

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 110
(6 May 2017)

Ms. Maria Lourdes Drilon,
v.
Asian Development Bank

Lakshmi Swaminathan¹, President
Gillian Triggs, Vice-President
Shin-ichi Ago
Anne Trebilcock
Chris de Cooker

1. The Applicant commenced employment at the Asian Development Bank (the “Respondent”, the “ADB” or the “Bank”) on 16 February 2007 as Agriculture, Environment and Natural Resources Economist in the Southeast Asia Department. On 22 April 2012, the Applicant was promoted to Senior Natural Resources Economist International Staff at Level 5 (IS5) in the ADB’s Pacific Department (“PARD”). The Applicant held this position until her appointment was terminated for unsatisfactory performance as communicated to the Applicant on 23 November 2015. The Applicant contests this decision.

I. THE FACTS

Background

2014 Performance Rating

2. The Applicant’s 2012 and 2013 overall performance ratings were “satisfactory”. The Applicant’s supervisor, Director PARD, had noted on the Applicant’s 2012 assessment that she was “advanced” in the application of her technical knowledge and skills and client orientation, and “proficient” for the set of the core competencies. In 2013 the same supervisor gave her an “advanced” rating again for her technical knowledge but dropped her rating for client orientation

¹ Through Video Conference

to “proficient”. She was rated as “proficient” for all other competencies but her rating for communication and knowledge sharing also dropped to “developing”.

3. For the Applicant’s 2014 performance review, she received detailed comments along with a “not proficient” rating in three areas: (i) Client Orientation; (ii) Achieving Results and Problem Solving; and (iii) Working Together. In two other areas she received a “proficient” rating: (iv) Application of Technical Knowledge and Skills and (v) Communication and Knowledge Sharing, and she received a “developing” rating for innovation and change. Her overall performance rating was “unsatisfactory”. The supervisor’s overall comments were as follows:

“... In three areas however, [the Applicant’s] performance over the past year has been unsatisfactory. On client orientation, she has not taken opportunities to address problems early enough and her efforts to manage situations, despite considerable efforts, have not resulted in consensus solutions. On achieving results, she has not always anticipated problems early enough while small issues grew larger unnecessarily. On teamwork, she has sometimes allowed relationships to deteriorate before taking action. In all three areas, better routine communications could have made a positive difference.... There is considerable scope for [the Applicant] to improve performance ... I recommend a proactive improvement plan be developed and put into practice. ”

4. The Applicant challenged her supervisor’s assessment on 20 February 2015. She summarized that “the evaluation appears biased and, other than knowledge of skills, lacks recognition of the positive achievements of the year.”

5. On 25 February 2015, the Applicant provided her comments in part 3.2 of the 2014 PR form where she recorded a “different interpretation of the circumstances that led to my supervisor’s assessment”. Those comments included: “... on client orientation and working together, I am not aware of any recipient government personnel (ADB Clients) who have voiced reservations regarding my application to the task at hand ... On achieving results, the assessment may have

failed to recognize the corrective initiatives that have resulted in the projects being back on track ... In difficult situations I have sought my supervisor's guidance and diligently implemented it.”

6. On 24 April 2015, the Applicant submitted a request for compulsory conciliation in connection with the unsatisfactory rating in her 2014 performance evaluation. Since she failed to meet the time requirement in which to make that request, on 15 May 2015 that request was denied.

The Performance Improvement Plan (PIP)

7. On 27 March 2015, the Applicant was placed on a Performance Improvement Plan (the “PIP”) for three months from 1 April 2015 to 30 June 2015 to closely monitor her progress. The Applicant was provided a detailed work plan to be carried out during the PIP and was informed that unless her performance improved to “at least a satisfactory” level by the end of the three month period, action could be taken to terminate her appointment for unsatisfactory performance.

8. On 30 March 2015, the Applicant responded to the Director, HR Business Partners Division (“BPHP”), contesting her supervisor's assertions. The Applicant noted “at no time during the 2014 mid-year performance review did my Director indicate to me that I was not proficient in any of the six competencies assessed” and that she did “not accept the assessments.”

Progress Against the PIP

9. During the PIP period, which was extended from 30 June to 27 July due to the Director's home leave, a monthly Note-to-File was submitted for each of the Applicant's three review meetings held on 8 May, 15 June and 27 July. On 1 July 2015 and 27 July 2015, the Applicant submitted her status updates against the PIP in response to those Notes-to-File. On 31 July 2015, in a meeting called between the Applicant, her supervisor and a designated BPHP official to discuss the 27 July Note-to-File, the Applicant's supervisor stated that the Applicant had achieved 80% of the PIP, but he wanted the Applicant to achieve 100% of the PIP.

10. A 24 August Note-to-File made by the Applicant's supervisor and noted by the Applicant on 25 August 2015, stated that at the 21 August 2015 concluding PIP meeting, the Applicant's performance was assessed as remaining "unsatisfactory". The supervisor noted :

"(i) some issues may be due to delays by other parties, but those to do with schedules, submissions and communications were within [the Applicant's] control and have not progressed as planned;

(ii) the competency framework for level 5 requires [the Applicant] to demonstrate supervision skills, resolve client situations, foster team work, provide high quality communications, and innovate; and

(iii) improvements in all of these areas were not evident".

11. In a 25 August 2015 note to the DG, PARD, the Applicant commented on her last two meetings with her supervisor on the PIP, including the concluding meeting. She explained that she had "presented factual evidence to show that the 20% gap was ... beyond her control" or dependent on external factors and that "[o]f 15 activities in the PIP workplan, only one remains outstanding." Given those achievements, the Applicant noted "surprise" at the assessment as "unsatisfactory" and concluded that "[r]egardless of the evidence presented to [my supervisor] and the achievements to date reported on the PIP, I felt that his assessment of me is biased, predominantly perception-based, and not supported with factual evidence". Further she stated that the supervisor had extended the PIP beyond the 3 months set by BPHP to suit himself. She asked the DG to review her case objectively. On the same day, 25 August 2015, DG, PARD wrote to the Director, BPHP recommending Budget, Personnel and Management System's Division ("BPMSD's") "appropriate action pursuant to Section 10 of AO 2.05" (referring to the Administrative Order) following assessment of the Applicant as having "not satisfactorily completed the tasks detailed in her PIP" and her performance as remaining "unsatisfactory."

12. On 23 September 2015, BPMSD recommended the termination of the Applicant's employment, noted that this recommendation would be presented to a Panel for review, and requested a response from the Applicant within ten days. The Applicant responded on 7 October 2015 that "the unsatisfactory rating and HR recommendation lack any basis and must be

dismissed.” She also met with BPHP on 23 October 2015 to discuss her response and mentioned: a lack of fairness, transparency and accurate reporting of information, a lack of recognition for work completed successfully, and management’s negative bias towards the “lower level staff” allegedly like her, for complex projects she worked on.

Review Panel Recommendation to Terminate Applicant’s Appointment

13. On 6 November 2015, a Review Panel was constituted to review BPMSD’s termination recommendation and the Applicant’s comments. On 10 November 2015, after deliberation of the Applicant’s case, the Review Panel took the view that the Applicant had been given tasks that should have been within her ability as an IS5 to perform and recommended that the Applicant’s employment be terminated for unsatisfactory performance. The President approved the Panel’s recommendation and terminated her appointment for unsatisfactory performance on 23 November 2015.

Filing of a Criminal Complaint

14. While the internal grievance procedure was continuing, on 29 January 2016, the Applicant filed a criminal complaint against eight of her former ADB colleagues, including the DG, BPMSD, the DG, PARD and her supervisor alleging “cyber libel” for posting her written assessment onto ADB’s internal IT system. The Respondent explained in its Answer that this assessment was not made public. The complaint was dismissed on 27 May 2016 by virtue of the immunities afforded to the ADB, but a motion for reconsideration with the Prosecutor’s office was lodged on 18 July 2016 and to date remains pending.

Exhaustion of Internal Grievance Procedures

15. The Applicant requested Compulsory Conciliation on 11 December 2015; it ended unsuccessfully on 22 February 2016. The Applicant submitted a request for Administrative Review on 25 February 2016 to DG, BPMSD (the first time in which she alleged “bullying and harassment in the workplace” by her supervisor) which was denied on 15 March 2016. The Applicant filed an Appeal on 28 March 2016 with the Appeals Committee which submitted its Report and Recommendation on 29 June 2016. The Appeals Committee found that the Respondent had correctly applied the relevant ADB Administrative Orders for termination of employment and found no evidence of action which could be considered as an abuse of discretion, arbitrariness, improper motivation or discrimination. The Committee however found that the Performance Management Implementing Guidelines (PMIG) were not followed prior to the Performance Review process for 2014. Because of that, the Committee, while not recommending the relief sought by the Applicant, noted that Management might wish to determine other relief. The President accepted the recommendation of the Committee not to grant the relief sought by the Appellant but also asked his staff to “promptly look into the discrepancies highlighted ... and to consider revisions to practices among supervisors regarding performance evaluations and supervisors’ communications with staff.”

Application to the Tribunal

16. This Application, filed on 4 November 2016, contests the 23 November 2015 termination decision on the grounds that, additionally and/or alternatively, the decision allegedly:

- (a) constituted a grave breach of procedure;
- (b) constituted an abuse of process and power;
- (c) constituted an abuse of discretion; and
- (d) is discriminatory.

17. In her Application, she alleged that around the same time that she was put on the PIP, she “contemporaneously reported” to ADB’s Ombudsperson incidents of harassment at work. She

alleged that her supervisor had on two separate occasions called her a “tone deaf b---h”. In her Application she requested an oral hearing to call the Ombudsperson to give evidence to corroborate the allegation.

18. In its Answer, the Bank provides a 14 March 2016 “statement of truth” made by her supervisor (originally provided in the Respondent’s Statement to the Appeals Committee in response to the Applicant’s allegation in her 25 February 2016 request for administrative review) categorically denying any allegation of verbal harassment.

19. In her Reply, the Applicant provides her 30 January 2017 statement with further details of when the two alleged incidents occurred (on or around 20-21 January 2015 and on 8 May 2015 at the first scheduled PIP meeting) and alleging she had raised this issue with her supervisor’s supervisor, DG, PARD on five occasions from January 2015 to 23 September 2015. In its Rejoinder, the Respondent attaches statements from the DG, PARD and then Deputy DG, PARD refuting those assertions of the Applicant that the alleged harassment incidents had been raised with them.

20. The Applicant prays for the following relief:

- “(a) A declaration that the Impugned Decision purportedly terminating the Applicant’s employment is null and void;
- (b) The 2014 Performance Review be expunged from the Respondent’s official records;
- (c) Reinstatement of the Applicant (or compensation equal to three years of the Applicant’s salary as applicable on 23 November 2015 being the date of termination);
- (d) USD 50,000.00 for moral damages and pain and suffering;
- (e) Legal costs (to be quantified and advanced to the ADBAT at the conclusion of pleadings).”

21. The Respondent denies all the Applicant's allegations and requests the Application be dismissed in its entirety.

II. SUMMARY OF PARTIES' CONTENTIONS

Applicant's Contentions

22. The Applicant argues that her 2014 Performance Review and subsequent PIP was set up to dismiss her where there was no factual basis to do so. She alleges breaches in procedure, abuse of discretion and discriminatory motive. The Applicant alleges flaws in process regarding her 2014 performance assessment and subsequent performance improvement process. She argues that the Respondent failed to put her on notice that she would receive an unsatisfactory rating for her 2014 performance review (failure to provide a Note-to-File as allegedly required under Part IV-A of the PMIG) and that this breach in procedure makes all subsequent decisions, including the termination of employment, null and void. In addition, there were breaches in process with regard to her PIP such as no second month meeting and an extension of the review period.

23. The Applicant also argues abuse of discretion ("the objective facts do not warrant the Applicant's dismissal for unsatisfactory performance"), abuse of process (the performance process was used to dismiss the Applicant due to a strained work relationship), and discrimination based on age and gender shown by her supervisor allegedly calling her a "tone deaf b---h". She calls for an oral hearing for this complaint to be corroborated by the Ombudsperson. She also alleges that the Respondent has intimidated her witnesses.

The Respondent's Contentions

24. The Respondent argues that it has followed all applicable rules and procedures before terminating the Applicant's employment. It contends that the Applicant was duly notified of the shortcoming in her performance and was given a full, fair and adequate opportunity to address those shortcomings in accordance with AO 2.05, section 10 and the relevant guidelines set forth in Part IV-B of the PRIG. It closely monitored the Applicant's performance in the context of a

three-month work plan designed to address Applicant's deficiencies and gave her an opportunity to improve her "unsatisfactory" rating in her 2014 performance appraisal. In particular:

- Director BPHP wrote to the Applicant informing her that following her "unsatisfactory" rating for 2014, her performance would be now closely monitored for a three month period, with a detailed work plan to be prepared in consultation with applicant's supervisor and the DG, PARD;
- Applicant was also informed that unless her performance improved to at least a satisfactory level by the end of the three month period, action may be taken to terminate her appointment for unsatisfactory performance;
- A rigorous process under the PIP was conducted before a decision was taken to terminate her employment;
- This recommendation was then reviewed by a Review Panel set up under Section 10.6 of A.O. 2.05 and approved by the President to terminate Applicant's appointment for unsatisfactory performance; and
- The Applicant was issued the notice terminating her appointment on 23 November 2015.

25. The Respondent argues that IS5 and IS6 are "senior level" positions and that occupants of these positions are the Respondent's senior staff, who are expected to significantly contribute to the work program of the Bank.

26. The Respondent contends that in this case, the Applicant's views of her capabilities and performance do not correspond with the views of her supervisor, the Head of PARD and the Review Panel which considered the background to her case, including her views and comments. While the Applicant may have achieved some aspects of her closely monitored three month work program, or succeeded on a number of tasks earlier in her career, Respondent submits that the opinions and "written platitudes" of others are not a substitute for the views and conclusions of her immediate supervisor, particularly those formed in the context of the closely monitored work program that was designed to provide her with an opportunity to remedy her performance deficiencies and to meet Respondent's performance standards expected of an IS of her grade level.

III. FINDINGS

Preliminary Matters

27. As set out in the facts, the Applicant requested an oral hearing so that, amongst other things, her statement to the Ombudsperson in relation to the allegations of harassment could be made available. Under Article VIII of the Statute of the Tribunal it is for the Tribunal to take a decision in each case whether oral proceedings, including presentation and examination of witnesses, are warranted or not. It is not appropriate to call the Ombudsperson as a witness in light of the confidential function and AO 2.14 para. 3.9 which states that “the Ombudsperson cannot be compelled to provide information or be a witness in hearings ... about concerns brought to the Ombudsperson’s attention in his/her capacity as Ombudsperson”. The Tribunal notes as well a similar provision AO 2.11 para. 5.5 on Prevention of Harassment. As the submissions by the parties provide a sufficient basis for consideration of the issues, the Tribunal considers that oral proceedings are not warranted. (See *Claus*, Decision No. 105 (13 February 2015), paras. 52 and 53; *Mr. H*, Decision No.108, (6 January 2017), para 39).

28. Under Practice Direction No.3 of the Tribunal’s Rules of Procedure the Respondent has requested confidentiality of the name of the Applicant’s supervisor. This is granted in view of the sensitivity of the issues and the fact that he is still an officer in the Bank.

29. There is a question of the admissibility of documents submitted by the parties after the case was listed under Rule 11 of the Rules of Procedure. The documents concern the employment status of a Bank official whose statement was submitted in the Reply. As the statement in question is on file, the Tribunal finds that the subsequent reference to his employment status by the Bank does not alter the legal value of the official’s statement itself.

30. In view of the complexity of the legal issues raised in the case, in accordance with Article V(5) of the Statute read with Rule 5A, the Tribunal deems it appropriate to consider the case *en banc*.

The Merits

31. The Tribunal has set out its scope of review with respect to termination decisions in the following terms:

“Evaluating the performance of the Applicant is a matter for her supervisor(s). The Tribunal may interfere in such evaluation only under the strict conditions set out under the *Lindsey* formula, namely if it appears that the evaluation has not been reached by the proper processes, is arbitrary, discriminatory or improperly motivated or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed.” (*Ms. G*, Decision No. 106 [23 September 2015], para. 35 citing *Lindsey*, Decision No. 1 [1992] I ADBAT Reports 5, para. 12).

32. As decided in *Claus*, ADBAT Decision No. 105 (13 February 2015), para. 75:

“It is settled law that the assessment of staff member’s Annual Performance is essentially made by the Bank and it is not for the Tribunal to substitute its assessment. “

See also *Mr E.*, ADBAT Decision No. 103 (12 February 2014), para. 54; and *Haider*, Decision No. 43 [1999], V ADBAT Reports 6, para. 18.

33. In addition, it is well established that the “burden of proof rests on the person who makes allegations” (*Ms. G, Ibid*, para. 36).

34. In the case now before the Tribunal the following issues are to be considered:

- (1) Did the termination of employment for unsatisfactory service satisfy due process?
- (2) Was the decision arbitrary or an abuse of discretion?
- (3) Was the decision tainted by harassment, discrimination or improper motive?

Issue (1) Did the termination of employment for unsatisfactory service satisfy due process?

Applicant's Contentions Regarding Due Process

35. The Applicant alleges that the 23 November 2015 decision to terminate her employment constitutes a “grave breach of procedure” and as such, the decision should be rescinded.

36. The Applicant argues that Part IV-A of the Performance Management Improvement Guidelines (PMIG) dealing with performance issues was not observed. In particular, she maintains that at no stage during the period preceding the 2014 performance review did the Applicant’s supervisor initiate any specific meeting to raise performance concerns with the Applicant “as necessary”, no Note-to-File was created, and there was no evidence of any communication between the supervisor and BPMSSD about his concerns as to the Applicant’s alleged performance issues. The Applicant notes *Leonard*, Decision No. 92 [2009], VIII ADBAT Reports in support of her allegation that the supervisor was bound by the PMIG, which are “mandatory”. She also argues that PMIG Part IV-A operates together with Part IV-B and that any alleged compliance with the formal requirements of Part IV-B cannot remove the violation of substantive due process.

37. The Applicant also points to the Appeals Committee’s finding that the Implementing Guidelines were not followed when performance issues were first identified during 2014 and any subsequent action, in this case the PIP process leading up to the impugned decision, is to be declared null and void.

38. The Applicant further argues that the PIP process breached several other procedural requirements, namely:

- (i) she was not provided the opportunity to comment on the Note-to-File of the 8 May 2015 PIP meeting’
- (ii) there was no meeting with her supervisor to discuss her performance during the second month of her work plan; and
- (iii) she was not provided an opportunity to submit her comments to the 23 September 2015 notice recommending her termination.

In her Reply she notes that she “made every effort to arrange a meeting with supervisor through his secretary, but the supervisor was not available and went on leave”.

39. The Applicant further alleges “proper procedures” were not followed because the work plan was extended from 30 June 2015 to 27 July 2015 in order to suit her supervisor’s leave schedule and did not reflect the Respondent’s alleged good faith.

40. The Applicant argues that there is confusion concerning the standard of performance that must be reached to satisfy a PIP and that AO 2.05 para. 10.4 refers to a standard of “at least generally satisfactory” performance while the PMIG refers to a “satisfactory” standard.

Respondent’s Contentions Regarding Due Process

41. The Respondent submits that it need only follow Part IV B of the PMIG and not Part IV-A, and it has complied with those provisions as the performance appraisal form itself is the vehicle for providing the feedback to staff on performance in cases of unsatisfactory performance.

42. It also notes that the PMIG are intended to provide more specific details and guidance, but they are not intended to provide a rigid set of rules. They are clearly merely “guidelines”. The Respondent notes *Ibrahim*, Decision No. 86 [2008] VIII ADBAT Reports, 115, para. 51 to argue that, although encouraged, Notes-to-File are not required.

43. The Respondent repeats that the Applicant was informed of her unsatisfactory performance in a Memorandum from Director BPHP to the Applicant dated 27 March 2015. The Applicant was warned that: “*Unless your performance improves to at least satisfactory level by 30 June 2015, action may be taken to terminate your appointment for unsatisfactory performance in accordance with Section 10 of Administration order 2.05*”.

44. The Respondent also contends that there was no legal requirement for the Respondent to formally put the Applicant on notice that she would be receiving an unsatisfactory rating in the context of the 2014 performance appraisal. The Respondent argues that the requirement for a Note-

to-File as described in Part IV-A of the PMIG arises only where there are significant ongoing performance concerns outside of the annual performance review exercise. As per the Respondent, the supervisor provided feedback to the Applicant, which as the record reflects addressed a deterioration of performance over time. It was within the discretion of the Applicant's supervisor, and Respondent's management, to determine when the Applicant's performance deteriorated to the point that warranted a formal intervention and performance related discussion. A judgment was reached that the 2014 performance appraisal was the appropriate moment to formally assess the Applicant performance as "unsatisfactory". It argues that supervisors must have some flexibility to address performance related issues, and that the guidelines are not intended to create a rigid structure requiring a Note-to-File to be issued before a staff member is rated "unsatisfactory" in the context of the annual performance review exercise.

45. The Respondent goes on to acknowledge however, that where a staff member's performance is judged unsatisfactory in the context of an annual performance appraisal exercise, Part IV, section B2 of the PMIG makes it abundantly clear that the basis for that rating must be clearly indicated on the PR form. This was achieved in the Applicant's 2014 performance form where detailed reasons were given for the unsatisfactory rating.

46. The Respondent also submits that all the steps described in AO 2.05 paras. 10.1-10.7 and Part IV of the PMIG were followed. Accordingly, the Respondent argues, the Applicant was duly notified of the shortcomings in her performance and was given a full, fair and adequate opportunity to address them.

47. In its Rejoinder, the Respondent refutes the Applicant's assertions that she "made every effort to arrange a meeting with the supervisor". The Respondent notes that her supervisor asked on the morning of 7 July 2015 to meet that day. When the Applicant asked for a third person to attend that meeting the supervisor had agreed by lunch time that same day and again requested a meeting that day, noting that after 4pm that day he would be away from the office until 27 July 2015. The Respondent also submits that the fact that there was no second meeting should not be a ground for finding that proper procedures were not followed because the Applicant herself has

materially contributed to the difficulties despite repeated requests by her supervisor to schedule a meeting. (Relies on *Azimi*, Decision No 88, [2009], VIII ADBAT Reports, 175 para 38.)

48. The Respondent also refutes the allegation that the Applicant was not provided an opportunity to submit her comments to the 23 September 2015 notice of recommendation that her employment be terminated. The Respondent notes that in that notice it specifically stated at para. 31, “Please provide your written comments on the aforementioned recommendation within ten working days from your receipt of this memo”.

49. The Respondent also argues that Applicant’s contention that the extension of her work plan did not follow proper procedures is “disingenuous” as she was only advantaged by this short extension and her work plan was otherwise unchanged.

50. The Respondent rebuts the Applicant’s allegation that there is confusion concerning the standard to be reached in order to satisfy a PIP and submits that the evidence clearly shows that the Applicant did not meet the requisite standards in the instant case. The Respondent submits that there is no substantive, material or meaningful difference between AO 2.05 which requires “at least generally satisfactory” and the PMIG which state a “satisfactory” level. The word “generally” does not detract from the requirement of “satisfactory”.

51. Accordingly, Respondent submits that the decision to terminate Applicant’s employment for unsatisfactory performance was reasonably taken on the basis of facts accurately gathered and properly weighed and that the proper procedure was followed.

Finding (1): Did the termination of employment for unsatisfactory service satisfy due process?

52. The relevant Guidelines are set out in the 2015 Performance Management Implementing Guidelines as follows:

“Part IV. dealing with Performance Issues contains two sections A and B titled respectively ‘As necessary’ and ‘After Year-end Review and Assessment’ as below.

A. As necessary

1. A review meeting must be initiated by the supervisor to discuss performance issues as soon as they appear. A review meeting may also be initiated by the staff member to clarify work performance issues.
2. Supervisors must prepare a Note-to-File to document discussions of significant or ongoing and persistent performance concerns. The Note-to-File must be signed by the supervisor, any other staff member attending the discussion, and by the staff member to acknowledge receipt. The staff member may also submit separately his/her own version to the Note-to-File. The Note-to-File must be formally referred to during any follow up meeting or year-end assessment exercise. ...

B. After Year-end Review and Assessment

1. A Staff member whose performance is assessed as unsatisfactory will be given a written warning that action may be taken to terminate his/her appointment for unsatisfactory performance unless his/her performance improves to satisfactory level within 3 months.
2. The basis for an unsatisfactory rating must be clearly indicated on the PR form Part 3: Overall Assessment and Comments, Section 3.1. ...

53. As the Tribunal has held in *Ibrahim*, Decision No. 86 [2008] ADBAT Reports VIII, 116, para. 51:

Although it is obviously beneficial for an employee to be alerted to performance problems in a timely fashion, the Tribunal finds nothing in the governing law of then applicable Guidelines which mandates such discussion of performance or issuance of a Note-to-File at the time a performance concern arises. They are clearly merely “guidelines”.

In light of our jurisprudence, the Bank was entitled to rely on Part IV-B of the PMIG and was to comply with all those processes. The point of the end of year performance assessment was to have a fair assessment of the Applicant's work. For supervisors to have advised the Applicant in advance that they had already formed an assessment could have pre-judged the matter. Part A of the PMIG provides an opportunity for immediate communications with the employee when there was an area of concern. The Applicant did not bring evidence in the Application that there was a matter of sufficient seriousness to warrant triggering Part A.

54. The Tribunal concludes that the Respondent has followed the elements of the procedural rules (A.O. 2.05 Section 10) and relevant guidelines in respect of the performance evaluation of the Applicant. The records show that she was given the necessary feedback dated 11 August 2015. Despite repeated attempts on the part of the supervisor to schedule a meeting to discuss the progress during the second month of the PIP work plan, it did not occur then because of the Applicant's own non-cooperation with the suggested schedule before the supervisor went on leave (see *Azimi*, Decision No.88 [2009] VIII ADBAT reports, 175, para.38). The Tribunal concludes that the Applicant herself has contributed to the extension of the process and that while the extension was for the convenience of the supervisor, it did not leave the Applicant disadvantaged.

55. The Tribunal finds that while using two different expressions, "satisfactory" and "at least generally satisfactory", as the standard of performance required is somewhat confusing, the issue itself is not determinative in this case because the Respondent has found that the Applicant failed to meet either standard.

56. For these reasons, the Tribunal concludes that there is no evidence that the Bank has not satisfied due process.

Issue (2) Was the decision arbitrary or an abuse of discretion?

Applicant's Contentions Regarding Abuse of Discretion and Arbitrariness

57. The Applicant alleges that the Respondent abused its discretion because “the objective facts do not warrant the Applicant’s dismissal for unsatisfactory performance”. In reply to the notice dated 23 September 2015, the Applicant submitted a number of testimonials of successful completion of earlier tasks to support her view of her capabilities and to show that her performance was not unsatisfactory.

58. The Applicant notes that even her supervisor accepted that she had completed 80% of the PIP. She argues that the remaining 20% actions could not be completed unless external stakeholders, including the Papua New Guinea (“PNG”) Government progressed certain matters. She relies on the comments of the supervisor on the 2014 performance review, where he stated in his overall comments that “her projects have suffered from bad luck”. She therefore contends that despite this the supervisor assessed her performance as “unsatisfactory”.

59. The Applicant alleges that the Respondent “fundamentally accessed the performance review mechanisms to deal with a relationship breakdown with a subordinate” and the supervisor accessed performance review mechanisms “to break the Applicant’s morale.” The Applicant thus submits that the Respondent abused its power to pursue the improper purpose of ensuring that her employment was terminated.

Respondent's Contentions Regarding Abuse of Discretion and Arbitrariness

60. The Respondent argues that the decision to terminate the Applicant’s employment for unsatisfactory performance was taken on the basis of facts accurately gathered and properly weighed by management.

61. The Respondent argues as follows:

- the Applicant does not make out a case of abuse of discretion nor that the “objective facts do not warrant the Applicant’s dismissal for unsatisfactory performance”;
- the Applicant’s supervisor and those who manage her work program are most appropriately placed to reach judgments on her capabilities measured against the relevant performance standards and expectations;
- the Applicant’s views of her capabilities and performance do not correspond with the views of her supervisor, the Head of the PARD and the Review Panel which considered the background to her case, including her views and comments;
- the opinions and ‘written platitudes’ from others are not a substitute for the views of the Applicant’s immediate supervisor and others do not have the visibility into whether the Applicant is meeting Respondent’s performance standards expected of an IS of her grade level;
- the Applicant had submitted the above testimonials with her comments on the notice of recommendation dated 23 September 2015, and they were duly considered in the context of the Respondent reaching a determination that the Applicant’s performance had failed to meet the requisite standard;
- while the Applicant may have achieved some aspects of her closely monitored three month work program, or succeeded on a number of tasks earlier in her career, they are not a substitute for the conclusions of her immediate supervisor, particularly those formed in the context of the comprehensive and closely monitored work program that was designed to provide the Applicant with an opportunity to remedy her performance deficiencies.

62. With regard to the new statement made by an official submitted by the Applicant attesting to her capabilities, the Respondent again notes that the official who made the statement was not the Applicant’s supervisor, had no responsibility for managing the Applicant’s work or work plan, had no direct knowledge of her performance or performance reviews and had no knowledge or involvement in the Applicant’s closely monitored work program in 2015. Respondent submits that the testimonials of others are not a substitute for the determination by Applicant’s supervisor.

63. In its Rejoinder, the Respondent again notes that there was a factual basis to determine that her performance was unsatisfactory. The reasons were clearly articulated in the 25 August 2015

memorandum from DG, PARD to Director, BPHP and in the 18 August 2015 performance assessment. It also notes that the Applicant had the opportunity to comment on the 18 August 2015 Performance Assessment when she signed the recorded Note-to-File on 25 August 2015. It also notes that the 23 September 2015 notice of recommendation set forth the specific details in the section on “overall assessment” as to why her performance was determined to be unsatisfactory.

Finding (2): Was there an abuse of discretion or was the decision arbitrary?

64. Arbitrariness may manifest itself by the lack of regard for observance of proper procedure in assessing the alleged performance of an employee. In the Tribunal’s view the Applicant’s opinion of her performance capabilities as more than satisfactory cannot be taken as a substitute for the assessment made by her supervisor and other reviewers who have arrived at a different conclusion as per the relevant rules. In the Tribunal’s view the allegations of the Applicant are not sufficiently supported to establish bias or arbitrariness on the part of the management. There is nothing on record with regard to the performance evaluation or PIP exercises that were carried out to show that the rules were not properly adhered to.

65. The Tribunal concludes that the decision was not arbitrary for reasons given in her supervisor’s detailed 24 August 2015 Note-to-File following the closing PIP meeting, namely:

- (i) even though some issues may have been due to external factors, those to do with “schedules, submissions, and communications” were within the Applicant’s control and were not progressed as planned;
- (ii) the competency framework for level 5 requires the Applicant to demonstrate supervision skills, resolve client situations, foster team work, provide high quality communications, and innovate; and
- (iii) improvements in all of these areas were not evident.

66. The Tribunal therefore, concludes that the Applicant has failed to discharge her burden of proof that the challenged decision was vitiated by arbitrariness or an abuse of discretion.

Issue (3) Was the decision tainted by harassment, discrimination or improper motive?

Applicant's Contentions Regarding Harassment, Discrimination and Improper Motive

67. The Applicant's allegations are that her supervisor's attitude towards her was "most intimidating" and that "by calling her among other things a "tone deaf b---h" his behaviour was "manifestly harassing and discriminatory, designed to break morale." She concedes that she did not lodge a formal complaint for fear of adverse consequences. Further, she states that the supervisor's attitude amounted to gender based discrimination.

68. In her Reply, the Applicant attaches a statement dated 30 January 2017 in which she contends that on "5 occasions, I raised the issue with DG about the said misconduct of [my supervisor] for calling me a "tone deaf b---h". The Applicant alleges that the DG chose to ignore her complaint. She also alleges that the DG eliminated her response to her supervisor's Note-to-File on the PIP process that said the PIP tasks were completed, but the Ombudsperson intervened to have that response included.

69. In her Reply the Applicant also provides a statement from one staff member that corroborates her having confided to him the alleged incidents of harassment in January and May 2015. The Applicant argues that she did not lodge a formal complaint for fear of adverse consequences.

Respondent's Contentions Regarding Harassment, Discrimination and Improper Motive

70. The Respondent points to a lack of evidence to support the Applicant's contention that the decision was improperly motivated or that the performance review mechanism was accessed to deal with a relationship breakdown or to break the Applicant's morale. The Respondent notes that the process that led to the Applicant's employment termination was not solely in the hands of the Applicant's supervisor. Decisions regarding poor performance are taken after review by several persons, from separate departments, and from several perspectives, including the relevant supervisor, staff and management from BPMSD, the Review Panel and the President himself.

71. The Respondent rejects the allegations of discrimination and notes that the Applicant has offered no evidence and did not file any formal harassment complaint. In these circumstances, the allegations made are unsubstantiated. While the allegations were allegedly raised with the Ombudsperson, they were not formally raised until 25 February 2016, when she requested Administrative Review contesting her termination. The Respondent relies on *Ms D*, Decision No. 95 [2011], IX ADBAT Reports, 36, para. 35. They further point out that unlike *Ms. D*, the Applicant did not file a formal harassment complaint.

Finding (3): Was the decision tainted by harassment, discrimination or improper motive?

72. The Tribunal notes that the Applicant did not raise the above allegations of harassment until 25 February 2016 when she requested for Administrative Review against the decision of termination. The Tribunal observes that the Bank has processes in place under AO 2.11 to address allegations of harassment. The Applicant has not filed a formal complaint at any time against the alleged harassment by her supervisor and her supervisor has provided a statement denying the allegations. The Applicant has thus failed to discharge her burden of proving that the alleged incidents of harassment had occurred so as to vitiate the decision taken on her performance evaluation by her supervisor (See, *Ms D*, Decision No. 95 [2011], IX ADBAT Reports, 36, para. 35).

73. The Tribunal concludes that the Applicant's claims of harassment, discrimination and improper motive remain unsubstantiated.

Filing of the Criminal Complaint

74. Regarding the lodging by the Applicant of a criminal complaint before the local authorities against a number of her former Bank colleagues, the Tribunal reiterates its findings in *Mr. H*, ADBAT Decision No. 108 (6 January 2017), para. 88 that a legitimate or *bona fide* discharge of the official duties by Bank officials in the assessment of the Applicant's performance in accordance with the Bank's rules and procedures cannot be construed as "criminal conduct". The Tribunal therefore disagrees with the Applicant's statement that her employment claims before the Tribunal and her criminal complaint are distinct. For a former senior and experienced Bank official to have

taken such action with the local authorities was incompatible with the system of internal review which is linked to the immunities from jurisdiction enjoyed by the ADB pursuant to agreement with the Government of the Philippines.

Relief

75. As the Tribunal finds that the Applicant has failed to discharge her burden of proof on the matters alleged, all the relief claimed by the Applicant in paragraph 20 of this decision is denied. Requests for costs are also denied.

DECISION

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

Lakshmi Swaminathan

/s/

President

Gillian Triggs

/s/

Vice President

Shin-ichi Ago

/s/

Member

Anne Trebilcock

/s/

Member

Chris De Cooker

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

At Yokohama, Japan, 6 May 2017