

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 120
(28 February 2019)

Ms. J (No. 2)
v.

Asian Development Bank

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

1. The Asian Development Bank (“ADB”, “the Bank” or “Respondent”) requests revision of the Administrative Tribunal’s Decision No. 116 of 2 October 2018. In that Decision the Tribunal found that the Respondent had failed to exercise its disciplinary sanction without discrimination and therefore ordered rescission of the President’s decision to dismiss the Applicant, or in the alternative, the payment of monetary compensation to the Applicant. In her response to the Respondent’s request, the Applicant requests affirmation of Decision No. 116 and in addition, modification to the Tribunal’s award at its paragraphs 2 and 3.

I. THE FACTS

2. In Decision No. 116, the Tribunal held that the Respondent was authorized to impose penalties for the Applicant’s misconduct in relation to her use of tax-exempt vehicle purchases through fraudulent misrepresentations, but its disciplinary sanction of dismissal was not properly exercised, *i.e.* “without discrimination”, and therefore had to be rescinded. In taking its decision, the Tribunal relied on additional information it had requested from the Respondent, including

details regarding the number of vehicles purchased by each individual using the TEV privilege and *“and other pertinent information concerning the individual’s situation.”* This information was supplied by the Respondent on 2 August 2018 in a consolidated table that showed relevant details of all 33 staff who were disciplined. On review of this Table, the Tribunal *“noted a case of a staff member who was in the same situation as the Applicant (namely, not in a position of trust, availed himself/herself of the TEV entitlement more than once, and had no mitigating factors) but was not dismissed.”* The table’s column entitled the “number of vehicles” purchased by the individual under the TEV privilege had listed “2” for both the Applicant and the other staff member who was in the same situation. This information as presented by the Bank formed the basis of a finding, as a matter of fact, that given that the disciplinary action was taken for the same underlying reasons, the dismissal of the Applicant amounted *“to a failure of the Respondent to exercise its disciplinary sanction without discrimination.”*

3. After its deliberations, the Tribunal unanimously decided:

1. *The dismissal decision is rescinded;*
2. *The Applicant shall be reinstated to her former Level 3 position and be made whole for all earnings and benefits lost, less any earnings received since 20 October 2017 until payment, with restitution of her benefits and entitlements to the level they would have been but for the Bank’s actions subject to the condition that the Bank may impose any disciplinary measure, short of termination;*
3. *Alternatively, 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, para.*

1 of the Statute of the Tribunal, the Tribunal fixes the amount of compensation to be paid to the Applicant at USD 40,000;

- 4. In either case, award the Applicant USD 10,000 in damages for intangible injury relating to the Bank's failure in three instances to follow rules governing the Appeals Committee;*
- 5. The Bank shall pay a portion of the Applicant's attorney fees in the amount of USD 6,000; and*
- 6. All other claims are dismissed.*

Application to the Administrative Tribunal

4. On 29 November 2018, the Respondent submitted an application pursuant to Article XI of the Statute of the ADB Administrative Tribunal ("the Statute") requesting revision of Decision No. 116 and a stay of the implementation of Decision No. 116 pending the outcome of Respondent's request under Article XI.

5. The request for an interim stay of the execution of Decision No. 116 was granted by this Tribunal on 7 December 2018 under Rule 23 of the Tribunal's Rules of Procedure.

6. The Respondent makes its request on the assertion that the Tribunal's order to rescind the dismissal decision was based on its "misreading of the evidence" that the Respondent had provided to it. The Respondent submits that the Tribunal has "*misread the information in the 'number of vehicles' column of its 2 August matrix which led the Tribunal to mistakenly conclude that the*

Applicant, who was sanctioned for abusing the Tax Exempt Vehicle (‘TEV’) privilege twice, was similarly situated to a staff member who was sanctioned for abusing the TEV privilege on one occasion.”

7. The Respondent explains that it understood the Tribunal’s earlier request for additional information as *“asking for all vehicles that the individuals had purchased using the TEV privilege over the course of their career, including vehicles that were an abuse of the TEV privilege.”* It explains that the situation of the staff member who had not been dismissed was different from that of the Applicant as although that staff member had availed of the TEV privilege twice, he/she only abused the TEV privilege once and not twice as the Applicant had.

8. The Respondent asserts that the “mistaken” understanding of the “number of vehicles” column is the “newly discovered fact” required under Article XI for a revision to a judgment to be considered. The Respondent also asserts that this fact was unknown to it when the judgment was delivered as it only became aware that the Tribunal had “misread” the “number of vehicles” column in the 2 August matrix upon receipt of Decision No. 116.

9. On 21 December 2018, the Applicant submitted her response as a “Reply” to the Respondent’s Application for revision of Decision No. 116, asserting that the Respondent had not satisfied the conditions of Article XI that would have allowed review and subsequent revision of Decision No. 116 and that this application for revision should be denied.

10. The Applicant asserts that:

(i) information allegedly “misread” by the Tribunal is not a new fact. Instead, what the

Respondent is actually saying is that the Tribunal committed a mistake; and

(ii) the “misread information” alleged by the Respondent was not unknown to the Tribunal.

11. She additionally asserts that, in any event, the Bank’s investigation was conducted only on her second purchase and it cannot be said that she unlawfully availed herself of the TEV privileges twice. She also requests modification of the Tribunal’s decision in its award given that she was dismissed from the Bank on the date the Director, HR Business Partners Division signed the disciplinary memo on 21 September 2016 and not on 20 October 2017, which was when the President accepted the Appeals Committee’s rejection of her appeal of the dismissal.

12. She thus asserts that the alternative relief of compensation should be adjusted as an “*implication of the additional 13 months of unemployment that was not noted by the Honorable Tribunal*”; that the compensation should be in addition to the full payment of back wages and benefits; and that, if she is not reinstated, the prohibitions and restrictions that accompanied the order of dismissal should “*likewise be set aside.*”

13. She sets out her own request for relief as follows:

(i) Deny Respondent’s Application for Revision;

(ii) Affirm Decision No. 116 with modification of paragraph Nos. 2 and 3 of the Decision to read:

2. *The Applicant shall be reinstated to her former Level 3 position and be made whole for all earnings and benefits lost, less any earnings received since 21 September 2016 until payment, with restitution of her benefits and entitlements to the level they would have been but for the Bank’s actions subject to the condition that the Bank may impose any disciplinary measure, short of termination;*

3. Alternatively, should the President of the Bank decide that the Applicant shall not be reinstated, the other restrictions and prohibitions originally imposed upon her are still deemed set aside, she shall be compensated without further action being taken in the case pursuant to Article X, para. 1 of the Statute of the Tribunal, and the Tribunal fixes the amount of compensation to be paid to the Applicant at USD 80,000, exclusive of the restitution mentioned in the preceding paragraph which shall be computed up to the time that the President of the Bank decides not to reinstate her.

(iii) Grant other relief that may be just and equitable under the circumstances.

14. The Tribunal transmitted that response to the Respondent and gave the Respondent one week to submit its Rejoinder, which it did on 9 January 2019. The matter was then submitted to the Tribunal for decision.

15. In its Rejoinder, the Respondent reiterated its claims that when the Tribunal's decision is based on a misreading of material facts, the Tribunal may reconsider that decision "*in light of a correct understanding of the relevant facts.*" The Respondent refutes the Applicant's submission that she abused the TEV privilege only once as "*wholly unsupported by the facts that demonstrate that she abused the TEV privilege twice.*" The Respondent also requests that the Applicant's request to "slightly modify" Decision No 116 be dismissed given it does not meet the requirements of Article XI of the Statute so as to warrant further compensation.

II. FINDINGS

Preliminary Matters

En banc Decision

16. The case involves a review of a decision that was decided *en banc* under Article V(5) of the Tribunal's Statute read together with the Rule 5A of the Tribunal's Rules of Procedure. This request has thus been dealt with as well *en banc*.¹

17. According to Article IX, paragraph 1 of the Statute, "*All decisions of the Tribunal ... shall be final and binding.*" Article XI, paragraph 1 of the Statute provides for one exception to this principle of finality of Tribunal judgments, whereby a request for the revision of a judgment is made permissible, provided that three conditions are met:

- a) the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;
- b) the showing that at the time the judgment was delivered that fact was unknown both to the Tribunal and to that party; and
- c) the request to revise the judgment is made within a period of six months after that party acquired knowledge of such fact.

¹ The Tribunal is currently composed of four members.

18. This Tribunal in *Ms. D (No. 3)*, Decision No. 111 (28 February 2018), confirmed that Article XI “has to be construed very strictly.” (Citing *Lim (No. 2)*, Decision No. 81 [2007], VIII ADBAT Reports. See also, *Hua Du (No. 2)*, Decision No. 102 [2013], IX ADBAT Reports, para. 7; *Kalyanaraman (No. 3)*, Decision No. 100 [2013], IX ADBAT Reports, paras. 6 and 9).

19. The Bank asserts that the “mistaken” understanding by the Tribunal of the “number of vehicles” column in the 2 August table that the Bank had produced and provided to the Tribunal was a “new fact” that was unknown to both the Tribunal and itself. It also asserts that this fact was unknown to it when the decision was delivered as it only became aware that the Tribunal had “misread” that column upon receipt of Decision No. 116.

20. The Tribunal rejects the Bank’s submission. The relevant facts were the number of vehicles purchased by the Applicant and the other staff member that were an abuse of the TEV privilege. These facts were known by the Bank at the time of the decision and therefore the requirements under Article XI are not met. The Bank is instead questioning the finding of the Tribunal itself. The Tribunal reiterates its position that its findings, as decisions of the final instance of the judicial remedial system in the Bank, are *res judicata* and cannot be appealed. As held in *de Alwis (No. 2)*, Decision No. 66 [2004], VI ADBAT Reports p. 35, para. 17, “[w]hat the [Respondent] is asking the Tribunal to do is to review its decision ... by alleging mistakes ... in the appraisal of facts, which are not permissible grounds of review.” Many similar decisions can be found in other international administrative tribunals.

21. The Bank was given ample opportunity, including the chance to respond to two separate

requests of the Tribunal, to provide information regarding the circumstances surrounding the 33 individuals investigated in relation to the fraudulent TEV scheme and the consequent penalties imposed. It was incumbent on the Respondent to produce complete and unambiguous information to the extent necessary for the Tribunal to make its findings. The Tribunal relied on the information provided by the Bank and the Tribunal's interpretation of it was a plain reading of the table provided.

22. In the same manner, the Tribunal considers that the Applicant's attempt to modify the award in Decision No. 116 fails to meet the requirements of Article XI of the Statute. The fact that the Applicant had already been dismissed prior to the 20 October 2017 decision of the President of the Bank was known at the time of the Tribunal's deliberations. The Applicant is simply questioning the "correctness" of the Tribunal's appraisal, hence this cannot be covered by Article XI of the Statute. The Tribunal adds that even if the fact of dismissal prior to the 20 October 2017 decision of the President of the Bank had been unknown to the Tribunal at the time of its decision, the amount of compensation awarded would not have been affected, since when determining the amount the Tribunal took into account the fact that she had committed misconduct.

23. Accordingly, the Tribunal finds that neither the Respondent nor the Applicant has satisfied the conditions laid down in Article XI of the Statute.

24. The Tribunal notes that in the request to stay the implementation of the decision, the Respondent undertook to pay applicable interest on unpaid amounts should the Tribunal eventually dismiss the request for revision. The Tribunal notes that interest will indeed be due on those

amounts from 16 December 2018 until paid. 16 December counts as 30 days after 16 November 2018, the date when the Respondent received the decision.

DECISION

For these reasons, the Tribunal unanimously decides:

1. The Respondent's request for revision of its Decision in *Ms. J*, Decision No. 116 (2 October 2018) is denied;
2. The Applicant's request to modify paragraphs 2 and 3 of Decision No. 116 is denied;
3. All other claims are dismissed; and
4. The stay of execution of Decision No. 116 is lifted, with interest to be paid at the rate of 6% per annum on all amounts due from 16 December 2018 to the date of payment.

Gillian Triggs

/s/
President

Shin-ichi Ago

/s/
Vice-President

Anne Trebilcock

/s/
Member

Chris de Cooker

/s/
Member

Attest:

Cesar L. Villanueva

/s/
Executive Secretary

At Asian Development Bank Headquarters, 28 February 2019