

**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 121**

28 February 2019

Ms. Cruz (No. 2)

v.

Asian Development Bank

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

1. The Applicant in Decision No. 115 (21 July 2018), Ms. Cruz, seeks clarification in relation to implementation by the Asian Development Bank (“ADB”, “the Bank”, or “the Respondent”) of the remedy awarded by the ADB Administrative Tribunal (“ADBAT” or “the Tribunal”). Specifically, she asks whether the Bank, as the Respondent in that case, has discretion not to reinstate an employee even if the Tribunal has ordered it and the employee is ready and willing to be reinstated, and whether the Bank may deduct pension payouts from the computation of lost earnings it owes to her under the Tribunal’s decision.

**I. THE FACTS**

*Decision No. 115 (21 July 2018)*

2. Decision No. 115 involved an application to seek reversal of the decision of the ADB’s President to terminate the Applicant’s employment in the interests of good administration under the Bank’s 2016 Early Separation Program (“ESP”) on the basis of the criterion of “career stagnation” (in her case, employment at the same level between 1991 and 2016). On 21 July 2018, the Tribunal rejected the Applicant’s substantive claims, but found that her employment had been

unfairly terminated because the Bank had not met its own and broader requirements of due process when her contested inclusion in the ESP was examined by a Review Panel with “composition defect[s].” The Tribunal consequently decided 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.*

#### *Method of Implementation of the Decision*

3. On 22 August 2018, the ADB President decided “in the interest of the Bank” to compensate the Applicant without further action being taken in the case. The President signed the 22 August 2018 memorandum addressed to him by the Director General, Budget, Personnel, and Management Systems Department (DG, BPMSD), thereby approving the recommendation to “*exercise your [the President’s] authority under Article X, Section 1 of the Statute to decide that Ms. Cruz should be compensated without further action being taken in the case ... because it is in the ‘interest of*

*the Bank' to bring the 2016 ESP to a close. ... This decision would become effective immediately upon your approval."* The DG, BPMSD informed the Applicant of this decision in his 23 August 2018 letter to the Applicant's counsel, stating that the *"ADB will compensate your client in the amount fixed by the Tribunal (i.e. "twelve months' remuneration") instead of implementing the Tribunal's decision to reinstate your client to her previous position."* This letter also indicated that the Bank was computing the Applicant's "lost earnings" for the relevant period and would be seeking information from the Applicant to complete this calculation.

4. Further correspondence ensued between the Applicant and the DG, BPMSD. In a letter of 31 August 2018, the DG, BPMSD asked the Applicant for information to enable computation of her lost earnings. He sought information related to the Applicant's "salary or other remuneration" received during the period from 16 December 2016 (when the termination of employment became effective) to 22 August 2018 (when the decision not to reinstate the Applicant was taken), and details of any costs related to her medical insurance or life insurance premiums for the same period. The letter also explained that the Respondent would use the Tribunal's Decisions Nos. 86-A and 86-B [*Anjum Ibrahim* (27 October 2008) and (19 August 2009)] to guide its computations. The Bank summarized its approach to calculating the Applicant's lost earnings in an attachment to the letter. The attached "Calculation Methodology" listed various elements of salary and benefits the Bank included as her lost earnings; the benefits specified were insurance premiums, severance pay adjustment, annual leave commutation and the recalculated pension contributions to reflect the period between 16 December 2016 to 22 August 2018.

5. The attachment to the letter of 31 August 2018 also noted that “*income received by Ms. Cruz from 16 December 2016 to 22 August 2018*” would be deducted from her calculated “lost earnings”. This income was defined as:

(i) *Pension payments to Ms. Cruz from 16 December 2016 to 22 August 2018. (Note: Since Ms. Cruz is paid her salary from 16 December 2016 to 22 August 2018, pension payments to her (based on the recalculated amount) would commence on 23 August 2018).*

(ii) *Earnings from other sources, if any, from 16 December 2016 to 22 August 2018.*

6. On 6 September 2018, the Applicant submitted the information requested. She told the Respondent that she had found no other employment during this period and had no source of any income. At this point, the Applicant raised an objection to the Bank’s interpretation of Article X, para. 1 of the Tribunal’s Statute, under which the Bank had chosen not to reinstate her. She said that she was “not averse to reporting back to work.” Finally, the Applicant reserved her right to request clarification from the Tribunal once she received the final computation.

7. The DG, BPMSD wrote to the Applicant on 17 September 2018 to reiterate the Bank’s position that 12 months’ separation pay would be given in lieu of reinstatement. The Respondent disagreed with the Applicant’s interpretation of Article X, para. 1 of the Statute and also noted that pursuant to Article IX of the Tribunal’s Statute, all decisions taken by the Tribunal are “final and binding”. The Bank attached to this letter the computation of the amounts due to the Applicant;

this showed the amount of pension payments that would be deducted from the Applicant's lost earnings.

8. On 25 September 2018, the Applicant responded to the DG, BPMSD's letter, advancing her right to be reinstated under the Tribunal's judgment, and objecting to the deduction of the pension pay outs from the computation of her lost earnings. The Applicant asserted that "*the only lost earnings that should have been deducted are income from employment or trade.*" Referring to Decisions 86-A and 86-B, *supra*, the Applicant maintained that the Bank itself had argued in those decisions that what should be deducted from lost earnings are "non-Bank" sources (para. 18 of Decision 86-B). The Applicant also noted that if the Tribunal had intended to have lost earnings offset by pension payments, it would have specified so, but instead it had named only the separation package as a deduction from lost earnings. The Applicant repeated her preference for reinstatement.

9. On 4 October 2018, the Office of the General Counsel of the Bank wrote to the Applicant, recalling the Bank's position, viz. no right to reinstatement and deduction of pension payments from the computation of lost earnings. The Respondent explained that had the Applicant been employed by the ADB during the relevant period, she would not have received any ADB pension payments. The Bank concluded that "*in short, if the pension payments ... were not deducted from her 'lost earnings', such amount would constitute a windfall gain to Ms. Cruz beyond her lost earnings.*" The Respondent also distinguished the present matter from Decision Nos. 86-A and 86-B by explaining that the Applicant in those cases had not received any pension payments from the ADB for the period between the termination of employment and the decision of the Tribunal. In addition, the Respondent noted that in Decision No. 86-B the Tribunal had explained that the

objective of reimbursing the Applicant for “lost earnings” was “*to reflect the level of compensation she could reasonably have expected to achieve and not to provide her with any windfall beyond her losses.*”

*Request for Clarification Regarding the Implementation of Decision No. 115*

10. On 17 October 2018 the Applicant submitted her request for “*clarification of the Decision [No. 115] as it is implemented by the Bank,*” “*pursuant to the inherent power of the Administrative Tribunal.*” The Bank received the request on 19 October 2018. On 10 December 2018, the Respondent submitted comments on the Applicant’s request for clarification on the implementation of Decision No. 115. The Applicant filed her reply to the Respondent’s comments on 20 December 2018. Finally, on 11 January 2019, the General Counsel of the Bank sent a letter to the Executive Secretary of the Tribunal for transmittal to the Tribunal, with a copy to the Applicant, responding to the Applicant’s reply.

11. The Applicant requests clarification as to both the Tribunal’s reinstatement order and one aspect of the Bank’s computation of lost earnings. In relation to reinstatement, she asks the Tribunal to confirm that “*reinstatement is a matter of right to Ms. Cruz and not optional on the part of the Bank*”, and that “*the failure of the President of the Bank to personally decide on Ms. Cruz’s reinstatement means that Ms. Cruz is deemed reinstated.*” She also seeks clarification as to “*whether the Bank may deduct pension pay outs from the computation of lost earnings.*” In her reply to the Bank’s comments on her request for clarification, she added a prayer for any and other relief to which she may be entitled.

*Main Arguments of the Parties*

12. Ms. Cruz alleges non-compliance with the requirement of Article X, para. 1 of the ADBAT Statute that requires the President personally to take the decision “*in the interest of the Bank*” to pay compensation instead of reinstating her under the Tribunal’s judgment. She further claims that it is inequitable for the Bank not to reinstate her, thus leaving her only “*a remedy of higher separation pay*”. She argues that this is inconsistent with the Tribunal “*serv[ing] as a deterrent to the violation of security of service*”. She challenges an interpretation of this provision of the Statute that would limit the Tribunal’s power to order reinstatement.

13. In addition, the Applicant states that she received only 12 months’ salary as a separation payment under the ESP rather than the 21 months’ salary granted to staff who did not challenge their inclusion in the ESP. She argues that the 12 months’ pay she received earlier was now going to be deducted from the reimbursement of her lost earnings, allegedly placing her at an “extreme disadvantage” in seeking to enforce her rights. Moreover, she contests the Bank’s deduction of pension payouts from the amount owed to her for “lost earnings,” since the Tribunal indicated that only the separation package was to be deducted.

14. The Respondent argues that the decision not to reinstate the Applicant under the award was consistent with Article X, para. 1 of the Statute and with the manner in which the Tribunal had interpreted this provision in a previous case (Decision No. 86-B, *supra*). The Bank denies the existence of an alleged right to security of service. It also counters the implication that the President did not himself take the decision to pay compensation instead of reinstating the Applicant. In

addition, the Bank maintains that pension payments received by the Applicant were earnings and that such earnings must offset the “lost earnings” for the purpose of implementing Decision No. 115. The Respondent does not object to the Tribunal considering the requested clarification.

## II. FINDINGS

### Preliminary Matters

#### *En banc Decision*

15. The case involves a request for clarification 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*.<sup>1</sup>

16. The Tribunal has admitted requests for clarification in the past (*Mesch and Siy* (No.2), Decision No. 6 [1995], *Chan* (No. 4), Decision No. 42 (5 August 1998), *Lim* (No. 2), Decision No. 81 (17 August 2007), and Decisions No. 86-A and 86-B, *supra*). The Tribunal also decides to do so in this matter.

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<sup>1</sup> The Tribunal is currently composed of four members.

**Issue 1: Does the Bank have discretion not to reinstate an employee when the Tribunal has ordered it and did the President himself decide not to reinstate?**

17. As a preliminary matter, the Applicant has questioned whether the President himself decided whether it was in the interest of the Bank to reinstate the Applicant. She claims that “*the failure of the President of the Bank to personally decide on Ms. Cruz’s reinstatement means that Ms. Cruz is deemed reinstated.*” The Respondent replies that the President did in fact take this decision by “apposing his signature next to his name” on the proposal of the DG, BPMSD, and by indicating the date of his action (“22/8” [2018]).

18. The Tribunal notes that signing off and dating was the same method the President had used to decide to endorse the report and recommendation of the Appeals Committee, the action challenged in Decision No. 115, and to which the Applicant raised no objection in that case. The Tribunal does not find the Applicant’s argument convincing, and it rejects the claim that the decision on how to implement the Tribunal’s judgment was not taken by the President. The Tribunal nonetheless suggests that in the interest of clarity, in the future the President may wish to write “approved” or similar wording alongside his signature and the date.

19. Ms. Cruz’s contention that she is entitled to reinstatement because of an alleged “right to security of service” in the Bank is similarly unfounded. While ostensibly seeking clarification of the Tribunal’s decision, the Applicant is attempting to relitigate the underlying rationale for the Bank’s ESP as substantively applied to her. Decisions of the Tribunal are final and binding.

(ADBAT Statute, Article IX; *Lim (No. 2)*, Decision No. 81 [2007], VII ADBAT Reports; *Hua Du (No. 2)*, Decision No. 102 [2013], IX ADBAT Reports, para. 7).

20. Turning now to the key issue at hand - the interpretation of Article X, para. 1 of the Statute of the Tribunal on remedies – the text provides in relevant part:

*... If the Tribunal finds that the application is well-founded, it shall order the rescission of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case; ....*

The “further action” referred to in Article X, para. 1 means further action by the Bank, not – as the Applicant has argued – further action by the Tribunal. The Tribunal’s interpretation of Article X, para. 1 of the Statute is supported by the text submitted to and approved by the ADB Board of Directors when the Board endorsed the Statute of the Tribunal in 1991. This text stated, “*The judgement of the Administrative Tribunal would be binding on the Bank and without appeal. However, the Bank would have the option to pay compensation (as determined by the Tribunal) in instances where it decided that it would be against the Bank’s best interests to comply with a decision requesting specific performance.... [followed by illustrative examples]*”.

21. In Decision No. 115, the Tribunal ordered in part that the Applicant be reinstated to her position and be made whole for lost earnings (minus the separation package), plus interest. At the same time, it additionally fixed an amount of compensation to be paid to the Applicant “should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case...”. As noted in Decision No. 86-B, the Tribunal’s *“authority to order specific performance is limited by the second sentence of Article X, ... which reserves to the President of the Bank the authority to determine whether to implement that specific performance. The requirement that the Tribunal fix an amount of compensation ‘at the same time’ provides the basis for granting compensation in lieu of an order to take the further action to reinstate....”* (Decision No. 86-B, *supra*, para. 10). Thus when, “in the interest of the Bank,” the President legitimately decides not to take the further action to reinstate, the amount of compensation awarded to the individual concerned replaces an order of reinstatement.

22. As noted in Decision No. 115, the Bank pursued the 2016 ESP in what it described as being “in the interest of good administration.” Here, the President endorsed the DG, BPMSD’s view that bringing the 2016 ESP to a close without reinstating Ms. Cruz, who had reached “career stagnation,” was in the interest of the Bank. The President’s decision not to take further action to reinstate the Applicant, but instead to compensate her, was within the Bank’s proper exercise of discretion in its implementation of the Tribunal’s decision.

**Issue 2: May the Bank deduct pension payouts from the computation of the Applicant's lost earnings?**

23. In relation to computation of the Applicant's "lost earnings" in application of Decision No. 115, she has contested the Bank's deduction of pension payments that were made to her between 16 December 2016 (when the termination of employment became effective) and 22 August 2018 (when the President decided not to reinstate the Applicant).

24. The Applicant is to be granted "*the level of compensation she could reasonably have expected to achieve and not to provide her with any windfall beyond her losses.*" (Decision No. 86-B, *supra*, para. 21). It is axiomatic that a person cannot simultaneously receive a salary as an ADB staff member and a pension as a Bank retiree. The pension payments, like the separation package she received, were amounts that the Applicant would not have received if her employment had not been terminated under the ESP. As income that was received rather than lost, both types of payments constituted proper deductions from what the Bank owed her under Decision No. 115. The deduction of the severance package applied only to the make whole remedy. In implementing Decision No. 115 and calculating the amount to be paid to the Applicant for all lost earnings, the Bank took the relevant elements into account in its stated methodology (see para. 4 above), and should apply it to reflect the Bank's additional pension contributions owing for the period between the termination of the Applicant's employment and the date on which she began to draw benefits under the Bank's pension scheme (16 December 2016 to 22 August 2018).

25. It appears to the Tribunal that the Applicant has misunderstood one aspect of the Bank's implementation of the decision in her case. What she might have received as a voluntary participant in the ESP is irrelevant to what the Tribunal has awarded to her in Decision No. 115. The Applicant is in effect seeking additional compensation for which there is no basis.

26. Additional costs have not been requested and are not awarded by the Tribunal.

## **DECISION**

For these reasons, the Tribunal clarifies its Decision No. 115 as follows:

1. The Bank is to:
  - a. Make the Applicant whole by paying her all lost earnings (including Bank contributions towards the Applicant's pension for the period 16 December 2016 to 22 August 2018), after deductions for:
    - (i) ADB pension payouts to her for the period 16 December 2016 and 22 August 2018; and
    - (ii) the separation package she received;
  - b. Pay interest on the resulting amount at the rate of 6% per annum;
  - c. Pay the costs awarded in the amount of US\$8,000.
  - d. In addition, following the Bank's decision not to reinstate the Applicant, pay twelve months of her remuneration in lieu of reinstatement.
2. All other claims are denied by the Tribunal.

Gillian Triggs

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/s/  
President

Shin-ichi Ago

\_\_\_\_\_  
/s/  
Vice-President

Anne Trebilcock

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/s/  
Member

Chris de Cooker

\_\_\_\_\_  
/s/  
Member

Attest:

Cesar L. Villanueva

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/s/  
Executive Secretary

At Asian Development Bank Headquarters, 28 February 2019