

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 129

Brömmelhörster

v.

13 October 2023

Asian Development Bank

Chris de Cooker, *President*
Raul C. Pangalangan, *Vice President*
Catherine F. Meier
John Raymond Murphy
Teresa Maria Da Silva Bravo

1. The Applicant has filed an Application (“the Application”) in terms of Article II of the Statute of the Asian Development Bank Administrative Tribunal (“the Tribunal” or “ADBAT”) read with Rule 6 of the Tribunal’s Rules of Procedure. He challenges the decision of the Administration Committee of the Staff Retirement Plan (SRP Administration Committee) of the Asian Development Bank (the “ADB”, “the Respondent”, or the “Bank”) rejecting his request to change his currency selection for his retirement pension. The Respondent has filed an Objection to Jurisdiction and contends that the Application is inadmissible *ratione temporis* as the Applicant failed to comply with the 90-day statutory deadline set forth in Article II, para. 3(b) of the Tribunal’s Statute. The Respondent requested suspension of proceedings on the merits pending resolution of the jurisdictional question. The Tribunal granted the Respondent’s request and accordingly the question before the Tribunal in the present case is limited to whether it has jurisdiction *ratione temporis* to entertain the Application.

I. THE FACTS

Currency Election and Pension Estimates

2. The Applicant retired from ADB on 9 June 2017 with an 80% partial incapacity pension. As of 18 November 2021, when the Applicant reached the age of 60, his incapacity

pension was automatically converted to a normal retirement pension in accordance with the Rules of the Staff Retirement Plan (“the SRP Rules”).

3. On 21 June 2017, the Applicant inquired to the Budget, People and Management Systems Department (BPMSD) about the calculation of his pension benefit upon reaching 60 years of age, and specifically whether his partial incapacity would affect his normal retirement pension benefit. On the same day, BPMSD provided the Applicant with the calculation of his estimated retirement pension benefit, confirming that his partial incapacity would not affect his normal pension benefit.

4. The SRP is administered in accordance with the SRP Rules. Section 5.2 provides that except as otherwise expressly provided all payments from the fund to a former participant should be paid in the normal payment currency which is defined in the SRP Rules to mean the currency in which the salary of the former participant was paid. The Applicant was paid in USD. Section 5.3 of the SRP provides that a participant may elect to receive all or a portion of the pension in the currency of permanent residence as recognised by the ADB. On 23 June 2017, BPMSD informed the Applicant that pursuant to that same rule he would have the option for a period of 90 days after pension payments began on 9 June 2017 to change his currency election but that thereafter his currency election was irrevocable. He was also told he would not be able to change the currency election when he reached the normal retirement age.

5. The Applicant initially elected a currency combination of 20%USD/80%EUR but changed this election within the 90-day period to 15%USD/85%EUR.

6. On 29 April 2021, the Applicant began communicating to the SRP Administration Committee about his wish to change his currency election to 40%USD/60%EUR when he reached normal retirement age in November 2021. On 13 May 2021, the SRP Administration Committee confirmed to the Applicant that under section 5.3(a) and (b) of the SRP Rules there was no distinction between normal and incapacity pensions for purposes of the currency election, which could not be changed upon reaching normal retirement age.

7. On 5 November 2021, the Bank’s Retirement Benefits and Investment Unit (RIU) again provided the Applicant with the calculation of his estimated retirement pension entitlement, which was in line with the initial calculation provided in 2017.

8. On 20 December 2021, more than one month after the Applicant had reached the age of 60 on 18 November 2021, the RIU corrected the previous pension estimation. The corrected estimate took into account the Applicant's 80% incapacitation as a component of the calculation, in line with section 3.4(e) of the SRP Rules. The calculation reduced the earlier estimates of the Applicant's retirement pension by approximately USD5,000 per annum. In arriving at the earlier estimates, the RIU had applied an incorrect methodology by failing to take into account the Applicant's partial incapacitation.

Discussion of Errors and Remedies

9. Between 21 December 2021 and 8 March 2022, the Applicant repeatedly expressed to the Bank his dissatisfaction with the revised estimate and requested a remedy for loss suffered due to the incorrect information previously provided.

10. In February 2022, the RIU acknowledged the error in its previous estimates and offered two options as a remedy. One option was to change the Applicant's currency election to 84% Euro/16%USD in order that the Applicant's USD pension benefit would remain the same as it was in the previous erroneous estimates. The other option was for the Applicant to convert another benefit to an annuity.

11. The Applicant rejected the Bank's proposal and requested currency splits of 80%EUR/20%USD in February 2022 and 75%Euro/25%USD in March 2022. The Applicant's counteroffers were declined by the RIU on the basis that these would result in USD pension benefits exceeding the previous erroneous estimates and would be inconsistent with section 5.3(a) of the SRP Rules.

12. On 18 April 2022, the Applicant submitted a request to the Secretary, SRP Administration Committee that the Applicant's currency election made in 2017 be rescinded and that he be allowed to receive his pension benefit entirely in USD, which would have been the outcome had he not elected to make a currency split election in 2017. He pointed out that his case involves two pensions: his incapacity pension and his normal retirement pension, and that it would be unfair to frame his currency election within the 90-day grace period referred

to in section 5.3(a) of the SRP Rules when that election was based on an incorrect estimate made in 2017 and repeated in 2021.

13. On 2 June and 20 June 2022, the Applicant emailed the RIU requesting an update. In his 20 June 2022 email he asked the RIU to explain to him the meaning of “all other remedies available within the Bank”, as referenced in Article II, 3(a) of the Tribunal’s Statute. That Article refers to the exhaustion of internal remedies required before an appeal can be made.

14. On 6 July 2022 the RIU replied to the Applicant advising him that his case was under review.

15. On 7 August 2022 and 14 September 2022, the Applicant requested an update from the Director General (DG), BPMSD. On 16 September 2022, BPMSD replied to the Applicant that his case was being carefully considered.

7 October 2022 Memorandum of the SRP Administration Committee

16. On 7 October 2022, the Head, RIU sent an email to the Applicant requesting that he “refer to the attached memo for the SRP Administration Committee’s decision on your request to change currency of payment after its due consideration.”

17. The 7 October 2022 memorandum attached to the email referred to the Applicant’s request to change his currency election to 100% USD. The memorandum indicated that the SRP is administered strictly in accordance with the SRP Rules, outlined the conditions under which a change in currency election can be accommodated, which did not include the Applicant’s situation, and concluded that the SRP Administration Committee “has decided to deny your request to change your currency election from 15%USD/85%EUR to 100%USD.” The 7 October 2022 memorandum further stated that “the error in the pension estimate does not form a sufficient basis for a new currency election. Reasonable accommodation has been provided to you to address the error.”

18. In this respect, the 7 October 2022 memorandum further indicated that the SRP Administration Committee “has however approved the options previously offered to you”,

including to change the currency election to 16%USD/84%EUR or to convert another pension benefit into an annuity.

19. The Applicant was given one month to advise whether he wished to avail of either option, after which these would no longer be available.

Subsequent Correspondence

20. On 18 October 2022 the Applicant wrote to the Secretary, SRP Administration Committee stating “[L]et me therefore reiterate the salient points of my earlier communications” and “I hereby request again to rescind any and all currency split decisions”. He asked for a decision and confirmation by 18 November 2022 that all administrative steps and other remedies within the Bank had been exhausted in accordance with Article II, 3(a) of the Tribunal’s Statute.

21. On 21 November 2022, the Applicant wrote to the DG, BPMSD stating that he had not received a response to his correspondence of 18 October 2022. He indicated that if he did not receive a reply within 10 days he would assume he had exhausted all administrative steps and would refer his case to an international law firm to assist him in filing a case with the Tribunal.

22. The Secretary, SRP Administration Committee (“the Secretary”) responded to the Applicant on 24 November 2022 recalling that by its communication of 7 October 2022 the SRP Administration Committee had “denied your request to change the currency election to 100% but approved a reasonable accommodation”. The Memorandum also recalls that “Section 8.2(b) of the SRP Legal Document provides that the decision of the SRP Administrative Committee is conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of ADB’s Administrative Tribunal.” The Secretary also recalled that the SRP Administration Committee had “responded to your request for updates on several occasions from 6 May 2022 to 5 October 2022 through video conferences and email”.

23. On 25 November 2022, the Applicant again asked DG, BPMSD to confirm that all other remedies had been exhausted pursuant to Article II para. 3(b) of the Tribunal Statute. This communication remained unanswered.

24. In December 2022, confidential discussions took place regarding a possible amicable resolution.

Application of 4 January 2023

25. Prior to this Application, the Applicant had previously filed an “Incomplete Statement of Appeal” to the Tribunal on 4 January 2023. This was dismissed on 20 February 2023 by a Notice of Dismissal on the basis it was clearly inadmissible under Rule 6 of the Tribunal’s Rules of Procedure for “failing to set out the facts and the legal grounds on which the pleas are based”.

26. In his Incomplete Statement of Appeal, the Applicant had requested that the Tribunal allow him to file a complete statement by 24 February 2023, which he considers to be the applicable deadline in his case. The Applicant further justified his request by reference to the holiday period and the amicable settlement discussions that had been ongoing during the month of December 2022.

27. The Tribunal dismissed the Applicant’s request on the basis that granting it would “entail a ruling on an essential aspect of the case, which the Tribunal cannot do without following the complete judicial proceedings.”

Application of 22 February 2023

28. On 22 February 2023, the Applicant filed a second Application which is the subject of these proceedings.

29. In this Application, the Applicant contends that although the contested decision was dated 7 October 2022, the final and binding nature of such decision was conveyed to him only on 24 November 2022. Accordingly, he requests that the Tribunal find that the 90-day deadline to file an application runs from 24 November 2022.

Jurisdictional Objection

30. On 23 March 2023, the Respondent filed its Objection to the Application based on lack of jurisdiction (“Respondent’s Objection to Jurisdiction”). The Respondent argues that the Application is not admissible as it fails to comply with the 90-day statutory deadline set forth in Article II, para. 3(b) of the Tribunal’s Statute and Rule 6 para. 9(d) of the Tribunal’s Rules of Procedure. The Respondent further maintains that there are no ‘exceptional circumstances’ as contemplated in Article II (3) of the Tribunal’s Statute. The Respondent requested that the Tribunal suspend the proceedings on the merits until it has rendered its decision on the Respondent’s Objection to Jurisdiction.

31. By Notice of 24 March 2023, the Tribunal directed suspension of proceedings on the merits of the case pending resolution of the jurisdictional issue.

32. The Applicant filed his Observations on the Respondent’s Objection to Jurisdiction (“Applicant’s Observations”) on 7 April 2023. On 28 April 2023, the Respondent filed its Response to the Applicant’s Observations on the Respondent’s Objection to Jurisdiction (“Respondent’s Response”). On 18 May 2023, the Applicant filed his Reply to the Respondent’s Response to the Observations to the Objection to Jurisdiction (“Applicant’s Reply”).

II. SUMMARY OF THE PARTIES’ CONTENTIONS ON JURISDICTION

33. In the Respondent’s Objection to Jurisdiction, it contends that the Application is not admissible due to the Applicant’s failure to comply with the 90-day statutory deadline. The Respondent further contends that there are no “exceptional circumstances” that would permit the Tribunal to entertain the late Application.

34. The Applicant asserts that his Application is admissible *ratione temporis* based on the following:

- a) the Respondent's 7 October 2022 memorandum was not clearly a final decision as it included proposals and denied a 'change' in currency election when the Applicant had requested a 'rescission' of his currency election;
- b) the 90-day deadline to address the Tribunal runs from 24 November 2022, the date the Applicant became aware of the final and binding nature of the Respondent's decision, rather than the date of that decision;
- c) the Respondent's 7 October 2022 memorandum does not mention its binding nature for appeal purposes;
- d) the Respondent's failure to reply to the Applicant's requests for clarification amounts to unfair treatment;
- e) the Respondent took more than six months to respond to the Applicant's request to rescind his pension currency election; and
- f) the Applicant sought legal assistance only after 24 November 2022 when he understood the binding nature of the decision and the parties sought informal resolution throughout December 2022.

35. The Applicant does not claim the existence of any exceptional circumstances.

36. The Tribunal will not address the following matters raised by the Applicant as they are not relevant to the issue of jurisdiction:

- a) the Respondent failed to meet its duty of care towards the Applicant in the context of his currency election and pension estimates and provided him with false and misleading information regarding his normal pension which led to an uninformed decision on his part regarding the currency of his retirement pension;
- b) section 5.3(a) of the SRP Rules is discriminatory towards recipients of incapacity pensions;
- c) the Respondent failed to rectify the error in the pension calculation and offered remedies which are contrary to the SRP Rules; and

- d) the Respondent consistently avoided the Applicant's requests and abused its internal procedures to the detriment of the Applicant's dignity as a Bank retiree.

III. FINDINGS

Preliminary Matters

a. Oral Hearings

37. Rule 11, paragraph 1, of the Tribunal's Rules of Procedure provides:

“Oral proceedings, including the presentation and examination of witnesses or experts, may be held only if the Tribunal so decides, on its own motion or at the request of a party filed up to the date fixed for filing the rejoinder.”

38. The Tribunal notes that neither party has requested an oral hearing. As the issue before it is limited to the question of its jurisdiction, and the submissions by the parties provide a sufficient basis for consideration of the issue, the Tribunal considers that oral proceedings are not warranted.

b. En Banc

39. In light of the importance of the issues posed in the case, the Tribunal decides, in accordance with Article V (5) of the Tribunal Statute that this Application warrants consideration by a panel consisting of all its members.

Legal Framework and Scope of Judicial Review

40. Article II (1) of the Tribunal's Statute states that:

“The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges non observance of the contract of employment or terms of appointment of such staff member. The expressions “contract of employment” and “terms of appointment” include all pertinent regulations and rules in force at the time of alleged nonobservance including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.”

41. Article II (3):

“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; and
- b. the application is filed within ninety days after the latest of the following:
 - i. the occurrence of the event giving rise to the application;
 - ii. receipt of notice, after the applicant has exhausted all other remedies available within the Bank, that the relief asked for or recommended will not be granted; or
 - iii. receipt of notice that the relief asked for or recommended will be granted, if such relief shall not be granted within thirty days after receipt of such notice.”

42. Rule 6, paragraph 9(d) of the Rules of Procedure of the Tribunal states as follows:

“9. The applicant shall file the application with the Executive Secretary within ninety (90) days after the latest of the following, taking into account Article II, paragraph 3(b) of the Statute:

- a. the occurrence of the event giving rise to the application;
- b. receipt of notice, after the applicant has exhausted all other remedies within the Bank, that the relief asked for or recommended will not be granted;
- c. receipt of notice that the relief asked for or recommended will be granted, if such relief shall not have been granted within thirty (30) Days after receipt of such notice; or
- d. the date of communication of the contested decision of the Pension Committee of the Bank to the party concerned.”

43. Rule 7, paragraph 1 of the Rules of Procedure of the Tribunal on Preliminary Objection to Jurisdiction states as follows:

“If the Bank objects to the exercise of jurisdiction by the Tribunal, and seeks a decision on this point before filing the answer the Bank may file a written objection within fifteen (15) days of provision of the application to it. Upon the filing of such objection, the President may suspend proceedings on the merits ...After considering the pleadings the Tribunal, or, when not in session, the President, shall either uphold the objection, reject it, or declare that it shall be joined to the merits of the case. ...”

44. Section 8.2(b) of the SRP Rules sets out what constitutes the exhaustion of administrative review related to SRP administered matters:

“(b) The Administration Committee, ...its decision or action in respect thereof shall be conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of ADB’s Administrative Tribunal.”

45. This is also reflected in Administrative Order 2.06 (*Administrative Review and Appeal Procedures*), paragraph 6.1, which provides that the requirement to exhaust administrative review “will not cover matters falling under the authority of the Administration Committee in accordance with Article 8 of the Staff Retirement Plan (SRP).”

46. In the instant case, the following legal issues are before the Tribunal: (1) whether the 7 October 2022 memorandum constituted final notice that the relief requested by the Applicant was not granted; (2) when did the time period for filing the Application start to run and was the Bank obliged to inform the Applicant when the decision was final and binding; and (3) whether there are exceptional circumstances that allow the Application to be admitted.

Issue (1): Whether the 7 October 2022 memorandum constituted final notice that the relief requested by the Applicant was not granted

The Parties’ Contentions

47. The Applicant submits that Article III, para. 3(b)(ii) of the Tribunal’s Statute provides that an application shall be admissible if filed within 90 days after “receipt of notice, after the applicant has exhausted all remedies available within the Bank, that the relief asked for or recommended will not be granted”.

48. The Applicant maintains that the 7 October 2022 memorandum was not conclusive and binding as it included alternative proposals, both of which were unsatisfactory to the Applicant. He submits that a reasonably minded person would not consider two alternative options which require the election of a choice as a conclusive and binding decision in line with para. 8.2 of the SRP Rules. The Applicant further argues that the 7 October 2022 memorandum was not

conclusive and binding as it denied a request he had never put forward, specifically, a request to change his currency election. The Applicant's request was to rescind his original currency election rather than change it. The Applicant argues that the doctrine of *contra proferentem* requires that the ambiguity in the document issued by the Bank be interpreted in favor of the staff member.

49. The Applicant submits that the Bank has a duty to provide clear, unambiguous and transparent decisions and that in case of doubt or ambiguity, the interpretation shall be construed in favor of staff.

50. The Respondent asserts that the Bank's decision was communicated clearly and unambiguously in the 7 October 2022 memorandum and the doctrine of *contra proferentem* should be applied only in the event of ambiguity.

The Tribunal's Findings on Issue (1)

51. The Tribunal has described the doctrine of *contra proferentem* as follows: "[...] Any ambiguity or uncertainty [...] wherever appearing in documents emanating from the Bank must, therefore, be resolved *contra proferentem* and in favor of the staff" (*Mesch and Siy*, Decision No. 2, ADBAT I, (1994), 21, para. 17.

52. In *G.G. v EPO*, ILOAT Judgment No. 3696 (2016), para. 4, the ILOAT further described the doctrine as follows: "Inasmuch as the determination of the central issue will be a function of interpretation, it would be helpful at this juncture to recall the basic principles of interpretation as stated by the Tribunal. Those principles state that the words of a provision are to be interpreted in good faith giving them their ordinary and natural meaning in their context. Where the language of the text is clear and unambiguous, the words must be given effect without looking outside of the text to determine the meaning. Texts which are ambiguous are to be construed in favour of the staff member. ...".

53. The Tribunal does not find support in the record for the Applicant's contention that the 7 October 2022 memorandum is ambiguous or unclear. The email of BPMSD forwarding the memorandum to the Applicant invites him to "refer to the attached memo for the SRP

Administration Committee’s decision on your request to change currency of payment after its due consideration.” The 7 October 2022 memorandum itself refers to the Applicant’s memorandum in which he made his request, explains that a change in currency election can only be made in accordance with the SRP Rules, that the error in estimation did not form a sufficient basis for a new currency election, and that the SRP Administration Committee “has decided to deny your request to change your currency election from 15%USD/85% EUR to 100%USD.” The Tribunal is not convinced by the Applicant’s assertion that confusion resulted from the reference to a ‘change’ in currency election resulting in a 100 percent USD payment rather than a ‘rescission’ in currency election resulting in a 100 percent USD payment, or the Applicant’s suggestion that a rescission is not a change.

54. The 7 October 2022 memorandum goes on to state that the SRP Administration Committee “has however approved the options previously offered to you to cover the shortfall...” The Tribunal considers that communication of the SRP Administration Committee’s approval of alternative mitigating proposals confirms rather than confuses the decision that the Applicant’s request for a 100 percent USD currency election had been denied and thus that the relief he had requested had not been granted and that the acceptance of either of these alternatives would not have altered that.

55. In conclusion, the Tribunal finds that the Bank’s 7 October 2022 decision refusing to grant the Applicant relief was clear and unambiguous.

Issue (2): When did the time period for filing the Application start to run and was the Bank obliged to inform the Applicant that the decision was final and binding

The Parties’ Contentions

56. The Applicant acknowledges that the 7 October 2022 memorandum constitutes the final position of the Bank in respect of the grievance. However, he asserts that the memorandum did not indicate the conclusive and binding nature of such decision and that he was not aware of this fact until official notification reached him on 24 November 2022. Therefore, the Applicant argues that the 90-day filing period started to run on 24 November 2022.

57. The Applicant sought clarification from the SRP Administration Committee on 18 October 2022 and 21 November 2022 as to whether he had exhausted all administrative steps and remedies within the Bank. The SRP Administration Committee Secretary replied only on 24 November 2022, and informed the Applicant, by quoting section 8.2(b) of the SRP Rules, that the decision was conclusive and binding.

58. The Respondent submits that the Applicant was notified of the SRP Administration Committee decision on 7 October 2022 and para. 8.2(b) of the SRP Rules clearly stipulates that SRP Administration Committee's decisions are conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Tribunal. Consequently, the Respondent argues that, as the Application was filed on 22 February 2023, it is inadmissible *ratione temporis*.

59. The Respondent asserts that pursuant to the principle that ignorance of the law is no excuse, the Applicant's argument that he was not aware of the conclusive and binding nature of the SRP Administration Committee decision until 24 November 2022 is without merit.

60. The Respondent points out that there is no requirement in the SRP Rules that the SRP Administration Committee explicitly state or make reference in its communications to the Applicant of the time periods for submissions in the next step of the internal justice system. The absence of such references in the 7 October 2022 memorandum does not depart from any standard practice or understanding that might have led to confusion or uncertainty on the part of the Applicant.

61. The Respondent also argues that the fact that the Applicant filed an incomplete Application to the Tribunal on 4 January 2023 seeking an extension of the time period for filing an application is indicative of his concurrence with the Bank's position and an attempt to circumvent the applicable time period.

62. Finally, the Respondent maintains that the 24 November 2022 memorandum from the SRP Administration Committee reiterated what had been previously communicated to the Applicant on 7 October 2022, and that statements that merely confirm an earlier decision are not to be treated as starting anew the time period for filing an application. The 24 November

2022 memorandum therefore does not create a new deadline for the Applicant to apply to the Tribunal.

The Tribunal's Findings on Issue (2)

63. The first question to answer is whether the time period for the filing of the Application begins to run from the date of the contested decision or from the date the Applicant states he became aware that the decision was final and binding. The second question is whether the Bank was obligated to inform the Applicant when the decision was final and binding.

64. Article II (3)(b)(ii) of the Tribunal's Statute and Rule 6, para. 9(d) of its Rules of Procedure provide that an application shall be admissible if filed within 90 days after "receipt of notice, after the applicant has exhausted all remedies available within the Bank, that the relief asked for or recommended will not be granted".

65. Article II (3)(b)(ii) refers to the "receipt of notice" as the point in time the 90-day application period begins to run. An applicant's awareness of the finality of the decision rendered is not relevant for the determination of the commencement of the time period.

66. The SRP Rules stipulate that SRP Administration Committee decisions are conclusive and binding upon all persons interested, subject to appeal in accordance with the procedures of the Tribunal.

67. As the United Nations Appeals Tribunal (UNAT) held in *Abdellaoui v. Secretary General of United Nations*, Judgment 2019-UNAT-929, para. 28: "[...] *staff members are presumed to know the Staff Regulations and Rules applicable to them. It is the staff member's responsibility to ensure that he or she is aware of the applicable procedure in the context of the administration of justice at the United Nations. Ignorance cannot be invoked as an excuse.*"

68. Regarding the question of whether there is an obligation on organizations to ensure that complainants are informed of remedies and time limits to challenge decisions, the Administrative Tribunal of the International Labor Organization (ILOAT) has held that its jurisprudence does not place such an obligation except in highly exceptional and very specific

circumstances. See *M. v ITU*, ILOAT Judgment No. 4517 (2022) (where the complainant was incapacitated and the organization had acted “shockingly from a human perspective”); and *F. v CCC*, ILOAT Judgment 4499 (2022) (where the complainant required special consideration as she had been the victim of attempted murder). In the present case, the Applicant has not asserted the existence of any highly exceptional and very specific circumstances as contemplated by the ILOAT.

69. The Tribunal finds that there is no requirement in the Bank’s regulatory framework or in applicable jurisprudence supporting the Applicant’s assertions that the 90-day period for the filing of his application should run from the date (i) he became aware of, or was notified of, the final and binding nature of the decision, and (ii) was provided with information about the means of redress.

70. As regards the Respondent’s argument that its 24 November 2022 memorandum does not constitute a new decision but merely confirms an earlier one, the Tribunal considers this discussion is not relevant and mischaracterizes the position of the Applicant. The Applicant does not argue that the 24 November 2022 decision was a new decision, but rather that the time period for filing an application commenced on the date he became aware of the final and binding nature of the 7 October 2022 decision.

71. The Tribunal also considers without merit the Respondent’s argument that by filing the Incomplete Application seeking an extension of time, the Applicant indicated concurrence with the Bank’s position regarding the date of the appealable decision. The Tribunal disagrees and considers that the Incomplete Application could reasonably have been filed in anticipation of disagreement regarding the applicable deadline.

72. It is also relevant to note that the Applicant does not dispute that he was informed of and aware of the final and binding nature of the SRP Administration Committee decision on 24 November 2022, which was six weeks prior to the expiration of the 90-day time limit and sufficient time for the Applicant to avail himself of his right to appeal the decision.

73. The Tribunal finds that the 90-day deadline for the Applicant to have filed his Application runs from the date of receipt of notice of the Bank’s decision rather than the date

the Applicant allegedly became aware of or was notified of the final and binding nature of the decision. Accordingly, the 90-day period contemplated in Article II (3)(b)(ii) commenced on 7 October 2022 and expired on 6 January 2023. The Applicant filed his application on 22 February 2023 and thus his application is inadmissible for that reason.

74. The Tribunal finds that the applicable provisions do not require that staff members be informed of the final and binding nature of individual administrative decisions for the purpose of exercising their rights. At the same time the Tribunal notes that in many national and international administrations it is the practice to inform staff of the finality of administrative decisions to avoid unnecessary confusion and to create certainty for staff members wishing to exercise their rights. In any event, the Bank responded to the Applicant in sufficient time for him to avail himself of his rights.

Issue (3) Whether there are exceptional circumstances that allow the Application to be admitted.

The Parties' Contentions

75. The Applicant justifies his request that the Tribunal find his Application admissible by reference to the length of time employed by the Bank to respond to his request to rescind his currency election.

76. The Applicant submits that he only sought legal assistance at the end of November 2022 after he was informed that the SRP Administration Committee decision was final and binding. He also submits that the parties continued to attempt informal resolution throughout December 2022 until an unsatisfactory offer put forward by the Bank expired on 5 January 2023.

77. Finally, the Applicant argues that the Bank has a general duty of fairness and transparency towards staff, and that the Bank's failure to respond to the Applicant's requests for clarification of the 7 October 2022 memorandum amounts to unfair treatment.

78. The Respondent submits that the length of time taken by the SRP Administration Committee to issue the Applicant with its decision was not unreasonable given the complexity

of the process, is not relevant, and does not constitute “exceptional circumstances” under Article II(3) of the Tribunal’s Statute.

79. The Respondent contends that the fact that Applicant sought legal assistance only at the end of November 2022 is irrelevant and a “self-inflicted delay”. The parties attempt to seek informal resolution in December 2022 is also irrelevant and raised by the Applicant despite the confidential nature of the process in clear violation of Rule 14, para. 5 of the Tribunal’s Rules of Procedure. The Respondent adds that neither of these constituted exceptional circumstances.

80. The Respondent rejects the Applicant’s contention that it treated him unfairly by failing to respond to his request for confirmation that internal remedies had been exhausted. It maintains that there is no obligation to provide an express affirmation to the Applicant that all administrative steps and internal remedies have been exhausted.

81. Finally, the Respondent points to the fact that the Applicant has demonstrated proficiency in pension matters, including the applicable application process, both in his communications with the Respondent with regard to the currency election and by reason of having worked closely as a member of the Bank’s staff council with BPMSD on pension matters.

82. In his Reply, the Applicant clarifies that he does not claim the existence of any exceptional circumstances.

The Tribunal’s Findings on Issue (3)

83. Notwithstanding that the Applicant does not claim the existence of exceptional circumstances, the Tribunal will address the issues raised only to the extent that they are relevant under Article II (3). Article II (3) provides that no application that is filed outside of the 90-day time period, “shall be admissible, except upon exceptional circumstances as decided by the Tribunal”.

84. Despite the aspiration of certainty and finality that underpin adherence to time limits, the Tribunal’s Statute is sufficiently flexible to ensure justice is able to be done between parties in appropriate cases. Whether or not exceptional circumstances exist to condone the late filing

of an application will depend among other things on the extent of lateness and the reasons for lateness. The Tribunal takes note of *Malekpour*, WBAT Decision No. 320 (2004), which defines “exceptional circumstances” in the similar context of the exhaustion of internal remedies. The WBAT held that exceptional circumstances must be “real and serious impediments” and that “mere inconvenience is not sufficient”.

85. As for the Applicant’s argument that the Respondent took more than six months to reply to the Applicant’s 18 April 2022 request to rescind his pension currency election, the Tribunal finds that, although the time the Bank took to respond could have been shorter, it was not a serious impediment to the Applicant in filing a timely Application as it related to a period before the contested decision and therefore before the commencement of the 90-day time limit.

86. The Applicant also argues that he sought legal assistance only after 24 November 2022 and refers to the parties’ attempt to find informal resolution throughout December 2022. In this regard the Tribunal finds that the Applicant’s late decision to seek legal counsel was within his control and that settlement discussions, in the absence of an agreement to the contrary, do not suspend the time period for filing an application and therefore do not constitute real and serious impediments to filing a timely application.

87. The Tribunal refers to the Applicant’s assertion that the Bank failed in its general duty of fairness and transparency towards him. At the outset the Tribunal notes that the arguments of the parties relating to the fair treatment of the Applicant relative to the erroneous estimate of his pension, the changes requested in his currency election and any other matters other than the notification of the contested decision, are outside of the scope of the jurisdictional question presently before the Tribunal.

88. The Tribunal considers that the Bank’s treatment of the Applicant in the context of the notification of the contested decision is relevant to the jurisdictional questions before the Tribunal only to the extent it constitutes an exceptional circumstance under Article II (3) of the Tribunal’s Statute.

89. As a consequence, the only question that remains is to determine whether the 24 November 2022 reply to the 18 October 2022 request for clarification was unduly dilatory and

thus would constitute an exceptional circumstance. The Tribunal finds that although the Bank could have responded more expeditiously under the circumstances of the case, it notes that the response of the Bank was delivered six weeks prior to the expiration of the 90-day filing deadline. The Tribunal considers that six weeks is sufficient time for the Applicant to have acted to protect his interests and that there was, as a consequence, no prejudice. It is also relevant to note that in his Incomplete Application, the Applicant stated that it was not possible to submit a complete application due to the intervening holiday period and pending discussion of amicable resolutions. The Tribunal does not find these justifications convincing.

90. The Tribunal does not find the existence of any exceptional circumstances under Article II (3) of the Tribunal's Statute permitting the Tribunal to decide to assume jurisdiction over the Application filed outside of the 90-day filing period.

DECISION

The Tribunal unanimously decides to dismiss the Application and all claims for relief.

Chris de Cooker

/s/

President

Raul C. Pangalangan

John Raymond Murphy

/s/

Vice-President

/s/

Member

Catherine F. Meier

Teresa Maria Da Silva Bravo

/s/

Member

/s/

Member

Attest:

Cesar L. Villanueva

/s/

Executive Secretary

In Manila, 13 October 2023