

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 115**  
(21 July 2018)

Ma. Editha T. Cruz  
v.  
Asian Development Bank

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

1. The Applicant, a National Staff member, challenges the decision of the Asian Development Bank (“the Respondent, “the ADB” or “the Bank”) to terminate her employment under the 2016 Early Separation Program (“the ESP” or “the program”). The Applicant contests the 29 September 2017 decision of the President of the ADB to accept the recommendation of the Appeals Committee to terminate her appointment “in the interest of good administration” in accordance with Administrative Order (AO) 2.05 (“Termination Policy”), paragraph (“para.”) 8.1.

## **I. THE FACTS**

### *Background*

2. The Applicant joined the ADB on 19 January 1989 as a National Staff member, Secretary Level (S3) in the Budget, Personnel and Management Systems Department (“BPMSD”). In January 1991, she was promoted to the position of Secretary S4 in the same office and transferred to another department [Programs Department (East) (PED)] in August 1994. In January 2002, she was transferred to the Sustainable Development and Climate Change Department (SDCC) as an Administrative Assistant. Her position was renamed as Operations Assistant (Administrative Staff (AS) 4) in November 2005. In March 2016, she was transferred back to BPMSD, at which time the Respondent told the Applicant that she was “viewed to have less potential for future growth in SDCC in comparison to other AS staff in SDCC”. Her

appointment as Operations Assistant (AS4) was terminated in the “interest of good administration” under the Bank’s 2016 ESP.

*2016 Early Separation Program (ESP)*

3. In August 2016, the Respondent launched the ESP to support the Bank’s staffing optimization efforts. The President of the ADB approved the implementation of the 2016 ESP after several months of planning and preparation, including consultations with the Human Resources Committee of the Board of Directors and the Staff Council. A Memorandum dated 3 August 2016 from the Director General, BPMSD through the Vice President, Administration and Corporate Management (VPAC) to the President explained that the 2014 Mid Term Review (MTR) of Strategy 2020 stressed the need to align staffing levels and skills with the changing business needs of the Bank’s client countries. To further these goals, it was decided to implement a management-driven, non-voluntary separation program in the “interest of good administration” under the provisions of paragraph 8 of AO 2.05. The objectives of the ESP were to “facilitate the separation of staff, whose contribution to ADB has become limited or diminishing and/or who are experiencing career stagnation, with dignity and with fair and reasonable compensation.” The legal framework for termination in the interest of good administration is different from that of termination for unsatisfactory service or a termination for misconduct, the latter two being related to a fault of the staff.

4. Appendix 2 of the Memorandum dated 3 August 2016, titled “Interest of Good Administration”, explains this concept. Paragraph 3 provides that in short, the termination of a staff member’s appointment “in the interest of good administration” means that the President has made a determination that such termination is necessary or appropriate in furtherance of the goals and interests of ADB in the circumstances and contexts in which ADB operates. Paragraph 15 further provides that good administration *“also embodies the concept of fairness in substance and in processes, and requires that the ESP is designed and implemented fairly. The assessments, determinations and decisions will be derived from fair and appropriate processes ...”* which are set forth in the Guidelines for the Implementation of the 2016 ESP.

5. The ESP Guidelines for the implementation of the 2016 ESP were issued on 8 August 2016. Under the ESP Guidelines, the staff being considered for inclusion in the program first had to meet all of the following general criteria, namely:

- a) be an active staff who is on regular appointment;
- b) have served a minimum of 5 years' service; and
- c) not have received an "unsatisfactory" rating in the recent performance review.

6. The program was not to be used as a substitute for dealing with unsatisfactory performance or for addressing poorly performing staff outside the normal performance review process. In addition to the general criteria described above, identification and selection of staff for separation under the ESP had to meet one or more of the following key criteria:

- (i) Skills mismatch - staff whose skills do not meet the current and/or evolving requirement of ADB in either technical or managerial capacity, and who are thereby incapable of performing or producing outputs expected by the ADB. Such staff may have demonstrated satisfactory performance in preceding years, but the relevance of their skills and/or experience is diminishing due to the changing nature of ADB's current and future operational needs.
- (ii) Stagnation - staff who have stagnated in their professional development and ability to contribute to the mission of ADB in the circumstances in which it now operates and who have limited potential for career growth, with poor prospects to move jobs upward or laterally. Limited potential can also be due to demonstrated lack of willingness to take on greater responsibilities based on the requirements and expectations of the position level and demands.
- (iii) Lack of mobility - staff who do not want to move to other positions and do not accept reassignments when offered, or when efforts to reassign staff proved unsuccessful despite ADB's efforts to move them.

7. The ESP Guidelines included a detailed Implementation Procedures as follows:
- a) Heads of Departments (“HODs”), in consultation with their directors, will identify staff to be considered for inclusion in the program based on the selection criteria.
  - b) HODs submit recommendations to the Review Panel.
  - c) A Review Panel considers each case for inclusion in the 2016 ESP against the criteria. The Review Panel may reject staff recommended by HODs if it considers that the criteria have not been met. The Review Panel may also request HODs to amend the written case for inclusion of staff in the 2016 ESP for those staff that the Review Panel considers as meeting the criteria. The Review Panel endorses the list of identified staff.
  - d) Once endorsed by the Review Panel, BPMSD provides the names of staff endorsed by the Review Panel together with the written case for inclusion in the 2016 ESP, as approved by the Review Panel, to the respective HODs.
  - e) HODs accompanied by BPMSD (respective Business Partners) inform the staff that he/she has been identified for separation and that he/she had the option to resign voluntarily. A written notice is also provided to staff. Staff will have up to 21 calendar days to comment or submit his/her resignation.
  - f) If staff resigns, he /she will sign a mutually agreed separation with accompanying estimated termination payments. The staff member’s last reporting day should not be later than 30 calendar days from the date of notification of resignation.
  - g) The Review Panel will review the case of each identified staff who has not resigned within the 21 calendar days referred to above and consider their comments, if any, if the Review Panel confirms that the staff will be included in the 2016 ESP, a recommendation for termination of the appointment of the staff in the interest of good administration will be submitted (i) to the President for International Staff and (ii) to DG, BPMSD for National Staff/Administrative Staff (NS/AS).

- h) BPMSD provides to staff, whose employment is terminated in the interest of good administration, a copy of the termination memorandum approved by BPMSD for NS/AS, which includes an estimated termination payment. The staff's last reporting day will be the date of receipt of the termination memorandum. After this day, staff may continue to access to his/her work station for the next 15 calendar days.
- i) BPMSD initiates the exit clearance procedures for staff.

8. The Review Panel for National Staff comprised (i) DDG, BPMSD (as Chair); (ii) the concerned HOD; (iii) an independent HOD and (iv) the Senior Advisor of the Office of DG, BPMSD as secretary. For the cases that were contested, the same members of the Review Panel reconvened to review the case of staff who did not voluntarily resign.

9. There was also a provision in the ESP package that those selected for the 2016 ESP would receive compensation, including a 90 days' notice period and a termination payment equal to one months' salary for each year of service up to a maximum of 12 months. The identified staff was also given the option to resign voluntarily from the Bank, in which case additional payments were made.

10. The President's 9 August 2016 Memorandum to the Board of Directors stipulated "[t]here are no targets or quotas per department or office" and "*[all] assessments, determinations and decisions under the ESP will be based on clear criteria and procedures, and only staff who meet the criteria are to be included. The process includes several layers of review. These steps are important to establish confidence in the integrity of the process as well as from a legal standpoint and to maintain the trust of the majority of staff who are not affected by the ESP*" (emphasis supplied).

11. On 8 August 2016, VPAC issued a memo announcing the launch of the program and explaining that the objective of the ESP was to "*support ADB's staffing optimization efforts to rebalance the work load and address skills needs through early separation of staff with limited and diminishing contributions and/or lack of potential career growth.*" The ESP was given wide

publicity, for example, in the Frequently Asked Questions (FAQs) and publications like the “ADB Today”. The ESP was implemented from August to December 2016. In all, 90 staff at various levels, international, national and administrative, including the Applicant, were terminated. Of those, 88 chose to resign while the remaining two, including the Applicant and another staff member whose case is currently before the Tribunal, chose to contest their inclusion through the Bank’s internal justice system and then filing of an Application in the Tribunal.

### *Termination of Applicant’s Appointment*

12. In accordance with the procedures laid down in the ESP Guidelines, DG, BPMSD on 14 October 2016, recommended the Applicant’s inclusion in the ESP as she met one of the relevant criteria (“career stagnation”) described in the ESP provisions and Guidelines. DG, BPMSD provided the following justification in the 14 October 2016 ESP Form:

Career stagnation: [The Applicant] has been at the same level (AS4) for 25 years. She was a Secretary from 1989 to 1998, an Administrative Assistant from 1998 to 2005 and an Operations Assistant from 2005 to present.

In 2015, [the Applicant] was one of the AS staff moved from SDCC to BPMSD as part of the initiative to increase the IS to AS span of support. She was selected because she was viewed to have less potential for future growth in SDCC in comparison to other AS staff in SDCC. The rationale for the move was explained to her. Since then, BPHP has been assigning her to short term and temporary administrative roles across the Bank. [The Applicant] has applied to 3 AS5-AS6 roles outside of BPMSD since 2011 but unsuccessfully. [The Applicant] does not have the potential for a career move and has stagnated at the same level.

### *Review Panel*

13. In accordance with the ESP Implementation Guidelines, DG, BPMSD’s recommendation was reviewed by a Review Panel where Deputy Director General (DDG), BPMSD; DG, BPMSD; and the Secretary (SEC) were Members; with Senior Advisor, Office of the DG, BPMSD (“BPOD”) in attendance as Secretary. The Review Panel endorsed the recommendation on the same day, 14 October 2016.

14. On 26 October 2016, following a meeting with DG, BPMSD to notify the Applicant of her identification for inclusion in the ESP, the Applicant was sent a detailed note of the meeting and given the option of either contesting her inclusion or resigning.

15. On 15 November 2016, the Applicant contested her inclusion through a written submission to the DG, BPMSD.

16. On 6 December 2016, the same members of the Review Panel, in accordance with the ESP Guidelines, reconvened to review the Applicant's case and consider her comments. In the Minutes of the Second Review Panel it is stated in para. 6 that, *"In reviewing the documentation provided by [Applicant], the second Panel focused on the main issue, i.e. whether any additional information relevant to the case had been brought forward, or, ii) any errors were found in the first review to justify a change to the Panel's initial conclusion, that she met the criteria under ESP, i.e. (ii) career stagnation"*. Applicant had submitted two main objections namely (i) questioning the design and legality of the ESP; and (ii) arguing that her career has not stagnated, and that it was not her fault that she was not promoted in the last 25 years. The Panel carefully reviewed the submission provided by the Applicant. However, the Panel did not find any new facts that would merit the reversal of its original endorsement of the recommendation to include the Applicant in the ESP, under the specific criteria of career stagnation.

17. Following the review, the Review Panel did not change its earlier conclusion that the Applicant met the criteria for inclusion in the 2016 ESP and confirmed the recommendation made by DG, BPMSD, to terminate her employment in the interest of good administration. In accordance with AO 2.05, para. 8.1, the DDG, BPMSD requested DG, BPMSD's approval to terminate the Applicant's appointment based on the Review Panel's confirmation of DG, BPMSD's recommendation. This recommendation was approved by the DG, BPMSD on 14 December 2016, and the Applicant was then notified by a Notice of Termination.

18. The Applicant received a termination payment corresponding to 12 months' salary and a lumpsum payment corresponding to the 90 days' notice period that she chose to encash and not

serve, and payment for her accumulated leave balance. Her end of employment date was 15 December 2016.

*Exhaustion of Internal Grievance Procedures*

19. After the Applicant received the aforesaid memorandum dated 14 December 2016 from the DG, BPMSD, she submitted a request for compulsory conciliation which ended unsuccessfully on 10 March 2017. The Applicant then filed a request for Administrative Review to the DG, BPMSD, which was considered and denied on 27 April 2017.

20. On 12 May 2017 the Applicant filed an appeal with the Appeals Committee. This was rejected on 18 September 2017, whereby the Appeals Committee found no instances of abuse of discretion, discrimination, abuse of process, or improper procedures. It noted that *“the Appellant was at the same level (AS4) for 25 years, indicating career stagnation. Under the 2016 ESP criteria, the Appellant could be terminated in the interest of good administration.”* While concluding that *“there was no abuse of process, and proper procedures were followed”*, the Appeals Committee also recommended that *“future ESP exercises be strengthened by including more independent members to the ESP Review Panel.”* The Report and recommendation of the Appeals Committee was endorsed by the President on 29 September 2017.

21. The Applicant then filed this Application before the Tribunal on 22 December 2017. The Respondent filed its Answer in the Tribunal on 5 March 2018, Applicant filed her Reply on 17 April 2018, and the Respondent filed its Rejoinder on 16 May 2018.

*Relief Requested*

22. The Applicant prays for:

- a) Rescission of the following decisions of the Bank:
  - The Notice of Identification of her name issued by DG, BPMSD, which identified the Applicant for termination under the 2016 ESP;



- The Memorandum dated December 14, 2016 issued by the DG, BPMSD, which served as Notice of Termination rejecting the Applicant's contest of her inclusion in the 2016 ESP;
  - The Memorandum dated April 27, 2017 issued by the DG, BPMSD denying the reliefs sought by the Applicant in her Request for Administrative Review;
  - The Memorandum dated September 18, 2017 issued by the Appeals Committee recommending the rejection of the Applicant's Appeal.
- b) Full back wages computed from the time her service was terminated to the Decision of the Tribunal;
- c) Monetary compensation in the form of damages corresponding to her remaining years in service before retirement;
- d) Reinstatement and maintenance of lost benefits; and
- e) Any other reliefs.

## II. SUMMARY OF THE PARTIES' CONTENTIONS

### *Applicant's Position*

23. The Applicant asserts that the ESP is violative of due process and ADB policy pursuant to AO 2.05, para. 2.1 to accord staff security of service. AO 2.05, para. 2.1 stipulates as follows:

It is ADB's policy to accord staff members security of service in ADB consistent with their satisfactory performance and conduct and the efficient administration of ADB. ADB will observe due process in initiating and deciding on the involuntary or premature termination of staff member's appointment.

The Applicant contends that she was given limited functions in anticipation of her inclusion and did not have reasonable time to prove her skills. She also argues the decision is an abuse of discretion as it failed to meet the criteria as her career has not stagnated. She asserts her unsuccessful applications for roles outside BPMSD do not constitute sufficient basis to conclude

that her career has stagnated. Finally, the Applicant asserts discrimination because of her age (54 years).

### *Respondent's Position*

24. The Respondent asserts that it has the legal authority under AO 2.05, para. 8 to terminate the appointment of staff in the interest of good administration, the ESP established comprehensive, fair and transparent processes for determining which staff might be affected by the ESP, and the Applicant was selected fairly and properly in accordance with the ESP Guidelines. It contends that it did not violate the security of service of the Applicant or breach due process but applied the provisions on termination in the interest of good administration appropriately, as it determined the Applicant had suffered from career stagnation.

25. The Respondent submits that the process for selection was “rigorous” and conducted in a “fair and consistent” manner. In this regard it noted that DG, BPMSSD’s recommendation was reviewed by a Review Panel which endorsed the recommendation. When the Applicant contested her inclusion, her comments were considered by the Review Panel for a second review. The final decision to terminate the appointment of the Applicant in the interest of good administration was taken by the DG, BPMSSD only after taking into account the comments of the Applicant and the endorsement of the Review Panel.

26. The Respondent notes that security of service is not absolute and, in particular, is subject to the “efficient administration of ADB” (AO 2.05, para. 2.1). The Respondent asserts that the Applicant met the career stagnation criteria; its justification for this included her having been at the same level for 25 years and her having unsuccessfully applied for three promotions in the last five years. The Respondent strongly disagrees with the allegation of discrimination based on her age and asserts that age was not a criterion for inclusion and did not play any role. The Respondent notes that the Applicant has provided no evidence to support this allegation.

### III. FINDINGS

#### Preliminary matters

##### *En Banc Decision*

27. The case involves the interpretation of the 2016 ESP provisions which warrants the case being decided *en banc* under Article V (5) of the Tribunal's Statute read with Rule 5A of the Tribunal's Rules of Procedure.

#### The Merits

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

“The Tribunal’s scope of review of this Application, which involves a managerial decision, is to “say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed” (*Lindsey*, Decision No.1, (1991), 1 ADBAT Reports 5, para.12). The Tribunal is to examine allegations of non-observance of the Applicant’s contract of employment, which includes the applicable rules of the Bank (Article II, para. 1 of the Statute of the Tribunal). The Tribunal’s role is not to substitute its views for managerial decision properly taken”. (*Ms. G (No.2)*, Decision No. 107 (19 August 2016), para. 65).

See also *Mr E.*, ADBAT Decision No.103 (12 February 2014), para. 54; *Haider*, Decision No.43 [1999], V ADBAT Reports 6, para. 18; and *Breckner*, Decision No.25 (1997), III ADBAT Reports 17.

29. In addition, it is well established that the “burden of proof rests on the person who makes allegations.” (*Ms. G*, ADBAT Decision No. 106 (23 September 2015), para. 36).

30. The primary issues posed in this case are:

- (i) Did the termination of employment in the interests of good administration follow due process?
- (ii) Was the decision arbitrary or an abuse of discretion?
- (iii) Was the decision tainted by discrimination?

**Issue 1. Did the termination of employment in the interests of good administration follow due process?**

31. The salient facts regarding the procedures that have been followed by the Respondent in this case have been mentioned in paragraphs 12 - 18 above. Having regard to the relevant facts and the detailed procedures laid down in the Guidelines for the Implementation of the 2016 ESP, the Tribunal is satisfied that the procedures have been adhered to by the Respondent in terminating the services of the Applicant under the 2016 ESP. However, the important question arises whether the composition of the Respondent’s second ESP Review Panel meets the requirements of due process.

32. The Bank’s AO 2.02 (“Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members”), para. 2.14 (as in force at the relevant time) specifically stipulates its obligation in relation to involuntary separation as being to:

*“observe due process in all areas of personnel administration, in particular, in initiating and deciding on the involuntary or premature separation of staff from service. ...”*  
(emphasis supplied)

The Tribunal also recalls that the President’s 9 August 2016 Memorandum to the Board of Directors recognised that the layers of review were *“important to establish confidence in the integrity of the process as well as from a legal standpoint ...”*.

33. The Tribunal notes that the Review Panel served its purpose during its first review. The members of the Review Panel were in a position to assess the goals and interests of the Respondent and what skills were required by management to achieve those goals, rather than what the Applicant herself thought of her abilities and skills. It may also be added that the assessment made by the Applicant of her own ability and competence in a particular job cannot be taken as the yardstick of the requirement of the management. The decision of the Review Panel at its first meeting on endorsement of the recommendation cannot, therefore, be considered an abuse of managerial authority.

34. However, the Tribunal notes that when the recommendation was contested by the Applicant and reviewed at the Second Review Panel meeting on 6 December 2016 by exactly the same members of the Review Panel, including at least one and arguably two (DG, and DDG, BPMSD) of three members with highly influential views on the Applicant and a prior interest in including her in the ESP, the process was essentially reduced to a rubber stamp. On contesting the earlier recommendation, the Applicant had a right for that recommendation to be reviewed by an impartial body, in accordance with AO 2.02, para. 2.14, and, in particular, that it be considered by different officers.

35. A critical feature of due process is impartiality of any decision-making body, particularly in view of the provisions of AO 2.02, para. 2.14. The Appeals Committee had the opportunity to consider the impartiality of the Review Panel, but failed to do so. Although the Appeals Committee hinted at a broader structural (member composition) problem of the review by recommending that *“future ESP exercises be strengthened by including more independent members to the ESP Review Panel”*, its conclusions did not cure the earlier composition defect in proceedings. Although the Tribunal does not require an altogether different composition, the membership of the Review Panel for its second meeting should not have included all of the same members and in particular, should not have included the officer who made the initial recommendation to include the Applicant in the ESP.

36. Therefore, after reviewing the record, the Tribunal concludes that the second review by the same members of the Review Panel did not meet the Bank’s own requirements of

“confidence in the integrity of the process” and in particular, the broad requirements of due process; the Application accordingly succeeds.

37. The Applicant being successful on this plea, the Tribunal finds it unnecessary to consider the other allegations raised here regarding abuse of discretion and discrimination.

### **Conclusions**

38. The Tribunal concludes that the Application succeeds and the 14 December 2016 decision of DG, BPMSD and 29 September 2017 decision of the President are rescinded.

### **DECISION**

For the above reasons, the Tribunal unanimously decides that:

1. The Applicant shall be reinstated to her position and be made whole for all lost earnings minus the separation package she received, with the Bank to pay interest at the rate of 6% per annum;
2. Pursuant to Article X paragraph 1 of the Statute of the Tribunal, should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case, the Tribunal fixes the amount of compensation to be paid to the Applicant at twelve months' remuneration;
3. To award costs in the amount of US\$8,000; and
4. All other claims for relief are denied.

Lakshmi Swaminathan

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/s/  
President

Gillian Triggs

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/s/  
Vice President

Shin-ichi Ago

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/s/  
Member

Anne Trebilcock

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/s/  
Member

Chris de Cooker

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/s/  
Member

Attest:

Cesar L. Villanueva

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/s/  
Executive Secretary

At Asian Development Bank Headquarters, 21 July 2018