

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 122
(28 February 2019)

Mr. Ocampo
v.
Asian Development Bank

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

1. On 20 November 2018, the Applicant filed the present Application with this Tribunal challenging the decision of the Director General, Budget, Personnel, and Management Systems Department (“DG, BPMSD”), of the Asian Development Bank (the “ADB” or “the Bank”), by letter dated 12 November 2018. In this letter the DG, BPMSD, dismissed allegations made by the Applicant on 12 October 2018 regarding abuse of discretion and breaches of confidentiality on the part of a Bank employee in her exchanges with the Bank’s medical insurance provider (“the Provider”). The Director General held that the employee’s actions were part of the normal course of the employee’s official duties. The Application does not provide details regarding exhaustion of all other remedies available to current and former Bank employees. The Applicant, who is self-represented, seeks US\$400,000 for the psychological and moral damage allegedly suffered.

I. THE FACTS

Background

2. The Applicant joined the Asian Development Bank on 10 January 1977 as a National Staff

member and took early retirement on 28 April 1997. Following an operation in late 2012, the Applicant experienced difficulties with the Provider over alleged inaction regarding correspondence and claims.

3. On 17 January 2016, the Applicant wrote to two officers, one will be named “Ms. X”, within BPMSD’s Bank’s Benefits Office requesting their assistance with the Provider’s alleged unresponsiveness and requesting assistance in securing action on his request for reimbursement of medical claims. The Applicant attached to this letter his 10 December 2015 letter to the Office and Team Manager Customer Services of the Provider (“Ms. Y”), which had not been answered yet. On 27 January 2016, Ms. X replied to the Applicant’s concerns regarding his medical claims with her own calculations that she called a “tabulation of payments”. She copied Ms. Y from the Provider and explained “*I am copying [the Provider] of this email for their information (and to please correct me for any inaccuracies).*” Ms. X also emailed Ms. Y to prompt her that the Applicant was waiting for a response to his 10 December 2015 letter. That email was forwarded to the Applicant as part of the same email chain.

4. Some eighteen months later, on 19 October 2017, the Applicant wrote to the DG, BPMSD, including a compilation of complaints against the Provider, noting that he was entitled to “*seek restitution from [the Provider] through your office the amount of US\$300,000 for the psychological and moral wrong, harm maltreatment suffered before and after my hospital confinement*” and requesting the DG, BPMSD take action on “*this complaint particularly against [the Provider].*”

5. On 5 March 2018, the DG, BPMSD wrote to the Applicant noting that “*ADB is not involved in the administration of medical claims of plan members*” and that these “*services are exclusively provided by the medical claim administrator, [name of the Provider] as an independent entity.*” The DG, BPMSD’s letter went on to explain that “*any disputes in relation to a medical claim must be addressed in line with the administrative process set forth in section 11.06 of the Summary Plan Description*” and attached that extract for the Applicant’s benefit. The letter also explained to the Applicant that any restitution claims against the Provider could not be made through BPMSD “*or via any legal framework that ADB provides for internal conflict resolution ... ADB’s contract with [the Provider] transfers all responsibility and liability for GMIP [General Medical Insurance Plan] insurance claims adjudication and administration to [the Provider].*”

6. On 30 June 2018, the Applicant wrote to the Vice-President, Administration and Corporate Management; the DG, BPMSD; Director, HR Operations and Health Division; the Senior Compensation and Benefits Specialist, BPMSD; and the Vice President of the Association of Former Employees of ADB, complaining again of the Provider’s poor service performance, but in addition, and for the first time, alleging that Ms. X had breached Administrative Order (“AO”) 3.10 (Medical and Dental Retainer Plans (1 September 2004)), para. 5.1 which stipulates that the “*responsibility for rendering the services in accordance with the Medical and Dental Retainer Plan lies with the Medical Retainer [the Provider] and ADB assumes no responsibility for [the services] given by the Medical Retainer.*” The Applicant complains against the action of the Bank in response to his request for assistance. He explains that the material he had submitted was “*strictly for the information of DG, BPMSD, and therefore confidential*” and yet had been seen by Ms. X and then copied [in her 27 January 2016 response] to the Provider “*without my*

permission or consent” as a “clear breach of confidentiality”. He also complains that Ms. X had “censored” his letter for ten days, thereby further delaying and barring the Applicant “from receiving an official reply from the only authorized source and party on the matter”. The Applicant went on to insinuate an “existing mutual interest” between Ms. X and Ms. Y and a cover up on behalf of the Benefits Unit of “[the Provider’s] corporate malaise.” The Applicant ends by saying he believes that a “thorough investigation into the issues described and in particular [Ms. X’s] behavior need immediate action not only for the sake of individual plan holders but also for the reputation and integrity of ADB.”

7. On 18 September 2018, the DG, BPMSD wrote to the Applicant reiterating that *“any dispute in relation to medical claims must be addressed consistent with the administrative process set forth in Section 11.06 of the Summary Plan Description.”* With regard to the Applicant’s claims against Ms. X, the DG, BPMSD wrote *“[Ms. X’s] act of liaising with [Ms. Y] was part of the normal course of her official duties to correspond with [the Provider] and was not violative of the cited AO.”*

8. On 12 October 2018, the Applicant responded to the DG, BPMSD, repeating his complaint and adding that Ms. X had breached ADB’s Code of Conduct¹ with respect to integrity, confidentiality, and respect for clients. The Applicant concludes that Ms. X’s action was *“not in the best interest of good administration and clear violation [of] the Bank corporate creed.”*

9. On 12 November 2018, the DG, BPMSD wrote to the Applicant explaining that the Bank

¹ Referring in particular to paragraphs 1.3, 2.3, 2.17, 4.1-4.4, 4.7 and 4.24 of AO 2.02 (Code of Conduct), which was issued on 31 March 2017, i.e. after the events at issue occurred.

had *“once again reviewed the documents you submitted involving [Ms. X] and reiterate our findings ... With this letter, we respectfully advise that we will no longer engage in any further correspondence with you on the matter.”*

10. Concurrent with his correspondence with DG, BPMSD, on 6 October 2018 the Applicant first submitted a letter-memorandum to the Tribunal with the caption *“Subject: Appeal for Restitution.”* Pursuant to paragraph 9 of Rule 6 of the Tribunal’s Rules of Procedure (Rules) this letter-memorandum was returned on 10 October 2018 by the Tribunal’s Executive Secretary for non-compliance with the Rules, including for failure to exhaust all other remedies available within the Bank. The Executive Secretary wrote to the Applicant that Rule 6 could be complied with only *“after the applicant shall have brought his or her pleas first within the administrative processes of the Bank ...”*. A subsequent memorandum dated 12 November 2018 was likewise returned on 19 November 2018 for similar reasons. On 20 November 2018, the Applicant again submitted a memorandum to the Tribunal. This memorandum likewise was not in proper form as it provided no description of remedies exhausted within the Bank, but on 28 November 2018 the Tribunal advised the Applicant, copying the Bank, that with corrections, it would consider the Application. On 5 January 2019, the President of the Tribunal instructed the Executive Secretary to place the matter before the Tribunal at its next session for consideration in accordance with Rule 6, paragraph 11 of the Tribunal’s Rules.

Relief Requested

11. The Applicant prays for *“restitution for psychological and moral damage, suffered and continue to suffer today”* in the amount of US\$400,000.

II. FINDINGS

12. The jurisdiction of the Tribunal is governed by Article II of the Statute of the ADB Administrative Tribunal (the Statute). Article II (3) of that Statute specifies that:

... No such application shall be admissible, except upon exceptional circumstances as decided by the Tribunal, unless: (a) the applicant has exhausted all other remedies available within the Bank, except if the applicant and the President of the Bank have agreed to submit the application directly to the Tribunal; ...

13. Paragraph 11 of Rule 6 of the Tribunal's Rules provides:

... If it appears that an application is clearly irreceivable or devoid of all merit, the President may instruct the Executive Secretary to take no further action thereon until the next session of the Tribunal. The Tribunal shall then consider the application and may either adjudge that it be summarily dismissed as clearly irreceivable or devoid of all merit, or order that it should be proceeded with in the ordinary way.

14. The facts show that the Applicant did not utilize the internal appeals mechanism of the Bank despite these having been clearly laid down in AO Nos. 2.06 (Administrative Review and Appeals Procedures) and 2.07 (Administrative Tribunal) and also pointed out by the Tribunal's Executive Secretary when returning the earlier communications. The case file also does not show that the President of the Bank has agreed to submit the Application directly to the Tribunal. An

Applicant must first seek remedies within the internal administrative processes of the Bank, and only when the President of the Bank has rendered a final administrative decision regarding that complaint may an Application be filed with this Tribunal. Other international administrative tribunals have also recognized the importance of the requirement for exhaustion of internal remedies. “[T]he judicial remedy provided by the Tribunal is designed as a forum of last resort for the resolution of employment disputes after the administration of the organization has had a full opportunity to assess a complaint to determine if corrective measures are appropriate.” (*Ms. C. O’Connor*, IMFAT Judgment No. 2010-1, para. 29).

15. This present Tribunal has also held that when an applicant has not complied with the requirements of exhaustion of internal remedies, the Tribunal must decide that it has no jurisdiction to entertain such a claim and must dismiss it. (See *Jianming Xu*, ADBAT Decision No. 69 [2005] VII ADBAT Reports).

16. The Tribunal will do the same in the present case. The Tribunal holds that the Applicant did not comply with the requirements of exhaustion of internal remedies under Article II, paragraph 3 (a) of the Tribunal’s Statute. It does not find any exceptional circumstances warranting a waiver of this requirement. In fact, no such circumstances were presented to it. The Tribunal therefore concludes that it has no jurisdiction to entertain the Applicant’s claim and that the Application must, in accordance with paragraph 11 of Rule 6, be dismissed summarily as clearly irreceivable. As a consequence, the Applicant’s claim for damages is also denied.

DECISION

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

Gillian Triggs

/s/

President

Shin-ichi Ago

/s/

Vice-President

Chris de Cooker

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

At Asian Development Bank Headquarters, 28 February 2019