

## **ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 69  
(20 January 2005)**

**Jianming Xu  
v.  
Asian Development Bank**

**Flerida Ruth P. Romero, President  
Arnold Zack  
Yuji Iwasawa**

1. Applicant herein asks Respondent Asian Development Bank to honor a perfected and concluded contract of employment it entered with him. The Respondent ADB, however, alleges that the Tribunal lacks jurisdiction to hear the Applicant's claims as they are time-barred and not receivable; therefore, the Application should be dismissed as inadmissible.
2. The Applicant applied for a regular position with the ADB on 26 November 2000 stating in his Personal History Form that he had been employed by the People's Bank of China (PBOC) until 1999 and that he was currently employed with the International Monetary Fund (IMF).
3. On 25 October 2001, he was offered a fixed-term appointment with the ADB for three years, which stated that it is "open for acceptance for only one month from the date of this letter, and is made on the assumption that you will be able to report for duty within three (3) months of the date of your acceptance of this offer."
4. In his Acceptance Letter of 30 October 2001, the Applicant expressed to ADB an intention to start work on 17 December 2001. On 29 November 2001, Director, Budget, Personnel and Management Systems Department (BPMSD) requested a clarification from the Applicant with respect to his employment status with the PBOC inasmuch as "we are unable to process further the offer of employment to you until such time as this is clarified and specific notification... is received."
5. In e-mails he sent to the Bank in December, he confirmed that he had been employed by the IMF for the past two years and was assigned to IMF by PBOC; that his resignation had been accepted by IMF effective 10 December 2001 but did not indicate that PBOC had also accepted his resignation. It was only on 16 January 2002 that he advised Human Resources Division (BPHR) that the PBOC had not yet allowed him to join the Bank and, therefore he was unable to report for duty within three months after his acceptance of appointment, i.e., by 31 January 2002.
6. When he finally advised the Bank on 13 August 2002 that the PBOC had allowed him to join the Bank, he was informed that the position had already been filled by another applicant and therefore, "we will have to await the availability of another position." In acknowledging receipt of this reply, the Applicant said: "Thanks for your message and I very much hope that another position will be available soonest." Confirmation of his resignation from the PBOC finally came on 30 August 2002.
7. On 7 November 2003, the Applicant wrote BPMSD requesting that his employment contract with the Bank be honored in a timely manner before he considers bringing his case to the

Administrative Tribunal. BPMSD replied on 11 November 2003 that he did not meet the condition for employment in ADB's offer, since he failed to report for work within three months after he accepted the offer of employment.

8. On 30 January 2004, the BPMSD, in reply to another request from the Applicant, clarified that while he was assured that his application would be considered should there be a vacant position that suited his qualifications, ADB has not been able to find any such position since 30 August 2002 when PBOC finally accepted his resignation and he became available for recruitment by ADB.

9. On 24 March 2004, he sought, for a second time, a legal opinion from the General Counsel who told him the next day to refer his questions to the Director, BPHR.

10. On 16 July 2004, the Applicant filed this Application with the Tribunal on the grounds that the Respondent's letter of 30 January 2004 was the decision that gave rise to this Application, that on 24 March 2004, he had exhausted all remedies available to him when he sought the legal opinion of the General Counsel, and that the response received by him on 25 March 2004 was the notice in satisfaction of Article II, Section 3(b)(ii) of the Statute of the Administrative Tribunal.

11. He contends that the Respondent failed to fulfill its obligations under its administrative orders and basic legal principles. Consequently, he seeks relief from the Tribunal for having been deprived of employment with the ADB when it breached a perfected and concluded contract of employment with him, and claims various damages and legal costs.

12. In its Answer of 29 September 2004, the Bank objected to the Application based on lack of jurisdiction. Accordingly, the Tribunal suspended further arguments on the merits of the case pending resolution of the jurisdictional objection.

13. The Bank submits that the Applicant has not met the requirements in Article II, Section 3 of the Tribunal's Statute in that, first, he did not exhaust internal review proceedings such as the grievance procedures pursuant to Administrative Order (A.O.) No. 2.06 within ninety days of the 13 August 2002 decision, compulsory conciliation or administrative review by the Director General, BPMSD, or an Appeal with the ADB Appeals Committee. Second, the ninety-day period for filing an Application with the Tribunal should be counted from the occurrence of the event giving rise to the application and in this case, it was 13 August 2002 when the Applicant was informed of the Respondent's decision that the position for which he had previously applied had been filled by another candidate. This was the final and definite determination on the part of the Respondent that he would not be engaged for that position. That he accepted this decision is shown when he responded thus: "Thanks for your message and I very much hope that another position will be available soonest." All subsequent communications were merely confirmatory of the Respondent's earlier final decision; hence, these will not delay the running of time.

14. The Tribunal finds that the act giving rise to this grievance of the Applicant was the decision of the Respondent embodied in its letter of 13 August 2002 informing him that the position he had applied for had been filled since he failed to meet the requirement of reporting for duty within three months of his acceptance. Upon receipt of this letter, he had no reasonable expectation that a job was available. When he was told that "we will have to await the availability of another position", it was not an employment contract or a commitment to hire him but merely

an expression of the willingness of the Respondent to consider him along with other candidates for a future position.

15. The Applicant should have filed his Application with the Administrative Tribunal within ninety days of 13 August 2002, and not from the BPMSSD's letter of 30 January 2004 nor the General Counsel's email of 25 March 2004 for these merely confirmed the final decision of the Respondent conveyed to the Applicant on 13 August 2002 and accepted by him with thanks. Indeed, precedent has it that subsequent actions or decisions which are merely confirmatory of an earlier final decision will not delay the running of time. As the Tribunal stated in Roman A. Alcartado, ADBAT Decision No. 41 [1998], IV ADBAT Reports, 69, 75, para. 20:

Nor can the Applicant "cure" his delinquency by sending an inquiry to the Respondent, as he did on 26 February 1997, in order to provoke a response, such as one from the Officer-in-Charge, BPHR, dated 3 March 1997, which simply reiterates and confirms a decision made many months before.

The ninety-day period began on 13 August 2002, and his failure to avail himself of the right of appeal by the end of that time window forecloses his right to any subsequent protests.

16. The facts moreover show that the Applicant did not utilize the internal appeals mechanism of the Respondent Bank when these were clearly laid down in its Administrative Orders. The exhaustion of internal remedies, needless to say, must occur within the prescribed time limits. See Rive, ADBAT Decision No. 44 [1999], V ADBAT Reports 15, para. 9.

17. In view of the fact that the Applicant did not comply with the requirements of exhaustion of internal remedies and his Application was time-barred, the Tribunal decides that it has no jurisdiction to entertain the Applicant's claim and therefore dismisses it. His claim for damages, legal and other costs, is denied.

## **Decision**

For the above reasons, the Tribunal unanimously dismisses the Application.