

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

DECISION NO. 74
(11 January 2006)

Ms. X
vs.
Asian Development Bank
(Nos. 1 and 2)

Flerida Ruth Romero, President
Khaja Samdani, Vice-President
Claude Wantiez
Arnold M. Zack
Yuji Iwasawa

1. This case concerns a claim of harassment brought against the Asian Development Bank by an employee of the Asian Development Bank Institute in Tokyo.

I. THE FACTS

Background

2. The Applicant, a Japanese national hereinafter referred to as "Ms. X", is employed as an accountant in the Directorate of Administration, Management and Coordination (AMC) of the Asian Development Bank Institute (ADBI) in Tokyo. She had been employed as a temporary employee under a short-term contract until she was given a fixed-term contract on 16 June 2001, which was then converted to a regular appointment on the recommendation of her supervisor, hereinafter referred to as "Mr. Q", the former Director, AMC. Her performance record has been exemplary; consistently receiving the highest merit increases without any negative administrative decisions or disciplinary actions in her record. There is no record of her filing any formal complaints against the Institute or its personnel until 27 June 2003, three days prior to the return of Mr. Q to the Ministry of Finance.

27 June 2003 Complaint

4. On 27 June 2003 the Applicant submitted a formal complaint commencing as follows:

Since the beginning of my employment at the ADBI ..., I have suffered various forms of harassment and breaches of my employment contract, which are attributable to the responsibility of [Mr. Q], Director AMC. This document is intended to report the above harassment and breaches, and to request the ADBI to take an appropriate disciplinary measure against him and to compensate for the resultant psychological and physical damage inflicted upon me.

In particular she listed the following complaints:

- a. Her treatment as a temporary agency staff member before her appointment as a support staff member when Mr. Q had assured her of conversion to permanent employee status after a period of three months;

- b. Her being reproached as a temporary agency staff member for bypassing her superior and approaching the former Dean directly about her employment situation;
- c. The excessive delay in her conversion from temporary to established support staff;
- d. Her performance assessment by peers and colleagues while a temporary agency staff member;
- e. Lack of access to bonus and paid holidays because of the delay in approving her appointment to an established support staff post;
- f. Nature of overtime as a temporary agency staff member and alleged impact on her eyesight;
- g. Possible disclosure of comments about performance of a fellow employee;
- h. Dissatisfaction with the handling of complaints about the competence of a fellow employee;
- i. Mr. Q's handling of the Applicant's possible complaints about the April 2003 departure of the temporary librarian;
- j. Mr. Q's inaction in the handling of a request for title recommended by her supervisor following her request for expanded responsibility for legal services;
- k. Sexual harassment charges against Mr. Q for unwanted touching of fingers and hand and continuous staring between "my chest and feet" occurring in March and June 2001 and from January to April 2003.

Investigation

5. On 13 August 2003, the Applicant was offered the option to engage in an informal process to resolve the portion of the complaint dealing with sexual harassment, but did not avail herself of this opportunity. The matter was referred to compulsory conciliation. The Director appointed two impartial bank staff members to conduct an investigative interview which was carried out on 25-27 November 2003.

6. The report issued by the investigators on 24 December 2003 summarized the allegations as the result of a gradual breakdown in the work relationship between the Applicant and Mr. Q, ranging from a lack of clear communications over the terms of employment to insufficiency in office processes and culminating in the perception of unfair treatment.

7. It found misunderstanding regarding terms of employment, delays, some unavoidable, which were poorly communicated by supervision, and unsubstantiated claims of intimidation. The investigators reported receiving a threat as to the consequences to the Institute and to the career of the Applicant if the complaint was pursued. The report found that "[t]he behaviors listed in allegations 1-3 and 5 constitute bad management practice and misconduct."

8. As to complaints 4, 7 and 8, the report criticized the Institute management for contacting staff at peer level for written assessment of the Applicant's performance, as well as for violating Ms. X's privacy in revealing her as the author of one such memo. It found that Mr. Q's adherence to

specific, transparent ADB procedures within the Institute "was ad hoc and insufficient. This breach in confidentiality reflects poor judgment and lack of sensitivity to the nature of these activities"

9. Items 6, 9 and 10 of the 27 June 2003 complaint, according to the report, resulted from her working "excessively long hours," which were documented by time sheets, from her being given additional legal work which might have contravened her contract of employment or terms of appointment, and from Mr. Q's attempt "to blame her for the sudden resignation" of the librarian.

10. The report noted "the major factor influencing this situation was the unstable work atmosphere in the Institute at the time. Normal lines of authority or reporting responsibility were not observed. Standard ADB operating procedures were not followed and decisions were not transparent. There was broad mistrust among staff and a low level of open communication and distrust between the Dean of the Institute and the other management staff. In a sense the work relationship between [the Applicant] and [Mr. Q] was an outgrowth of this atmosphere in the Institute."

11. As to the complaint of sexual harassment, the Investigators reported that Mr. Q "does not deny touching the [Applicant's] fingers or hand but qualifies that it was incidental rather than sexual contact." They went on to note that, "[i]deally, if the issue was raised in a timely manner with [Mr. Q] such that he understood that this touching was unwanted, he would have had the opportunity to explain and change his behavior. By this time, however, the [Applicant's] working relationship with [Mr. Q] had deteriorated to such an extent that [she] was unable to approach [him]. For the [Applicant] the working environment had become hostile and offensive as a result of issues with the (i) terms of employment, (ii) low transparency in office processes, and (iii) the perception of unfair treatment."

12. The report made the following specific recommendations:

- It is not evident that the issue [of] excessive workload for the complainant has yet been addressed. The workload for this position should be assessed and additional resources used as needed.
- The job description and responsibilities for the complainant should be clear and observed.
- Expenses related to damaged eyesight should be reimbursed by ADB.
- Bonuses and paid holidays that were missed because of delays should be provided with interest.

Appeal to the Administrative Tribunal

13. On 6 May 2004, the current Director, AMC, dismissed all of the Applicant's allegations. On 31 May 2004, she appealed that decision to the Appeals Committee which on 20 September 2004, without finding a hearing was required, recommended the Appeal be rejected as being without merit. The President accepted the Report and Recommendations the same day and the Applicant on 17 December 2004 appealed to the Administrative Tribunal seeking the following relief:

- a. "I request that the Administrative Tribunal conduct full hearings on this matter with the former Dean and the former Senior Administrative Officer, who are thoroughly familiar with the management skill of [Mr. Q]."
- b. "I request that the Tribunal commission an assessment on the following three to a reliable private consulting company: (1) the past and present management skills of the Asian Development Bank Institute (ADBI) management, (2) the performances so far up to now conducted by the ADBI management, (3) the appropriateness of the salary so far up to now paid to the ADBI management. In addition to this, I request that the results of the aforementioned assessment be used as part of the reference materials for your judging this matter and that the results are made public."
- c. "I request that the Tribunal invalidate 'Report and Recommendation of the Appeals Committee on Appeal No. 3 of 2004' (Annex 1) issued by the Appeals Committee on 20 September 2004."
- d. "I request that [Mr. Q] and [the Dean] apologize to me in writing."
- e. "I request that [Mr. Q] return to the ADBI a part of the salary overly paid for his poor performances."
- f. "I request that the ADBI pay me compensation of 45,000,000 Japanese Yen against the moral injury, humiliation, besmirched reputation, wounded feelings, mental stress, anxiety, anguish and physical damage that I suffered and am suffering."
- g. "I request that the ADBI pay my legal costs and any other costs involved."
- h. "I request that the Asian Development Bank (ADB) immediately make provision for assisting employees who suffered or suffer from any kinds of harassment at work and that the provision be stipulated in the Administrative Order."
- i. "I request that the ADB reorganize the current members of the Appeals Committee so that the appeal system should be appropriately conducted and that the ADB set up a system to support the employees who appeal by adopting experts and/or technically educating the personnel of the committee."
- j. "I request that the working environment of the ADBI be promptly improved to a level deemed adequate for an international organization."
- k. "I request that employment contract of the ADBI staff and/or temporary Professionals be appropriately concluded and that a legal advisor professionally serves the duty to ensure an appropriate working environment."

14. The Administrative Tribunal considered the foregoing claims at its August 2005 session and determined that an evidentiary hearing was required to help resolve conflicting statements as to what transpired during the instances of alleged sexual harassment. Accordingly we issued an order calling for a hearing for testimony on the issue of the alleged sexual harassment. Mr. Q petitioned to be granted status as an Intervenor and that request was granted.

Tokyo hearings

15. The Tribunal met in Tokyo on 12-14 December 2005, and undertook an informal hearing of the factual disputes before us, consistent with due process requirements. We insisted on our choice of a staff assistant to assure confidentiality as well as the security of the facilities and documents. Although the proceedings were conducted in English as the official language of the ADB, we also insisted on our choice of an interpreter to assure that we had a full and unbiased understanding of the presentation and testimony of the witnesses. We felt our designation of the staff assistant and interpreter was necessary to assure that the parties were provided the full and fair hearing which we felt necessary to justify our meeting away from our usual venue at the Tribunal's Manila facilities to properly hear and resolve the factual issues involved in the case. The evidence there presented showed the following:

Ms. X's testimony

16. The Applicant asserted that she was subject to several instances of sexual harassment by Mr. Q, when in 2003 he began coming to the Applicant's office to sign confirmed letters of remittance and vouchers, without bringing his own pen. She cited the following eight examples in particular:

She alleged that on 26 March 2001 Mr. Q stared at her when she was interviewed, but asserted at the Tribunal's fact-finding session that she felt she would be unfairly treated if she made any mention of it at that time;

She claimed that on 21 January 2003 he touched her fingers when she lent her pen to sign letters of remittances and vouchers. At the Tribunal's fact-finding session she testified that at the time she was very surprised, but said nothing;

She alleged that on 28 February 2003 Mr. Q was staring at her from her chest and down to her feet, and that he urged her to sit next to him on a sofa instead of at the desk;

She stated that on 21 April 2003 she lent Mr. Q her pen and he touched her fingers. She testified that she drew her hand back and said, "Oh, excuse me" allegedly to make him aware or to secure an apology, but claimed he said nothing in response. Also that day she claimed he touched her lightly when handing over bank notes, after opening and closing the safe;

She testified the same touching occurred on 22 April 2003 when putting away the bank notes, although she did not testify to saying anything further to him. She also testified that that day Mr. Q asked for a pen to sign the 4 or 5 accounting vouchers and touched her fingers when she handed him the pen. She stated she thought the action quite unnatural, but said nothing to him;

Ms. X testified that Mr. Q caused her "lots of mental insecurity" but she acknowledged "maybe that is the way he is. Maybe I wasn't a sexual target for him, but he treated me lowly and did not have regard for the impact of his actions on me." She acknowledged that throughout the period she was uncertain as to whether to raise the charge of sexual harassment but finally decided to do so when she learned that Mr. Q was leaving the Institute on 1 July 2003, so that she would avoid further dealings with him thereafter. She filed her charges on 27 June 2003, three days before his return to the Ministry of Finance.

Mr. Q's testimony

17. At the fact-finding session, Mr. Q testified that he had had a good relationship with Ms. X until the beginning of 2003 when a new faster computer was introduced eliminating the need for him to return to his office to wait after entering the code. That was the time when he believed the relationship deteriorated. He testified that Ms. X did criticize some of his decisions such as that involving the hiring of a librarian as well as the assignment of newspaper subscriptions to staff members. He claimed that although there was no formal sexual harassment training at the Institute, it was his duty to know the issues of sexual harassment and that he had had training in sexual harassment when working for the Ministry of Finance. He testified that he never said or did anything to make Ms. X uncomfortable, that he never touched her fingers as she alleged and that it was at her request that he undertook the signing at her office instead of at his. He stated there was usually a pen at the computer but that sometimes he had to ask her for one, taking it from her without touching her hand. He further stated that when he removed bank notes from the safe he either placed them on the desk or handed them to her without their hands touching. He also denied having stared at her or her body and did not recall her stating on 28 February 2003 that she would rather sit at the table than on the sofa. Mr. Q also testified that on 9 April 2003 Ms. X came to his office demanding he disclose information concerning another employee, which he declined to do. He claims he noted her "threatening manner" in a note he made at the time.

18. Mr. Q asserted that he first heard of the charges leveled by the Applicant on 30 June 2003, his last day at the Institute.

The Dean's Testimony

19. The Dean of the ADBI testified that in April 2003, six or seven staff members including the Applicant met with him and complained about Mr. Q, and that thereafter, he talked to Mr. Q to tell him of the staff's feelings toward him and the possibility of holding a seminar with the staff on that topic.

Applicant's Position

20. The Applicant cited the "inappropriate and arrogant attitude and discriminatory treatment taken by the management in ADBI for supporting staffs including temporary staffs are clearly harassment" and that "harassment, same as sexual harassment is also a grave human rights violation." She asserted that Mr. Q "lied and made trickery statements, that the ADBI management concealed or tried to cover up those lies and/or statements to avoid their responsibilities over [Mr. Q]", and that the Dean's denying her direct access to him, and his "unilateral rejection of my claims ... w[ere] intended to put a psychological and economic burden on me and to pressure me to abandon my claims by unnecessarily prolonging the Administrative Review Procedure." She challenged the report of the Appeals Committee as inadequate, requesting the ADB to appoint "staff members with advanced education and/or experiences about human rights protection so that my claims should be examined in more legally adequate manner."

21. The Applicant challenged the unprecedented request to have her colleagues evaluate her performance and potential for conversion to regular staff, despite her impeccable work record at the ADBI, as an infringement on her human rights to force her to work unreasonably long hours beyond regular working hours, to require her to assume disproportionately more work than others including additional legal work for which she was denied additional compensation, and to

force her to stay in an unstable status due to Mr. Q's lack of judgment and inefficiency. Those long hours, she asserted, led her to be "short sighted for just a short period of time after I entered into ADBI."

22. She protested the disclosure to others by Mr. Q of the full confidential memo written by her to the former Program Assistant, as well as his denial of such disclosure, and requests a hearing on the meeting where the confidential memorandum was discussed by numerous third parties. Such disclosure, she continued, contributed to a deteriorating relationship among employees and demonstrated Mr. Q's vicious intentions against her, constituting further evidence of harassment.

23. The Applicant also cited his blaming her for the departure of the librarian, which the librarian specifically pointed out by her email to every staff member of the ADBI. She requested an explanation for the difference in her treatment compared to another employee who alleged harassment, had an unsatisfactory business ability, and lacked dedication to work but resigned in order to live in the US and was given a substantial compensation, while she was expected to resign herself to harassment without redress or compensation therefor.

24. The Applicant charged that the Legal Advisor's lack of industriousness and negative attitude toward the prevention of sexual harassment, and his far from excessive workload were responsible for so many cases having been appealed in the ten years since the establishment of the ADBI.

25. Ms. X asserted that insufficient ability of the management, the failure to provide training of support staff, and the failed responsibility of the Legal Advisor have been the cause of many problems at the ADBI, contributing to the procedural problems and problems of hiring temporary staffers all of which result in sexual discrimination against females.

26. She complained that delays in process and inappropriate judgments as well as lack of ability by members on the Appeals Committee pose unhealthy and unfair working conditions requiring drastic internal reform and the importation of external professional experts in law and personnel matters to provide sound working conditions which are required to have truly valuable international organizations.

27. The Applicant denied that she was uncooperative in not accepting the informal process, asserting that she was insisting on examining Complaints 1 through 11 and not just No. 11. She claimed it was a "vicious statement" that she refused to cooperate with the Respondent's offers and that it is "insulting and inadmissible" that she appealed for an indemnity. She stated the Respondent "should recognize that words and action related to discrimination against women constitute sexual harassment."

28. On the factual issue of Mr. Q's contact with the Applicant, she declared that during one-on-one meetings, Mr. Q "always stared at my body up and down with his lustfully curious look", and arranged for her to sit on the sofa rather than at the table. Ms. X asserted that Mr. Q borrowed her pen without trying to go out for one or to look for one on any desk, that it was "unnatural that he never brought his own pen", and that he had touched her fingers when he tried to give her bank notes. She acknowledged "it may be coincidence if [Mr. Q] just touched my fingers once or twice. It is clear that his action was intentional as he touched my fingers five times" for three months and that the Respondent's statement that it was only five occasions "insults women." She claimed that Mr. Q "only had a low level of awareness of sexual harassment."

29. She noted that she did give him notice of the unwanted nature of his behavior when she withdrew her hand and said "excuse me" but that on later instances, he ignored that caveat. She argued that she is not a person to make a fuss over a slight physical touching, but felt deep in her heart, as she believed Mr. Q did, that he knew what he was doing and that he did so deliberately.

30. The Applicant acknowledged that she was uncertain until the end whether to raise the sexual harassment charge for fear of the impact it might have on her career and asserted it was not her intent to damage Mr. Q. She noted that she waited until 27 June 2003 to raise her complaint of sexual harassment because she knew Mr. Q was leaving and that she would no longer have to undergo his abuse, her case contributing to the benefit of all employees, and promoting and improving the management of the Institute.

Respondent's Position

31. Respondent asserted that apart from the allegations of sexual harassment all other complaints fall outside the scope of this Tribunal's jurisdiction, that Ms. X's complaints were properly addressed, that it scrupulously followed the applicable procedures under Administrative Order 2.11 for sexual harassment charges, that she did not meet her burden of proof, and that the decision of the current Director that Mr. Q did not sexually harass the Applicant was reasonable, properly motivated and not tainted with bias, prejudice or based on other extraneous circumstances.

32. Respondent asserted that Complaints numbered 1 to 10 of the 27 June memorandum fall outside the Tribunal's jurisdiction, and that six of those complaints (Nos. 1 to 6) related to the time when she was a short term contractor before becoming a staff member on a fixed-term appointment. It argued that even if the Tribunal had substantive jurisdiction over Complaints 1 to 6, the Applicant did not comply with the applicable time limits and her complaints are therefore time-barred, and that a second group of complaints related to the former Director's handling of matters when she was a support staff. It asserted that Complaints 1 to 10 did not constitute administrative decisions subject to review and that all were time barred and/or unrelated to her contract of employment or her terms of appointment. It complained that the Applicant's claim of retaliation by a restriction in pay increase this year has no merit, particularly in view of her having received the highest pay increase over a number of years and the fact that she was the only support staff in ADBI who received an extra annual bonus pay equivalent to five months of her base salary.

33. She was afforded the benefit of an impartial investigation, the assistance of a mediator, and an opportunity to respond to the report before the Director, AMC, issued his decision on 6 May 2004.

34. It noted that the Investigative Report found nothing to substantiate the allegations of non-physical harassment in inappropriate looking, and that there was no evidence presented by the Applicant on that issue, merely her own assertions. Accordingly, it concluded there is no reason to overturn the conclusion of the current Director, AMC, that Mr. Q did not sexually harass the applicant in a non-physical manner.

35. As to the allegations of physical sexual harassment, Complaint No. 11 on the 27 June 2003 document, Respondent noted that "instances of discrimination against women do not automatically amount to sexual harassment, as prohibited by Administrative Order 2.11." The Respondent observed that in the course of working together for three years, it never occurred to

the Applicant to discuss the matter with Mr. Q so that he would have been aware such possible hand contact was unwanted. It noted that even though the report concludes that the former director might have touched the Applicant's fingers, despite Mr. Q's denial of physical touching, the current Director found that no physical sexual harassment was proven. Since there was no reason to believe the Applicant rather than the former Director, AMC, the current Director appropriately concluded that no physical sexual harassment was proven.

36. Respondent continued by arguing that the alleged physical contact does not, on its own, constitute sexual harassment, since for sexual harassment to occur the contact must be shown to be unwanted by the recipient while the perpetrator knew or should have known the conduct was offensive to the recipient. Here, although the alleged touching was unwanted, if the touching is accidental it should not be considered sexual. The fact that the Applicant identified only five occasions over the course of a three-year period of working together when their fingers might have touched suggests that the touching was just accidental and not sexual. It adds that there was no reason why the former Director knew or should have known that the touching was offensive, since she did nothing to convey that feeling to Mr. Q. The Respondent discounted the Applicant's claim for relief on the grounds that she did not secure the legal services whose estimate she included, and because time spent on her own preparation of briefs and documents are not reimbursable before the Tribunal.

37. The Respondent recognized the Applicant as being a smart and dedicated woman in a Japanese cultural environment. It acknowledged the seriousness of sexual harassment and the need for women to be protected from unwanted touching, but concluded that in this case she has failed to establish that such sexual harassment did in fact occur. At the close of the December 13 hearing, the Respondent stated that there was no evidence of harassment, that the Bank took all the steps it could to make the facility harassment free, that despite the small size of the facility it did send an employee to training as a Helper/Mediator, as well as two others later, and distributed materials on sexual harassment, thus doing its best to have a policy in place. In the light of the foregoing, the Respondent concluded that no basis exists for concluding that the alleged incidents were anything other than accidental, and that the Tribunal should reject the Application in its entirety in the absence of any demonstration that she has suffered any loss or damages, physically, emotionally or to her career prospects.

Intervenor's Position on the Sexual Harassment Charge

38. At the conclusion of the Tokyo hearing, Mr. Q denied that he was responsible for any of the eight accusations of improper behavior leveled at him by the Applicant. He reaffirmed that he had had extensive training in sexual harassment when at the Ministry of Finance and for that reason was particularly careful to avoid physical contact with employees. He acknowledged that commencing in 2003 he did go to Ms. X's office to handle computer related print-outs, but denied any of the physical touching of which he is accused.

II. FINDINGS

39. This case was initiated by the Applicant's 27 June 2003 Complaint that she had been suffering various forms of harassment and violations of her contract of employment traceable in large measure to the conduct of Institute management including Mr. Q. The issues set forth in Complaints 1-11 of that document were the focus of the argument presented by the parties in the earlier stages of this proceeding. However, it is the concerns set forth as Issues a-k in her 17 December 2004 Application rather than Complaints 1-11 of the 27 June Complaint which constitute the appropriate focus of our consideration at this stage. Several items appear in both

documents, and the Investigative Report of 23 December 2003 prepared in response to her original complaint clearly establishes the difficult atmosphere in which the Applicant was working at the Institute, and which underscored the validity of much of her dissatisfaction and frustrations with the management under which she worked. The language of the Report prepared by two independent assessors appointed by management made that clear, as noted earlier, that there was an unstable work atmosphere in the Institute at the time There was broad mistrust among staff and a low level of communication and trust between the Dean of the institute and the other management staff. In a sense the work relationship between [the Applicant and Mr. Q] was an outgrowth of this atmosphere in the Institute.

40. It is apparent that the Applicant is a highly motivated and responsible accountant, with positive performance appraisals, who faced long hours of work and the frustrations of not securing the legal position she had been led to expect. It is also undisputed that she had spoken to her immediate supervisor in early May 2003 about her work concerns. Although requested by Ms. X, he did not appear at the Tokyo hearings to testify about his relationship with Ms. X and Mr. Q. Ms. X declined our offer to delay the proceedings to secure a written statement or to arrange a teleconference in which he could participate. She was also in a group that complained to the Dean of the Institute in April 2003 about Mr. Q's management skills.

41. Regardless of the difficulties Ms. X was facing at work, and her efforts to improve the workplace by challenging the shortcomings at the Institute, our role in seeking to deal with the problems giving rise to her complaints is constrained by the authority designated to the Tribunal by its Statute.

42. Article II of the Statute of the Tribunal defines our jurisdiction as follows:

The Tribunal shall hear and pass judgment upon an application by which an individual member of the staff of the Bank alleges non-observance of the contract of employment or terms of appointment of such staff member. The expressions "contract of employment" and "terms of appointment", include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the staff retirement plan and the benefit plan provided by the bank to the staff.

We are constrained by the foregoing terms of the Statute as well as Paragraph 2.2 of A.O. No. 2.06 which provides:

A staff member can seek administrative review only of decisions that contravene a staff member's contract of employment or terms of appointment. The expressions "contract of employment" and "terms of appointment" include all pertinent regulations and rules in force at the time of the alleged contravention.

43. Applying those requirements to the Applicant's 17 December Application to the Tribunal, except for (d), (f) and (g) dealt with in greater detail below, we find as follows:

- a. The claim for a "full hearing on this matter" to examine the management skills of Mr. Q does not comport with the grant of our jurisdiction to determine whether there has been non-observance of the contract of employment or terms of appointment of Ms. X. Rather it seeks an appraisal of the manner in which the Bank is managed which is beyond our authority absent any showing that such management performance constituted a violation of the Applicant's contract of employment. Although we recognize the Applicant's assertion that bad management is within the scope of harassment, we find no evidence

that that alleged "bad management" constituted a violation of the Applicant's contract of employment or terms of appointment.

- b. Similarly the demand for an independent external assessment of the management skills and compensation levels of Institute management constitutes a request to review and presumably substitute the judgment of the Bank's managerial authority and prerogatives, which are also beyond our authority to order or implement. The claim on its face fails to allege non-observance of the Applicant's contract of employment or terms of appointment.
- c. It is not for the Tribunal to endorse or invalidate the Report and Recommendations of the Appeals Committee, nor is it bound thereby. We acknowledge the Applicant's claim that the Appeals Committee failed to properly address her complaints. The proper recourse to dissatisfaction with that Report was to do as she did, i.e., appeal the Report to this Tribunal. It is within our authority to review that Report and Recommendations in the context of our responsibility and the governing law, and to render a decision that may differ from the Report and Recommendations. We are not bound by that document, but we lack the authority to invalidate the document as here requested.
- d. The request that Mr. Q and the Dean apologize to the Applicant in writing is dealt with in our discussion of the merits of the claim.
- e. The request for the return of a portion of Mr. Q's compensation for poor performance likewise intrudes on the authority of the Bank to manage its operations and personnel and to determine the appropriate compensation therefor. It is not within our province to determine the appropriateness of compensation let alone the legitimacy of a request for the return of a portion thereof, inasmuch as the request does not constitute a challenge to the non-performance of the Applicant's contract of employment or terms of her appointment. It is thus beyond our authority to render.
- f. The request for payment of 45,000,000 yen for moral injury, humiliation, besmirched reputation, wounded feelings, mental stress, anxiety, anguish and physical damage suffered by the Applicant due to her alleged sexual harassment is dealt with in greater detail below.
- g. The request for payment of legal and other costs is likewise a request for reimbursement or compensation beyond that to which she would have been entitled under her employment contract or terms of appointment but for the non-observation thereof. As an element of her sexual harassment claim, this request is also considered below.
- h. The request for assistance to other employees who suffered from any kinds of harassment at work again requires the Tribunal to undertake relief which is properly within the province of the management of the Bank, and from which we are proscribed since the requested assistance for others does not flow from the Applicant's deprivations due to non-observance of her contract of employment or terms of appointment.
- i. The request for reorganization of the Appeals Committee is beyond our authority. It is created by the authority of the Bank and pursuant to its statutes and Administrative Orders. Our authority is restricted to our role in resolving disputes over the management's failure to adhere to its responsibilities under the Applicant's contract of employment or terms of appointment. The request for changing the current membership

of the Appeals Committee or to set up a system to support employees who appeal is more properly directed to the management of the Bank rather than this Administrative Tribunal.

- j. The request for improvement of the working environment of the ADBI is a matter within the authority of the management of the Bank and of the Institute. We lack any authority to resolve issues of Bank or Institute management or operations or structure. Our responsibility is limited to correcting non-observance of contracts of employment or terms of appointment.
- k. The request for conclusion of ADBI staff and temporary professional contracts, as well as the provision of a legal advisor to assure an appropriate working environment, are matters of management prerogative and thus, as noted above, beyond the limited jurisdiction of this Tribunal.

44. There remain the issues of (d), (f) and (g), namely, the request for apology, compensation and reimbursement based upon the Applicant's claim of sexual harassment.

45. As noted earlier we do not subscribe to the Applicant's position that the wide range of problems, which she has faced since her employment with the Bank and Institute, constituted sexual harassment. While it may indeed be true that this case is an outgrowth of lax administration at the Institute, the Applicant's claim that "bad management is within the scope of harassment" does not give the Tribunal jurisdiction in the absence of persuasive evidence of violation of the Administrative Orders by the Bank.

46. Rather, we are governed by A.O. No. 2.11, paragraph 4.1, which defines sexual harassment as follows:

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 (i) which reasonably results in physical, sexual or psychological harm or suffering of another person in the Bank workplace ... (ii) which reasonably interferes with work or work productivity; or (iii) which is made a condition of employment, promotion or other personnel action or creates and intimidating, hostile or offensive environment The following forms of conduct, if unwelcome, may be considered sexual harassment:

- i. Physical conduct of a sexual nature which may range from unwanted touching, kissing, pinching, groping or patting, to assault and coercing sexual intercourse
- ii. Verbal conduct of a sexual nature
- iii. Non verbal conduct of a sexual nature which may include, among other things, sexually offensive pin-ups sexually offensive pictures or other offensive material, objects or written materials, leering suggestive looks, whistling and gestures which are sexually suggestive or rude.

47. The Applicant cites eight occasions of harassment, five of which involved actual touching of fingers, two of which involved arrogance and flaunting of authority, and one involving staring and leering. According to the Investigative Report, Mr. Q acknowledged touching, the Applicant's fingers but that it was "incidental rather than a sexual contact." At the Tokyo session

Mr. Q denied any such touching, emphasizing that as a person who had had extensive training in sexual harassment and claims he was particularly sensitive to the risks of touching and that he did not touch the hand of the Applicant even when transferring a pencil or bank notes. Mr. Q acknowledged he was aware of the rules, but that awareness does not constitute proof that he did not engage in the protested behavior. That objectionable behavior could still have been undertaken by someone who knew better. But in this case we need not determine whose version is more credible, because even if the Applicant's version of the touching and staring by the former Director were totally accepted as true, the question arises as to whether such actions fall within the prohibitions of A. O. No. 2.11, para 4.11, i.e. whether it was unwanted by the recipient and which the perpetrator knew or should have known was offensive to the recipient.

The Applicant now claims such contact was unwanted, but the A.O. also includes the requirement that "the perpetrator knew or should have known" the conduct was offensive at the time of the incident.

48. Here the claim is that there were some eight contacts over a three-year period. The Applicant made no report thereof to management until three days prior to the departure of the alleged harasser. There was one occasion, in April 2003 when on being touched, the Applicant withdrew her hand and said, "Excuse me." This she testified was to convey her displeasure and to notify Mr. Q that such behavior was unwanted. Yet the evidence also shows that she was similarly touched on successive occasions without saying anything to Mr. Q. There is no need to conjecture whether Mr. Q took the first withdrawal as a warning not to repeat the unwanted behavior. Indeed, even if that withdrawal and comment had occurred as Ms. X alleges, it is clear that that intended message not to repeat the touching did not get across to Mr. Q. He repeated the conduct thereafter on several occasions, suggesting that such an intended message was not received. She defends her silence until just prior to Mr. Q's departure on the grounds of her sensitivity about the Japanese "allergy" to allegations of sexual harassment, holding it against the alleged harasser and the victim. Moreover, the Applicant said that she did not want to see him anymore after the filing of her complaint. She did not think that this would put the alleged harasser at a disadvantage since being from management he could readily have access to office files.

49. It is beyond question that certain behavior such as grabbing or groping are on their face are both "unwanted by the recipient" and actions which the "perpetrator knew or should have known" were unacceptable and offensive. But for what could be perceived as casual touching, particularly when it is repeated without protest, i.e., for transgressions that are not blatantly and knowingly unwanted, it is incumbent on the claimant to so notify the alleged harasser of that offense. In the case of touching of fingers, the expert on sexual harassment employed by the ADB to train new hires and employees on the subject opined that, depending on the cultural environment, touching of hands may or may not constitute sexual harassment. For instance, the mere touching of hands may turn into "caressing", depending on the placing of the hands, how it occurred and the frequency of the contact. The same holds true with "looking at somebody." When dealing with a touching of fingers, which Mr. Q was originally quoted as saying was incidental, it is difficult for the perpetrator to know without further notice whether such behavior is unwanted, particularly if repeated on several occasions. Given the fact that such physical contact on a half dozen occasions over three years could have been considered as incidental, or casual without knowing offense, it was incumbent on Ms. X to make it clear to Mr. Q that such behavior was not merely unacceptable, but was in fact offensive. She apparently recognizes that such notice was appropriate when she said "excuse me" on one occasion in April 2003. But her acquiescence in protesting repetitions of that conduct failed to convey the message that it was unwanted. Ms. X acknowledged in her testimony in Tokyo that "Maybe that is the way he is.

Maybe I was not a sexual target for him." Making sure that he "gets it" is a requirement of the Administrative Order. If that message is not conveyed, the perpetrator is not on specific notice that such behavior is unwanted and the offended employee, failing to so inform the other party, can hardly claim to have been the victim of knowingly unwanted advances. The same reasoning applies to the other contacts the Applicant had with Mr. Q. She made no comment advising that his looking or staring at her, or even his request that she sit on the sofa rather than at the table, was offensive to her and not to be repeated.

50. Indeed when looked at as a whole, the Applicant's withdrawal of her hand with the phrase "excuse me" was quite insufficient to forestall further brushing or touching of her fingers or notice to stop glaring or request to sit at a sofa to support a charge of sexual harassment. One could conclude that he did not know his behavior was unwanted. Mr. Q, if he did the things of which he is accused, was entitled to clearer notice that such advances were unacceptable before repetition of such prohibited behavior could be used to sustain a finding of sexual harassment. Indeed, if the Applicant had been more explicit earlier in the period, it would have placed Mr. Q on notice, permitted the opportunity for reformation of behavior, and avoided the later occurrences, and this proceeding.

51. It should be added that the Bank's subsidiary, the ADBI, was not as scrupulous as it should have been when the Applicant filed her complaint three days before Mr. Q's departure from the Institute. The Dean failed to approach Mr. Q about the just revealed accusations, and failed to require him to respond to the charges. Instead of taking the opportunity to test the validity of the assertions with the alleged perpetrator, the Dean sought out the views of the Institute counsel, waiting until much later, after Mr. Q had transferred to another office, before he undertook to ventilate his position as to the Applicant's complaint. However, once the allegations were brought to the attention of the Manila Headquarters, appropriate procedures were followed.

52. In the light of the foregoing, the Tribunal is unable to agree that the Applicant has proven that Mr. Q was in fact guilty of sexual harassment as defined under A.O. No. 2.11. Her claim and the request for damages that flow therefrom must be denied.

53. However, one of our members has expressed a differing view as to our jurisdiction in this matter. In the view of the said panel member, even if Mr. Q was held to be guilty of sexual harassment, he would be guilty of misconduct as shown in A.O. 2.02. Misconduct of one employee does not constitute the violation of the terms and conditions of employment of another employee. An employee, guilty of misconduct, is liable to be proceeded against as a disciplinary measure by the employer; but the employer cannot be held responsible for an employee's misconduct unrelated to official duties. Misconduct unrelated to official duties, by definition, is not a part of an employee's official business. The alleged misconduct of Mr. Q by itself does not bring this case within the scope of Article II of the Statute of the Tribunal. The rules and regulations referred to therein are only those which pertain to the terms and conditions of the aggrieved party's employment.

54. Nonetheless, the claim of Ms. X that she was subject to sexual harassment by Mr. Q is dismissed, as are her requests for damages, compensation and apology.

DECISION

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