. 2.04.

53. It will be recalled that the Applicant made three charges against her immediate supervisor in August 2002, labeling them "harassment," and that she reiterated those three charges on 18 September 2002 under the label "sexual harassment." She had been advised by an attorney in the meantime that an employee alleging sexual harassment could not lawfully be relieved of her employment. This was misinformation. Whatever national or international law her counsel might have had in mind is not binding upon the Bank, which is an international organization and the law of which, with respect to the employment rights of staff members, is internal to the Bank and determined ultimately by the Tribunal. (See generally Haider (No. 2), Decision No. 48 [2000], V ADBAT Reports 45.) The Bank's regulations provide that the filing of any sort of appeal against a workplace decision does not suspend the implementation of the decision under review. According to A.O. No. 2.06, para. 4, "a request for . . . administrative review shall not suspend the implementation of the decision subject to administrative review." The Tribunal finds this to be a reasonable rule, in light of the lengthy and potentially indefinite suspension of decisions on matters such as confirmation, reappointment, discipline and the like that would follow if the rule were otherwise, fostering inefficiency and other harm to the interests and mission of the Bank. Even so, the Tribunal clearly has jurisdiction to hear and rule upon applications that properly present sexual harassment and sexual discrimination grievances, for these clearly implicate an interpretation of a staff member's contract of employment and terms of appointment, which include a ban upon such misconduct. (See Alexander, Decision No. 40, [1998], IV ADBAT Reports 41, para. 74.) A staff member ultimately vindicated through administrative review and Tribunal action can be made whole through the award of compensatory damages and other remedies.

54. The Tribunal finds, as did the Director, AMC, that the three alleged incidents under discussion – the loud argument and table pounding, the disparaging reference to the Applicant's age, and the warning that a good evaluation would not be given – if they occurred at all, cannot properly be characterized as "sexual harassment" as defined in A.O. 2.11. They may have been unwelcome to the Applicant, and caused her discomfort, but they cannot reasonably be viewed as being of a "sexual nature." They are not at all similar to the examples given in A.O. 2.11: unwelcome sexual advances, propositions or pressure for sexual activity, offensive flirtations, suggestive remarks and lewd comments or noises. Accordingly, it was not necessary for the Respondent to adhere to the precise complaint and investigation procedure set forth in A.O. 2.11, para. 6.7.

55. But the question for the Tribunal is not so much whether the Respondent complied with the procedures set out in A.O. 2.11 for sexual harassment. Rather, the question is whether – however the alleged misconduct was properly characterized – it actually took place and likely affected the fairness of the Applicant's immediate supervisor when he evaluated her work, or possibly tainted the decision of the Director, AMC, and Dean, ADBI, not to confirm the Applicant's appointment.

56. The Tribunal concludes that the Applicant has failed to carry her burden of proving that the three incidents under discussion actually took place, or that they resulted in a non-confirmation decision that was based on discriminatory or other illegitimate criteria.

57. The accusation concerning the alleged table-pounding incident of 28 February 2002 was not made by the Applicant until 12 August 2002, roughly one-half year later and only after the Applicant was notified of the recommendation that her appointment was not to be confirmed.

Although the Applicant brought a friendly co-worker with her to corroborate the incident, the Director, AMC, on 20 August 2002 interviewed another co-worker who had been present and who informed him that it was the Applicant who provoked the incident and who persisted in raising her voice, and that her immediate supervisor had not struck the desk. In 2004, in the course of the proceeding before the Tribunal, written statements were proffered from five other staff members in support of the Respondent's version of the events. Although such statements are to be scrutinized with care, in light of their timing and the fact that they were solicited by senior management, these are remarkably consistent, and strongly suggest a pattern of shouting and occasional insubordination on the part of the Applicant, directed not only at her immediate supervisor but also at the Administrative Officer and the Director, AMC – and considerable self-control on the part of the SAO.

58. There was also a delay with respect to the other two allegations of non-sexual harassment made on 16 August 2002. The statement by the immediate supervisor that the Applicant was too old allegedly took place on 1 April 2002, and the statement about not writing down good PER comments allegedly took place at the end of July. Other factors cast doubt upon the Applicant's credibility, both with respect to these charges and the charges of sexual harassment to be discussed below. The immediate supervisor denied making these comments. The Applicant on 22-23 August 2002 offered to withdraw all three accusations, offered an apology to her immediate supervisor, acknowledged her performance failings, and proposed a six-month extension of her probationary period under the guidance of her immediate supervisor – thus indicating that she was not at the time likely to have viewed him as an intimidating harasser. When the proposed extension was rejected, she reinstated her charges against her immediate supervisor on 9 September. As to the incidents of 1 April and end July, the Applicant could identify no one who had heard the supervisor's alleged comments, nor anyone in or out of the Bank to whom she had contemporaneously complained or commented about them.

59. Many of the same flaws can be found in the two charges of 19 September 2002 directed against the immediate supervisor that could indeed fall within the category of sexual harassment – i.e., the persistent dinner invitations and the innuendo regarding the Applicant's absence from work. If the immediate supervisor had in fact made these comments, they would clearly fall within the Bank's definition of "sexual harassment," which would warrant an investigation as envisioned by A.O. 2.11 and possible severe sanctions for the supervisor. In fact, two investigations were undertaken, apparently in an excess of caution. One was by the Director, AMC, on 20 September 2002, the day after the Applicant made the above-described two accusations. He interviewed the Applicant and the immediate supervisor, who denied the accusations, and the SAO also provided a written response to the Applicant's written charges. Because the Applicant could identify no other persons who overheard these alleged comments, or to whom she contemporaneously mentioned them, no other witnesses were interviewed. The Director, AMC, concluded that the Applicant's accusations lacked credibility.

60. Believing, however, that A.O. 2.11 contemplated an investigation by a more neutral party well versed in issues of sexual harassment, the Director, AMC – with the support of the Bank, which had never previously dealt with a complaint of sexual harassment under A.O. 2.11 – informed the Applicant on 6 December 2002 that he had "requested the assistance of independent outside experts from the Bank in Manila to look into your complaints against your immediate supervisor." (The quotation is from a registered letter sent to the Applicant at the home of her parents, where she lived, which letter was not returned to sender.) As noted above, an expert on sexual harassment and a native Japanese-speaking translator, both from Headquarters staff, went to Tokyo to interview the Applicant, her immediate supervisor and the Director, AMC – again, for lack of any other person known to have pertinent information about

the two sexual-harassment charges. Repeated efforts to contact the Applicant, well in advance of the Tokyo visit of 16-17 December, and during it, proved unavailing.

61. In her report of 18 December 2002, the special investigator concluded:

The investigation would have significantly benefited from an opportunity to interview [the Applicant] on her two allegations and on other relevant work related matters. However, the documentation provided, including a substantial number of documents authored by [the Applicant], was of critical importance in providing relevant background information to assist the evaluation of the allegations. The mission considered [that the SAO] was consistent, credible and sincere and his statements were corroborated by various documentation. On the other hand, [the Applicant's] non-cooperation with the investigation, the timing of her allegations, and her inconsistency, all contribute to a conclusion that her allegations are not credible.

Although the Tribunal is not directly reviewing the validity of the special investigation undertaken on 16-17 December 2002 – but rather the question whether the Respondent's non-confirmation decision was tainted – it bears stating that the exhaustive efforts to locate the Applicant and to interview her, the procedures utilized by the special investigator in conducting the investigation, and the thoughtful care with which the special investigator reached her conclusions were most commendable.

62. With that report in hand, the Director, AMC, concluded on 24 December 2002 that the Applicant's two charges of sexual harassment should be dismissed because they "are not credible due to (i) inconsistencies, and not being supported by contemporaneous evidence, and (ii) the timing of their appearance on her second last day in the office following a series of prior allegations, which were not proved either, and in spite of earlier opportunities and invitations to come forward with them." Although the Applicant's "unexplained non-cooperation with the [16-17 December] fact-finding investigation also tends to contribute to this conclusion.... I do not need to rely on this point for my decision."

63. Some nine and one-half months later, the Appeals Committee filed its report and recommendation regarding the Applicant's 20 September 2002 appeal against the decision not to confirm her appointment. The Committee concluded not only that the entire twelve-month probationary period had been implemented in complete accord with the Bank's administrative orders, policies and procedures, but also that the Applicant "has not shown that such actions were based on improper motivation, represented an abuse of discretion, and was not discriminatory nor arbitrary."

64. Although the fact that the Applicant's sexual harassment charges were thrice dismissed – by the special investigator, the Director, AMC, and the Appeals Committee – does not in any way preclude the Tribunal from making a contrary determination, their evident consistency carries weight. There is added weight when certain of these fact-finders had an opportunity to observe the accuser or the accused, or both.

65. In any event, the Tribunal reaches the same conclusion, for much the same reasons. Any claims that the Applicant's immediate supervisor was a sexual harasser are belied by her several acknowledgments in 2002 that she was comfortable meeting with and being supervised by him, by her retraction of such claims and her apology to him in August 2002, and by the facially balanced assessments of the Applicant's work given by her immediate supervisor on her PIP and PER evaluations. Moreover, the Applicant's inconsistent behavior and her total inability to corroborate her claims contribute to an appearance of fabrication: she failed to complain of

these two incidents to her supervisor or to his (the Director, AMC) at the time they allegedly occurred; she delayed in making the charges until the next-to-final day of work on 19 September 2002; she gave assurances in mid-August 2002 (when making three other charges of alleged "sexual harassment") that there were no other charges forthcoming; she expressly asserted her belief that bringing sexual harassment charges would keep her at work; she could provide no corroboration by any eyewitnesses or by anyone at work or at home to whom she might have related the hurtful incidents; and she evidently evaded the special investigator over the course of a two-week period in December 2002 (without any proffer of proof as to where she was during that period and why the many messages did not reach her).

66. What the record shows, instead, are supervisors – the SAO and the Director, AMC - who, in the face of persistently uncooperative and obstructive behavior on the part of the Applicant, adhered with patience and with meticulous care to the Bank's requirements concerning performance assistance and evaluation. Much the same can be said with respect to the Respondent's efforts to investigate the claims of harassment belatedly brought forward by the Applicant. The Director, AMC, conducted his investigations in August and September 2002 with dispatch and even-handedness, and reached conclusions that were more than reasonably based, and he wisely utilized the services of an informed special investigator in addressing issues in which he was perhaps too closely involved.

67. Although the Tribunal will not comment at length on the later handling of the report of the special investigator, given the focus of this case on non-confirmation rather than the application of A.O. 2.11 in sexual harassment cases, it suffices to state that the Tribunal is of the view that the Respondent delayed unduly in turning over the report to the Appeals Committee in response to that Committee's clear request for it, and that the Respondent's related directions to the Committee were rather more harsh than necessary. More troubling was the Respondent's failure to make the report of 18 December 2002 promptly available to both the Applicant and her immediate supervisor, even without their explicit requests therefor and even though A.O. 2.11 might appear to permit otherwise. The report was more than a mere "working document" (as it is characterized by the Respondent); it obviously implicated the most important rights of both the accused and his accuser; and there was hardly anything in the report (which essentially reiterated the positions of the SAO and the Director, AMC, already made known to the Applicant) that would have constituted a troubling disclosure to the two parties. The Respondent's very legitimate concerns regarding confidentiality related, at least in this case, to fear of disclosure to third persons beyond the parties, and those concerns could have been addressed by means other than total concealment from the parties for nearly one and one-half years.

68. The Tribunal concludes that the Applicant has clearly failed to prove that the decision not to confirm her appointment as Administrative Assistant was tainted by harassment or otherwise by arbitrary, discriminatory or malicious behavior, or that the Bank's administrative orders and other regulations with respect to performance evaluation and non-confirmation were violated.

## **Decision**

For these reasons, the Tribunal unanimously decides to dismiss the Application.