

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 128

12 May 2023

Ms. N (No. 2)

v.

Asian Development Bank

Chris de Cooker, President

Raul C. Pangalangan, Vice President

Catherine Meier

John Murphy

I. THE FACTS

1. On 27 June 2021, the Applicant, having earlier been granted an incapacity pension by the Staff Retirement Plan (SRP) of the Asian Development Bank, filed an application (the main application) with the Asian Development Bank Administrative Tribunal (the Tribunal) requesting it to review and vacate the decision of the Administrative Committee of the Staff Retirement Plan (AC-SRP) to set her incapacity at 50% partial capacity and to set it instead at 70%.

2. On 23 February 2022, the Tribunal awarded the Applicant moral damages in the amount of \$1000 for a procedural defect but dismissed all the other claims of the main application – see *Ms. N v Asian Development Bank, Decision No. 124 (2022)*.

3. On 27 April 2023, the Applicant submitted by email a request (the request for revision) in terms of Article XI of the Statute of the Tribunal (the Statute), read with Rule 22(2) of the Rules of Procedure of the Tribunal (the Rules), seeking “a rehearing of this matter on the basis of misfeasance by an officer of the Tribunal in respect of the maintenance of the file in the case, or in the alternative, a revision of the judgment as provided for in Article XI of the Statute... excluding the material which should not have been included in the file as it was filed after the time allowed for filing”.

4. Article XI(1) of the Statute provides that a party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment. Article XI(2) adds that the request shall contain the information necessary to show that the conditions in Article XI(1) have been complied with and shall be accompanied by the original or copy of all supporting documents.

5. Rule 22(2) of the Rules provides that in accordance with Article XI of the Statute regarding discovery of a fact which might have had a decisive influence on the judgment and was unknown to both the party and the Tribunal at the time of the judgment, that party may request the Tribunal to revise it. Such a request must be filed within six months after the party acquired knowledge of the fact and in any case not later than five years from the date of the final decision or judgment. In terms of Rule 22(3) of the Rules, in either case the request with its supporting documentation shall be notified to the other party which shall have an opportunity to submit its observations.

6. The Applicant based her request for revision on the alleged discovery of an unknown fact, namely, “the inclusion in the file of material filed by the Respondent out of time which by its nature may have had a decisive influence on the judgment of the Tribunal” and which, she alleged, at the time the judgment was delivered was unknown both to the Tribunal and to her. Although she did not precisely specify the alleged “material filed by the Respondent out of time”, it is apparent from the context that she refers to the Respondent’s Answer in the main application, which was filed on Monday 6 September 2021. She complains that she was given no notice of any late filing and no request was made of her to acquiesce in respect of such filing.

7. Without explaining the specific circumstances, the Applicant states that she discovered the alleged unknown fact on 21 November 2022 when she learnt that in another matter before the Tribunal - *Application No. 2022-04(2)* - counsel for the Respondent admitted that documents which had been filed out of time in her case had been considered in the determination of her case. In that application an objection had been raised which was allegedly filed late after the expiry date had fallen on a non-working day. From this information the

Applicant infers that there exists a long-standing practice with the Executive Secretary of the Tribunal to permit the Respondent routinely to file documents late.

8. Although the Applicant does not cite the relevant paragraphs in *Application No. 2022-04(2)* upon which she relies to show the existence of the alleged practice, they would seem to be paragraphs 4-8 of the Respondent's Response to the Applicant's Counterstatement to the Objection to Jurisdiction, which contended that the Respondent's objection to jurisdiction had been filed on time. In relevant part they read:

“The deadline for filing the preliminary objection to jurisdiction was 15 days from the receipt of the Application as set forth in paragraph 1 of Rule 7 of the ADBAT Rules of Procedure. However, when the due date falls on a non-working day, such as a weekend or a published ADB holiday, the due date is the next working day. This has been the longstanding practice by the ADB Administrative Tribunal Secretariat. This makes sense since the relevant staff supporting the Tribunal Secretariat do not and are not expected to work on non-working days and therefore are not available to receive the pleading or provide any other support that may be necessary to an applicant or the respondent when filing the required documents...This Tribunal has applied the above-described practice for submissions by the Applicant and by the Respondent in the past. For instance, in ***Ms. N v Asian Development Bank, Decision no. 124 (2022)*** Such established practice is not confined to this Tribunal. The World Bank Administrative Tribunal noted that “*the Tribunal's established practice is to extend deadlines to the following business day when they fall on weekends or holidays*” (see ***CF v International Bank for Reconstruction and Development, WBAT Decision No. 486 (2014) para 38***).

9. Correspondence in the file of the main application indicates that the Notice to Respondent of Transmittal of Application was received by the Respondent on 6 July 2021. In terms of Rule 7(2) of the Rules, the Respondent had 60 days from that date to submit its answer. 60 days after 6 July 2021 was Saturday 4 September 2023. On 2 September 2023 Mr. Jules Rubio, an official of the Tribunal's Secretariat, discussed with the Executive Secretary of the Tribunal a query from the General Counsel of the Respondent regarding the submission of pleadings in the event of the 60 days for the filing of the Answer expiring on a weekend or a holiday. The Executive Secretary informed Mr. Rubio that the standing practice is that when the deadline for submission falls on a weekend the expiry date would be the next working day on which the pleading could be submitted. On Monday 6 September 2021, Mr. Rubio emailed the Executive Secretary the Respondent's Answer confirming that the Answer had been received on Monday 6 September 2021 within the filing period prescribed by the Rules. The Notice to Applicant of Transmittal of Answer was sent to the Applicant on the same day, 6

September 2021. The Notice confirmed that the Answer had been received on that date and granted the Applicant 30 days from then to submit her Reply. The Applicant was thus informed that the Answer had been received on Monday 6 September 2021. Counsel for the Applicant confirmed receipt of the Notice, the Respondent's Answer and the Annexures in an email addressed to Mr. Rubio on 7 September 2021.

10. Other than suggesting that the Respondent's Answer ought not to have been taken into consideration in the determination of the main application, the Applicant does not explain in the request for revision how the alleged unknown fact by its nature might have had "a decisive influence" on the judgment of the Tribunal as contemplated in Article XI(1) of the Statute. However, she seeks leave to make further submissions in support of the reconsideration of the decision after being granted more information concerning the alleged unknown fact.

11. In the request for revision the Applicant seeks the following relief:

"1. That after the proper consideration of the facts now notified to the Tribunal the judgment of my case be revised on the basis of the pleadings or submissions made by the Respondent and filed out of time being excluded from the considerations of the Tribunal.

2. An order that any and all documents filed late be struck from the file in my application.

3. Pursuant to Rule 10.4 of the Rules of Procedure,

a. an order that counsel for the Respondent produce to both the Administrative Tribunal judges and to me the details of the late filing admitted by him to have occurred in my case; and

b. a direction to the Executive Secretary of the Tribunal for the production to the Tribunal and myself of details of all filings made by the Respondent in my case by the production of the e-mails sending the filings with the dates thereof recorded. I request a copy of the certification of the filings by the Executive Secretary of the Administrative Tribunal as to the proper date of filing.

4. That the Administrative Tribunal have the metadata of the documents filed out of time examined to see when they were produced in respect of the date of filing disclosed in the records of the Administrative Tribunal and that such be disclosed to me.

5. After the provision of the documentation to me, I seek leave to be able to properly frame submissions in respect of a reconsideration of the decision based upon the new fact, namely, that the Administrative Tribunal took into account matters which were not properly before it.

6. Such further or other orders and directions as are appropriate to do justice between the parties.”

12. On 26 April 2023, the Executive Secretary of the Tribunal officially forwarded the request for revision to the members of the Tribunal and at the same time sent an e-mail to the Applicant confirming the delivery of the request for revision to the members of the Tribunal.

13. The next day, 27 April 2023, the Applicant addressed an e-mail to the President of the Tribunal directly in which *inter alia* she requested that the Executive Secretary withdraw from having any dealings with the matter.

14. After consultation with the other members of the Tribunal, the President of the Tribunal instructed the Executive Secretary to inform the parties that the matter would be considered during the Tribunal's 50th session in Manila commencing on 9 May 2023. The President further directed the Respondent to submit its written observations to the Tribunal on or before 9 May 2023 in terms of rule 22(3) of the Rules and indicated that the Executive Secretary should not withdraw until it was properly established that there was any need to do so.

15. On 9 May 2023, the Respondent, pursuant to Rule 22(3) of the Rules submitted its observations to the Applicant's request for revision. As set out more fully below, the Respondent maintains that no unknown fact has been discovered which might have had a decisive influence on the judgment and furthermore that the request for revision amounts to an abuse of process. In particular, the Respondent contends that its Answer filed in the main application on 6 September 2021 was filed timeously in accordance with the applicable timeframes set down in the Rules.

II. FINDINGS

Preliminary matters

En banc

16. In light of the seriousness of the accusations, the Tribunal decides, in accordance with Article V(5) of the Statute of the ADB Administrative Tribunal read with Rule 5, paragraph 6 of the Tribunal's Rules of Procedure, that this Application warrants consideration by a panel

consisting of all its members.

Submissions

The submissions of the Applicant

17. As discussed, the Applicant maintains that she has discovered a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which was unknown to both her and the Tribunal at the time of the delivery of the judgment in the main application. Although not explicitly stated by her in the request for revision, the alleged unknown fact is that the Answer of the Respondent was filed late. The Applicant fails to specify in the request for revision when exactly the Answer of the Respondent ought to have been filed. It is clear though that she is of the view that the Answer should have been filed on Friday 3 September 2021 or Saturday 4 September 2021 and not on Monday 6 September 2021.

18. The Applicant asserts that late filing by the Respondent is accepted by the Executive Secretary of the Tribunal as a matter of course and that this is regarded by the Respondent as an established practice. She argues that the Rules stipulate clearly that filings have to occur within a prescribed number of days and that these days must be taken to be calendar days and not working days. She contends furthermore that neither the Tribunal nor the Executive Secretary have jurisdiction to extend the time limits provided in the Rules.

19. The Applicant makes a number of troubling allegations in relation to the practice of the Tribunal and its Secretariat that require to be set out in full. They read as follows:

“This conduct of the Administrative Tribunal, or its principal officer, with respect, raises issues of very great concern in respect of the apparent special and secret relationship of the Administrative Tribunal with the Respondent, the fairness of the administration of justice by or through the Administrative Tribunal and the certainty of the procedures of the Administrative Tribunal. If, as must be unlikely, a member of the Tribunal was aware of the late filing, but continued without notice to me, with the greatest of respect, such would have been improper and an action to subvert the course of justice and a breach of the Code of Ethics of the Judges of the Tribunal.

By the Administrative Tribunal giving the Respondent special treatment on an apparently habitual basis, there is an attack upon the very notion of the independence of the Administrative Tribunal from the Respondent. The nature of the trust of

applicants in the Administrative Tribunal decisions has been diminished by the consideration of material not legally or properly before it when reaching its decisions. With respect, the basic integrity of and trust in the Administrative Tribunal and its decisions are brought into question where an undisclosed practice is used to permit the filing of documents by the Respondent out of time.

Having an undisclosed arrangement between the Respondent and the Tribunal is with respect a form of corrupt practice by both the Respondent and an officer of the Appeals Tribunal which should negate any and all filing in my case made by the Respondent. The counsel for the Respondent, at the time of filing, well knew that the time for filing had passed but notwithstanding proceeded to file knowing that such would be accepted on the basis of an entirely undisclosed and unauthorized arrangement with the Tribunal to accept such a document not “within” the time provided, but a time admitted to be out of the time provided for in the rules of procedure of the Tribunal.”

20. On this basis, the Applicant seeks the relief set out earlier in this judgment.

The submissions of the Respondent

21. The Respondent submits that the new information discovered by the Applicant regarding the date of the filing of the Answer did not constitute the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal; and nor was it unknown to the Applicant and the Tribunal at the time of judgment. Hence the conditions precedent for relief in terms of Article XI of the Statute and Rule 22(2) of the Rules are absent and the request for revision should accordingly be dismissed.

22. The Respondent further submits that the request for revision contains numerous baseless claims, as well as grave, unsustainable and inappropriate allegations of “malfeasance”, an “apparent special and secret relationship” and “corrupt practices” by the Respondent and the Executive Secretary. As such, the Respondent contends, the request for revision amounts to an abuse of process and should be dismissed with censure.

23. With regard to the requirement that there should be a fact unknown to both the Applicant and the Tribunal at the time of judgment, the Respondent points out that the applicant was indeed aware that the Answer had been filed on 6 September 2021 and made no objection to the filing. The knowledge of her counsel, when he acknowledged receipt of the answer on 7 September 2021, can be attributed to the Applicant.

24. Moreover, and most importantly, the date of the filing of the Answer in any event had

no decisive influence on the judgment as it was filed on time. The Respondent submits that when a filing deadline falls on a non-working day, being any day on the weekend or on a published ADB holiday, the due date is the next working day. This approach has been adopted consistently by international administrative tribunals, and in many jurisdictions throughout the world, irrespective of whether such is expressly provided for in the relevant statutory instruments or not. Besides, in previous cases the Respondent has never objected to such an interpretation where other Applicants have filed accordingly.

25. The Respondent therefore submits that the conditions precedent for the application of Article XI of the Statute have not been fulfilled and the request for revision should be dismissed.

Considerations

26. The Applicant bears the burden to establish that the conditions precedent for a request for revision exist. It is she who must prove that there exists a fact which was unknown to both her and the Tribunal at the time of judgment which by its nature might have had a decisive influence on the judgment. She has failed to do so.

27. The fact that the Answer was filed on 6 September 2021 was not a fact unknown to the Applicant at the time of judgment. The fact that counsel for the Applicant acknowledged receipt of the Answer on 7 September 2021 is sufficient evidence that she knew the Answer had been filed on the previous day. There is accordingly no fact which was unknown both to the Tribunal and to the Applicant at the time of judgment and the application may be disposed of on that basis alone.

28. Be that as it may, the premise of the Applicant's argument is that the Answer of the Respondent was filed late on Monday 6 September 2021, as, according to her, it should have been filed on Saturday 4 September 2021. That premise is mistaken. While it is correct that the 60-day period permitted for the filing of an Answer in terms of Rule 7 ended on Saturday 4 September 2021, logic, fair practice, administrative convenience and the interests of the administration of justice all justify a purposive interpretation of the Rules to allow the filing on the next working day, which was Monday 6 September 2021.

29. The purpose of the time limits in the Rules is to give the parties a fair and proper opportunity to attend to the issues in dispute within a reasonable period of time. If the argument of the Applicant were to be accepted, it would mean that where the time period ends on a weekend or holiday the party in question would be denied the benefit of the full period mandated by the Statute or the Rules; thereby defeating the purpose of the statutory provision to afford the party the specified period. In the present case, that would mean that the Respondent's 60-day period would have been shortened to 59 days by it being required to file on Friday 3 September 2021.

30. The fact that the Statute and Rules do not expressly provide for the situation where the time period for filing a pleading ends on a weekend or holiday is not decisive. Even if there is a *casus omissus*, it is unrealistic, formalistic and pedantic to argue, as the Applicant (or her counsel) does, that the Tribunal should not fill the gap. The Applicant's submission amounts to an arid literalism that fails to appreciate the teleological principles of purposive interpretation. Courts and tribunals interpreting and applying the rules governing their procedures always have a discretion to direct that the true purpose of the relevant rule be achieved.

31. Courts and tribunals are frequently required to engage in inclusive interpretation, or interpretation by necessary implication, to give effect to the broader purpose of a legislative provision, especially where other provisions of the relevant enactment provide indications that such would be in keeping with the statutory purpose. Where the Rules, as in this case, expressly provide for a particular outcome (a period of 60 days to file an Answer), they also permit (*ex consequentibus* or *a natura ipsius rei*) everything necessary to achieve that result by implication and ought not be interpreted to favour an interpretation impeding the permitted result (in this case by requiring the Respondent to file its Answer on the 59th day). These principles of statutory interpretation are well established in law and are accepted and applied in most legal systems.

32. Furthermore, contrary to the submissions of the Applicant or her counsel, the Statute and the Rules provide an indication that the extension or modification of time limits are not absolutely prohibited in the ADB's legal framework; and, in the ordinary course of pleading cases, time limits may be extended or modified in the interests of fairness and justice. Thus, for example, Article II(3) of the Statute permits the 90-day period for the filing of an application

to be extended in exceptional cases and Rule 23(1)(a) allows for all time limits to be modified by the Tribunal similarly in exceptional circumstances. That is not to say that the relevant time period for the filing of the Answer in this case required extension or modification. It did not. The Respondent's Answer was filed on time. These provisions of the Statute and the Rules, however, provide a cogent contextual indication that an inclusive interpretation of the time period (*ex consequentibus*), to provide for a filing on the next workday where the period ends arithmetically on a weekend or holiday, is consonant with the rational, teleological underpinnings of the Rules.

33. And, finally, even if the Answer should have been struck out for not being timeously filed, the Applicant has made out no case showing that the absence of an Answer might have had a decisive influence of the judgment or would have entitled her to different relief in the main application.

34. In the final analysis, no unknown fact was discovered which by its nature would have had a decisive influence on the judgment in the main application. For that reason the request for revision must be dismissed.

35. The Respondent's concern about the Applicant's scurrilous allegations of malfeasance, secret relationships and corrupt practices on the part of the Secretariat of the Tribunal is well-founded. The allegations go beyond mere innuendo and unequivocally intimate that the officials of the Tribunal, and perhaps the Judges too, have acted improperly in allowing late filings. No sustainable factual basis is put forward for these likely defamatory assertions. The untenable, hyperbolic and emotive accusations are made simply on the basis that the officials followed a preferred interpretation (correct as it turns out) of the Rules. Some leeway could perhaps be given to an unrepresented litigant disappointed by the unfavourable outcome of the main application, but if the request for revision was drafted by a legal representative, as it may have been, this Tribunal strongly rebukes this conduct. It falls far short of what might be expected of counsel in terms of the professional codes of conduct applicable to legal representatives in jurisdictions throughout the world.

DECISION

For these reasons, the Tribunal unanimously decides to dismiss the Applicant's request for revision.

Chris de Cooker

/s/

President

Raul C. Pangalangan

Catherine Meier

/s/

Vice-President

/s/

Member

John Raymond Murphy

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

In Manila, 12 May 2023