

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 86-B
(19 August 2009)**

**Anjum Ibrahim
v.
Asian Development Bank**

**Florentino Feliciano, President
Arnold Zack, Vice-President
Khaja Samdani
Claude Wantiez
Yuji Iwasawa**

1. The Applicant seeks clarification as to her entitlement to back pay and other benefits resulting from the Bank's action pursuant to the remedy awarded by the Tribunal.

I. THE FACTS

Background

2. Decision No. 86 dealt with the Applicant's request to reverse the decision of the President imposing (a) an unfavorable rating in her Annual Performance and Development Plan ("PDP") Review for 2006, (b) an unfavorable rating in the monitoring work program that followed and (c) the penalty of termination.

3. The initial Tribunal decision rendered on 15 August 2008 was as follows:

For the above reasons, the Tribunal unanimously decides that:

1. The “U” rating is overruled and rescinded and this judgment be made part of the Applicant’s record. It therefore follows that the pre-condition required for issuance of the second “U” rating and all consequences eventually flowing therefrom were not met and are moot.
2. The Applicant shall be reinstated to her former Level 4 position and be made whole for all earnings and benefits lost with restitution of her benefits and entitlements to the level they would have been but for the Bank’s actions.
3. Should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case, pursuant to Article X paragraph 1 of the Statute of the Tribunal, the Tribunal fixes the amount of additional compensation to be paid to the Applicant at three years’ basic salary.
4. The several remedies proposed by the Applicant that go beyond her reinstatement and reimbursement for lost wages and benefits are denied, as is her request for preliminary measures.

4. On 27 October 2008, in response to the Applicant's request for clarification as to whether the decision was “an either/or decision”, the Tribunal issued its supplemental decision reading as follows

The Tribunal unanimously confirms and reiterates that its Decision No. 86 dated 15 August 2008 in the instant case requires (a) that the Applicant be made whole for all lost earnings and benefits and (b) in addition to that, the payment of an amount equivalent to three years of her basic salary. The specific reasons for these dispositions are set forth in Paragraphs 61-70 of our Decision No. 86 dated 15 August 2008.

5. On 30 September 2008, the ADB President opted to pay the Applicant three years' basic salary compensation in lieu of her reinstatement.

6. On 4 February 2009, the Applicant requested clarification of Decisions No. 86/86-A and specifics as to employment status, level of compensation, provision of compensation increases, duration of payments, reimbursement of health care costs, provision of pension plan payments, housing subsidy, home leave entitlement, moving expenses, etc.

7. The issues raised in her Application have been responded to by the Bank and are considered below.

II. FINDINGS

Has the Applicant's employment status been terminated, and if so when?

Applicant's Position

8. The Applicant argues that inasmuch as the original decision overruled and rescinded the initial "U" rating and voided the actions that followed, there was no cessation of her employment and that her status as a Bank employee has continued to this date without interruption. It therefore follows, according to the Applicant, that she is entitled to all lost earnings and benefits until "the date of reinstatement or if the Applicant is fired or resigns, whichever comes first".

Respondent's Position

9. The Bank takes the position that the termination of 6 March 2008 was dispositive of her status and that the “Applicant will not be reinstated”. It argues therefore, that she is not still employed by ADB and having been terminated on that date is not entitled to any benefits after that date.

Finding

10. In Decision No. 86 we found that the termination of 6 March 2008 had been mooted by our action overturning the initial “U” rating, and ordered the Applicant reinstated and made whole. Our authority to order specific performance is limited by the second sentence of Article X of the Statute of the ADB Administrative Tribunal which reserves to the President of the Bank the authority to determine whether to implement that specific performance. The requirement that the Tribunal fix an amount of compensation “at the same time” provides the basis for granting compensation in lieu of an order to take the further action to reinstate:

... should the President of the Bank ... decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case

11. At the time the Tribunal ruled that the second “U” and the 6 March 2008 termination action were voided, we found that the Applicant should have been continued

as an employee of the Bank. Although as required by Article X, we formulated an amount of compensation to be provided in the event that the President decided not to take the reinstatement order, it follows from our rescission of the initial “U” rating that she continued to be an employee of the Bank, notwithstanding the Bank’s voided 6 March 2008 termination.

12. In negating the termination action of 6 March 2008, in Decision No. 86, the Tribunal anticipated the Applicant’s return to work with compensation for earnings and benefits lost.

13. The Bank was alerted to our action to continue the employment of the Applicant on 15 August 2008 when our Decision No. 86 was promulgated, but it was not until 30 September 2008, that the President of the Bank exercised his option of not taking the “further action” of reinstatement called for in the Decision of the Tribunal. We find that she is entitled to be made whole for losses from her improper earlier termination until 30 September 2008, when the President exercised his Article X option to provide compensation instead of implementing our reinstatement decision.

14. Thus as noted in the Decision we find that the Applicant is entitled to reimbursement for lost pay and benefits up until the Bank’s decision on 30 September 2008 to exercise its option not to reinstate the Applicant. As noted in the Decision and subsequent clarification, that is designed to reimburse her for lost earnings in expectation of her reinstatement. The Bank’s authority and subsequent decision not to take the “further action” of reinstatement does not detract from its obligation as set forth in the 15

August 2008 Decision to make the Applicant whole for the financial losses she had suffered by its action prior to that date. The Tribunal recognizes the authority of the President of the Bank to decline to take the action of reinstatement. However we believe that authority is to be distinguished from the Bank's obligation to make whole the Applicant for her improper termination on 6 March 2008. The decision of the Tribunal orders reimbursement of the earnings lost to the Applicant as a consequence of the Bank's flawed act of removal. The Tribunal views the additional three-year payment as a separate action, as provided for in Article X, for the Bank's decision not to embrace the "further action" of implementing her return to her former position, and distinct from its obligation under the directive to make her whole for earnings lost.

15. Thus the Bank's exercise of its authority on 30 September 2008 to compensate the Applicant with the equivalent three years' basic salary in lieu of her reinstatement we view as the appropriate payment for then terminating her employment. It is not a substitute for the money owed until that date.

To what reimbursement of earnings is the Applicant entitled?

Applicant's Position

16. The Applicant contends that in addition to back pay at the basic salary she had previously received, she is also entitled to the merit increases she would have received had she not been improperly denied such increments from the time of the initial Unsatisfactory Rating at the beginning of 2007. She also seeks accrued interest for the

Respondent's failure to provide compensation "within 30 days of notification of judgment" as required by Article X of the Tribunal Statute.

Respondent's Position

17. The Bank takes the position that any reimbursement should be limited to salary for the period from the initial "U" rating until the Applicant's 6 March 2008 termination, agreeing with the Applicant to use as the basis for calculation, the average salary increase for all staff in 2007 excepting those given Special Recommendation or Exceptional ratings. It would also use that calculation if a salary increase for 2008 is called for, basing any determination of the three year basic salary payment on the figure established for computing salary immediately prior to 6 March 2008.

18. Alternatively, it argues that if the Tribunal finds the appropriate termination date to be 15 August 2008, any determination of earnings lost must be offset by such earnings from non-Bank sources as have been made possible by Applicant's separation from the Bank. The Bank notes that the Applicant refers to "income from her apparent employment since April 2008 as Resident Editor of a Pakistan newspaper, the Business Recorder". Respondent asserts that payment of the three-year compensation at the last basic salary rate would constitute a sufficient deterrent and punitive effect. It argues that the date of implementation should not be affected by the delay resulting from the Applicant's initiating requests for clarification.

Finding

19. As indicated above, we find the Applicant is entitled to reimbursement for lost earnings during the period from the imposition of the initial “U” rating until the Bank opted to terminate her in lieu of returning her to her position. Had it not been for the imposition of that “U” rating, it is reasonable to conclude from her prior history that her compensation thereafter would have been in excess of the basic rate for the period involved.

20. We find appropriate the method of calculation for the period from the imposition of the initial “U” rating until 30 September 2008 as being the average salary increase for all staff in 2007 and 2008 excepting those given Special Recommendation or Exceptional Ratings.

21. The objective of Decision No. 86 was to reimburse the Applicant for “earnings lost” to reflect the level of compensation she could reasonably have expected to achieve and not to provide her with any windfall beyond her losses. In fact, the Applicant mitigated her damages during the period in question by taking a new job and it is thus necessary to determine the extent of any interim earnings during that period she was out of work to provide an offset to the amount to be paid by the Bank. As noted in *Yang-Ro Yoon* (No. 4) IBRD Decision No. 317 (2004), para. 56, it is the task of the Applicant to demonstrate she “suffered a net loss of income”. Given her work as an Editor in the

interim, she should produce evidence of such interim earnings as a prerequisite to her receipt of reimbursement for any such lost net earnings.

To what benefits is the Applicant entitled?

Applicant's Position

22. The Applicant contends that she is also entitled to a restoration of medical insurance for her dependent mother and herself, as of the date of her improper termination. She notes that although she secured other coverage, she is entitled to reimbursement of the Bank's contribution to the insurance coverage she was denied. She also seeks reimbursement for home leave travel to Islamabad for 2008 and 2009 which is a legitimate entitlement despite the fact that she was "forced to return to her home country after the illegal termination". She further seeks payment for her rental accommodation in Islamabad and claims she is entitled to normal housing subsidy. She also claims entitlement to reimbursement for the cost of her return to Manila. Finally she also seeks adjustment of her pension to reflect the salary increases being herein provided, without any break in contribution.

Respondent's Position

23. The Bank asserts that it is unreasonable for the Applicant to claim payment for home leave travel to a place where she on her own, opted to live, or a housing subsidy designed to help defray housing costs for staff working away from their

place of permanent residence. It rejects the claim for restoration of medical services noting that its contract with the providers restrict eligibility to ADB employees, and that so doing would entail specific performance which was foreclosed by the Bank's termination action. Likewise, on the issue of pension adjustment to reflect no break in service or contribution, the Bank asserts that it would not be appropriate to alter the pension plans records of objective facts to reflect some hypothetical deemed period of service on which to base Applicant's future pension benefits.

Finding

24. The Bank had an obligation to provide the Applicant a rental subsidy until 30 September 2008 and therefore is obligated to compensate her for any housing expenses she incurred while in Islamabad offset by any housing subsidy provided by her interim employer, if any. However, once the Applicant decided to move to Islamabad, having been denied reinstatement, she has no grounds for claiming the cost of home leave, relocation, travel benefits and allowance, shipping or insurance costs related to a return to Manila.

25. Her improper removal on 6 March 2008 was the proximate cause of her loss of medical insurance coverage, and her need to expend personal funds for a benefit that would have otherwise been paid for by the employer. She is entitled to reimbursement of the amount expended by her for the substitute insurance coverage she secured prior to 30 September 2008. Similarly in the area of pension contribution, the Bank by improperly terminating her deprived the Applicant of the matching contribution

to her pension fund to which she would have been entitled but for that termination. The Bank shall make that contribution reflecting what it would have paid into the fund for the period at the adjusted salary rates as provided above, from March 2008 until the date of its decision not to reinstate. In ordering such payments for medical and pension coverage, the Tribunal is not reinstating her or otherwise mandating any form of specific performance for the period in question, but merely directing her reimbursement for benefits of which she had been improperly deprived.

What is the appropriate rate for payment of the three years' compensation?

Applicant's Position

26. The Applicant asserts that the appropriate basis for calculating the three years' compensation is the amount, including merit increases, the Applicant would have been paid at the time of the implementation of the 15 August 2008 Decision.

Respondent's Position

27. The Bank asserts that the basis for calculating the three-year compensation is governed by the language of Article X which is "the equivalent of three years' basic salary of the applicant" and that since the Applicant's last basic salary was that she received at the time of the initial "U" rating, that should be the basis of the three-year compensation determination.

Finding

28. Although the language of Article X does refer to compensation based on basic salary, it does not specify the effective date for determining that basic salary. In Decision No. 86, we rescinded the Bank's imposition of the initial "U" rating. From that rescission must also flow a rescission of the basic rate then in effect, recognizing that the Decision called for the Applicant's reinstatement at a rate that would reflect what she would have received but for the Bank's action. As noted above we have provided a calculation to reflect what that rate would have been, based on a reasonable progression in compensation. Since the Bank opted to exercise its right to provide the equivalent of three years' compensation in lieu of effecting her reinstatement, it is the basic salary rate to which she was entitled at the time of the Bank's decision not to reinstate her that must control the determination of her three-year equivalency. Accordingly, the payment of the equivalent of three years' basic salary is to be based on the salary to which the Applicant was entitled as of 30 September 2008.

What is the appropriate rate of interest to be paid for the delayed implementation of Decision No. 86?

Applicant's Position

29. The Applicant notes that the Respondent failed to provide compensation "within 30 days of notification of judgment" as required by Article X of the Tribunal Statute and claims that due to the unreasonably delayed implementation of Decisions No.

86/86-A the Bank should be assessed interest based on the rate the ADB charges on Ordinary Capital Resources (OCR) loans as per the Tribunals Decision in *Mesch and Siy* (No. 2), Decision No. 6 (31 March 1995).

Respondent's Position

30. The Bank acknowledges its inadvertent delay in payment of the three years' basic salary and agrees to pay interest as directed by the Tribunal.

Finding

31. Interest on delayed payment shall be calculated and paid at 5% per annum.

DECISION

For these reasons, the Tribunal unanimously decides:

1. to order the Bank to reimburse the Applicant for earnings lost, including merit increases as described in paragraph 20 above, during the period from the imposition of the initial "U" rating until 30 September 2008, offset by earnings received during that period from non-Bank employment;

2. to order the Bank to reimburse the Applicant for any housing expenses she incurred whilst in Islamabad from 1 April 2008 until 30 September 2008, offset by any housing subsidy provided by any other employer during that period;
3. to order the Bank to reimburse the Applicant her expenditures for substitute medical insurance coverage and payment of the pension fund contributions the Bank would have paid, from March 2008 to 30 September 2008;
4. to order the Bank to pay an amount equivalent to three years of what the Applicant's basic salary, including merit increases, would have been at 30 September 2008;
5. to order the Bank to pay interest on the delayed payment of the total amounts to be reimbursed at the rate of 5% per annum;
6. to award the Applicant costs in the amount of US\$5,000; and
7. to dismiss all of the Applicant's other claims.