

Decision No. 73

Alan Berg,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Jiménez de Aréchaga, President, P. Weil and A. K. Abul-Magd, Vice Presidents, and R. A. Gorman, E. Lauterpacht, C. D. Onyeama and Tun Suffian, Judges, has been seized of an application, received August 3, 1987, by Alan Berg, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on April 6, 1988.

The relevant facts:

2. (a) The Job Grading Program

The general facts relating to the Job Grading Program are as stated in paragraphs 2 through 10 of Decision No. 56.

3. (b) The particular facts of the case

The Applicant, a Nutrition Adviser in the Population and Human Resources Department (PHRD), joined the Bank in August 1972 as a Deputy Director of the then Population and Nutrition Projects Department at level X which at that time designated staff in the rank of Division Chief and above. On May 1, 1974 the Applicant's personnel action form showed a nominal grade designation change for the Deputy Director position from level X to level 0, effective January 1, 1974.

4. On November 1, 1975 the Applicant was transferred to the Office of the Director, Agriculture and Rural Development Department (AGRD), as Senior Nutrition Adviser. In the Applicant's Anniversary Evaluation Review (AER) covering the period September 1975 through August 1976, his Director referred to this change in the Applicant's "status." In 1979, the Applicant was transferred to the Office of the Director, Population, Health and Nutrition Department (PHND), still as Senior Nutrition Adviser. The Applicant's AERs through July 1985, and his personnel action forms through May 1985, described his grade/level as an 0. Internal Bank documents prepared from 1976 to 1978 record the Applicant as occupying a position at N level while holding a personal grade at level 0.

5. During the Job Grading exercise, the Applicant's position was graded at level 26, equivalent to the former level N. On September 26, 1985 the Applicant was informed of the level of his position and of the fact that he would have salary protection for the next two years by virtue of the Respondent's policy of "grandfathering" the salary of staff members given a lower grade as a result of the exercise.

6. In October 1985, after the conclusion of the Job Grading exercise, the Bank issued Staff Rule 5.06, entitled "Assignments to Lower Level Positions." Paragraph 7.01 of the Rule provides, in part, that "A staff member may be assigned to a lower level position when ... there is an organizational benefit and the staff member accepts the assignment ...," and paragraph 7.02 provides, in part, that "A staff member who accepts an assignment to a lower level position where there is an organizational benefit retains his existing grade on a personal basis"

7. The Applicant filed for an administrative review of the decision grading his position at level 26 and, after a disposition unsatisfactory to him, filed an appeal with the Job Grading Appeals Board (JGAB). After the JGAB recommended no change in the grade of the Applicant's position, he in April 1986 filed an appeal with the Appeals Committee against the decision to downgrade him from an O level to an N level position without cause and without informing him until the implementation of the grading exercise that he had been demoted earlier.

8. The Respondent challenged the jurisdiction of the Appeals Committee on the grounds that the Appellant's position was not in any way downgraded under the job grading exercise, and that the Appellant had suffered no damage for which relief could be granted because his situation was no different than had he actually held an O level position which was regraded to level 26. On May 29, 1986 the Appeals Committee decided that the issues raised in the appeal fell within its jurisdiction.

9. On April 27, 1987 the Appeals Committee issued its report. It noted that on September 26, 1985, when the Applicant was first informed of his new grade and the "grandfathering" arrangement, he was unaware of the fact that his O grade was a grade personal to him; and that it was not until July 1986, with the Bank's answer to the appeal, that the Applicant officially became aware of the reason why he was being deprived of his personal grade, i.e., because "personal grades were abolished and persons holding such grades were grandfathered in the same way as those whose positions were downgraded." The Appeals Committee concluded that "Appellant should be permitted to continue his personal grade until such time as the Bank takes a general policy decision, properly communicated to staff, that personal grades should be abolished." The Committee further concluded:

Although the Bank is perfectly free to make policy decisions concerning staff, the Bank must, in making decisions which materially and adversely affect the terms of appointment and conditions of employment of staff, satisfy certain criteria, such as, studying the matter carefully; taking into account all relevant considerations; publicizing the process leading up to the decision; and communicating the proposed decision to staff before it has become a fait accompli. The personal grades decision in this Appeal does not satisfy these criteria.

Besides, as stated in paragraph 14, at no time was Appellant informed of the arrangement under which he was deprived of a higher level position and assigned to a lower level position. It would not be fair, therefore, to deprive him of the protection which his personal grade gives him against the adverse consequences of that arrangement.

Under these circumstances, the Committee recommends that Appellant be permitted to retain his personal grade or the equivalent thereof under the new job classification scheme.

10. On May 11, 1987 the Vice President, Personnel Administration (PA), transmitted a copy of the Appeals Committee report to the Applicant and stated that he could not accept the Committee's recommendation. The Vice President, PA, conceded:

It would seem from the report that there has not been sufficient clarity with respect to your downgrading at the time of your transfer in 1975. This is not only regrettable, but unacceptable and I would express the opinion that such confusion is now no longer possible. This does not take away that at the time the system did not work in your case.

He concluded, however, that the position to which the Applicant had been transferred carried a lower grade and that he retained his former grade in a "personal capacity," and that it was a principal purpose of the Job Grading exercise to eliminate such anomalies in grading and compensation.

11. On June 5, 1987 the Applicant wrote to the newly appointed Senior Vice President, Administration (SVPA), requesting him to "reconsider the judgment reflected in his predecessor's memorandum of May 11, 1987." On June 26, 1987 the SVPA informed the Applicant that he would not do so.

The Applicant's main contentions:

12. The Respondent violated Principle 2.1 of the Principles of Staff Employment when in 1975 it downgraded the Applicant's grade/level without giving him any written explanation or notice whatsoever. The Applicant was

kept ignorant of his true personnel situation and it was not until he received the Bank's letter of September 26, 1985 informing him of his new grade and the associated salary "grandfathering" that the Applicant became aware that he had held an 0 level position only on a "personal" basis. He was not officially informed of the point in his career when he lost his 0 level position until July 10, 1986 when he received the Respondent's Answer before the Appeals Committee. No explanation was even given to the Applicant as to how this decision was reached. It was reasonable for the Applicant to rely on his AERs and personnel action forms regularly received from the Respondent which indicated his grade/level as an 0.

13. Under the principle of fairness the Respondent should not be allowed legally to protect itself by relying upon gossip, office-size changes, or reporting relationship as substitutes for effective and formal notification of a change in grade/level, particularly when the gossip of his demotion had not effectively reached him, he was eventually given back an office of a size generally allocated to 0 level staff, and he continued to report to a Director both before and after his 1975 transfer.

14. Because the Respondent failed to notify the Applicant of the terms and conditions of the assignment he undertook in 1975 which involved a downgrading, the Applicant did not have the opportunity to accept or reject such assignment.

15. Because he was kept in the dark as to his true position within the Bank, and because he relied to his serious detriment on the Bank's recurrent documentation in the forms of AERs and personnel action forms, the Applicant was profoundly prejudiced at a time when he had other employment options available to him which are now foreclosed due to the passing of time.

16. It was arbitrary and unfair summarily to deprive the Applicant of his personal grade, since the Respondent after taking a policy decision on both job grading and personal grades reflected in the brochure on Job Grading, kept the staff informed about what they should do if they did not agree with the results of the grading exercise and about where they could go for help, but did not tell them what to do if personal grades were changed.

17. Paragraph 7.02 of Staff Rule 5.06, which provides: "A staff member who accepts an assignment to a lower level position where there is an organizational benefit retains his existing grade on a personal basis . . ." puts in serious question the Respondent's contention that under the Job Grading Program personal grades were to be abolished.

18. The Applicant should be permitted to retain his personal level 0 position until his departure from the Bank as the Appeals Committee has recommended.

19. The Respondent, having conceded that its personnel policies were inexcusable from an administrative perspective, must compensate the Applicant because certain of these policies harmed the Applicant financially, professionally and emotionally.

20. The Applicant made the following pleas:

- rescission of the decision to downgrade his position from an 0 to an N level;
- rescission of the decision confirming the downgrading of his position; and
- reestablishment in an 0 grade level or the equivalent thereof for the balance of his tenure at the Bank.

In the alternative, the Applicant requested grandfathering in a personal 0 grade level position for his remaining years at the Bank. In addition, the Applicant requested:

- a reasonable amount of compensation for all additional injuries suffered by him as a result of the Respondent's violation of his conditions of employment. These injuries include anguish, his loss of time in seeking administrative relief inside the Bank, and his loss of standing in the eyes of the Bank staff resulting from the Bank's actions.

- all attorneys' fees and associated costs; and
- omission of his name from any communications by the Tribunal in this matter, including the judgment to be rendered in his case.

The Respondent's main contentions:

21. The absence of written and direct communications to the Applicant that from and after 1975 he was to hold a personal 0 grade did not constitute a violation of the Respondent's procedures. No formal procedure had been established for this purpose; resort to a personal grade was only for the purpose of solving a difficult personnel situation known to both the staff member and his manager. That was the case with the Applicant, whose transfer from the position of Deputy Director to that of Senior Nutrition Adviser was dictated by the difficulties he experienced in an operational department.

22. Although there is no evidence of direct and written communication to the Applicant in 1975 that he was being transferred to a level N position, it is surprising that someone of his professional experience and sophistication should have taken for granted that the Deputy Director position and that of Senior Adviser were of the same level.

23. The Applicant's colleagues in the Agriculture Department have stated that they knew that he was transferred to an N level position. Moreover, his Director, in the Applicant's 1976 AER, referred to his change in "status" and the Applicant's Vice President spoke of his "new status." Furthermore, there are documents in the files of the Respondent that show the status of the Applicant and that were neither confidential nor restricted.

24. Even if the Applicant did not know that his 0 grade was personal, he was not prejudiced by his lack of such knowledge. His claim that had he known he would have sought another position with an international agency, with promise of greater advancement and compensation, is unsubstantiated and hypothetical.

25. Moreover, even if the Applicant had been informed of his true position, and had he successfully contested the N level classification in 1975 and his position been graded at level 0, this position would have been downgraded during the Job Grading exercise and the Applicant would have been entitled only to the two years of salary protection that he was in fact given. No exception was made in the exercise of staff members holding personal grades.

26. The Vice President, PA, by declining to accept the Appeals Committee recommendation, quite properly gave priority to the institutional interest in eliminating anomalous grading situations.

27. The Applicant has been compensated for many years within the range of a grade higher than the grade of his position, and he has received salary protection for a period reasonably sufficient to alleviate any adverse effects from the decision to terminate that situation.

28. The Applicant's personal grade was not based on his contract of employment nor was the Applicant promised that he would always be compensated within the range of the position to which he was first appointed.

29. Both the Applicant and the report of the Appeals Committee made selective references to Staff Rule 5.06 which are incomplete and which omit pertinent language. Staff Rule 5.06, effective October 1985, reflected the Respondent's decision not to abolish personal grades entirely but rather to continue them in the limited circumstances there provided. In any event, the Appeals Committee recommendation provided no support for the Applicant's plea for relief.

30. There was no abuse of process in the grading of the Applicant's position nor has the Applicant alleged that there was such abuse.

31. There was no justification for the award of monetary compensation for "additional injuries," because the

Applicant has provided no evidence or measure of the anguish, loss of standing, and loss of time that he claims to have suffered.

32. The Respondent has breached no obligation owed to the Applicant that would warrant an award of attorney's fees and costs by this Tribunal, which has denied such an award in all but the most exceptional circumstances.

33. Although the Applicant has requested anonymity in the decision of the Tribunal, such is not warranted. The Applicant has not demonstrated that there are "exceptional circumstances" as required by this Tribunal in order to justify a departure from its practice to include the names of applicants in its reports. The Applicant's situation cannot be distinguished from that of all other applicants challenging grading decisions. His allegation that continued open discussion of his case within the Bank could impair his effectiveness is hardly an "exceptional circumstance."

Considerations:

34. In previous cases arising out of the Job Grading Program the Tribunal has determined that this Program - involving decisions regarding criteria for evaluating staff positions, the assignment of various tasks to particular positions, and the ultimate determination of grade levels constitutes an exercise of discretionary authority by the Respondent, and that "it is not for this Tribunal to substitute its own judgment for that of the competent organs of the Bank" ([Pinto](#), Decision No. 56 [1988], para. 35). Consequently, the Program as such is subject to review by this Tribunal only if it is shown that there has been an abuse of discretion, by reason of the action taken in a concrete case "being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure" ([Pinto](#), Decision No. 56 [1988], para. 36).

35. In the present case the Applicant has contended that improper procedures were followed by the Respondent concerning his grading at the time when he was transferred to the Agriculture and Rural Development Department in 1975. According to documents in the Respondent's files, which were not made available to the Applicant, the position then assigned to him, as Senior Nutrition Advisor, had a grade level (grade N) lower than that of his previous assignment as Deputy Director (grade 0). According to the same documents, the Applicant was nevertheless allowed to retain his former grade 0 but on a personal basis.

36. As contended by the Applicant and conceded by the Respondent there is no evidence of a direct and written communication to the Applicant conveying to him the arrangement whereby he was to retain a higher personal grade while moving to a position with a lower grade. Furthermore, the documentation to which the Applicant had access, such as his AER's from 1975 to 1985, clearly stated that his job continued to be graded at level 0 and contained no intimation of a demotion to a job carrying a lower grade.

37. The Applicant contends that he learned of the arrangement made in 1975 only as a result of the Bank-wide job grading program in 1985, and there is no direct evidence to contradict this assertion. He was then informed that, as part of this program, his personal grade was being abolished and he would be entitled to retain the salary corresponding to his personal grade level only for a two year grandfathering period. After September 30, 1987 his compensation would be based on a lower salary range.

38. The Respondent has observed that in 1975 there was no formal procedure for notifying staff members that the grade they held was personal. The Tribunal considers, nevertheless, that the Bank has an obligation to inform the staff member of a change in his employment status, especially when constituting a demotion to a lower level position. Such a communication must also indicate the reasons for that demotion. This obligation is demanded by elementary considerations of due process. Its existence is independent of the adoption of the Principles of Staff Employment.

39. Consequently, the Tribunal finds that in not advising the Applicant, at the time of transfer, that his new work assignment had a lower grade level, and that he retained his former grade only on a personal basis, the Bank did not follow a proper procedure. This is recognized by the Vice President, PA, in his letter of May 11, 1987

which is the decision contested by the Applicant. In that letter the Vice President, PA, admits that “there had not been sufficient clarity with respect to your downgrading at the time of your transfer in 1975. This is not only regrettable but unacceptable at the time the system did not work in your case”.

40. The consequences of that improper procedure have materialized at the present time as a result of the application to the staff member of the Job Grading exercise. The Applicant rightly contends that if he had been made aware of his true situation in 1975 he might have been able to dispute the decision taken and to take remedial action, either to obtain another suitable assignment within the Bank or to seek a position outside it. While at that time he had prospects of outside employment, it is now too late for him to be considered for an outside position by reason of his age.

41. For these reasons, the Tribunal concludes that the treatment of the Applicant fell short of the required standards and this has effectively caused him harm. However, the decision adopted by the Respondent in 1985 assigning grade 26 to the position occupied by the Applicant is not disputed. Moreover, the Tribunal considers the suppression of personal grades to be one of the legitimate purposes of the Job Grading exercise. Consequently, rescission of that 1985 decision is not a remedy appropriate to the intangible injury done. In these circumstances the Tribunal will order the payment to the Applicant of compensation which it equitably assesses at two months net base salary.

42. A second issue arising in this case concerns the entitlement of the Applicant to salary increases after the expiration, on September 30, 1987 of the two years grandfathering period provided by Staff Rule 6.04, paragraph 5.06 which reads:

A staff member whose position is graded at a lower level as a result of a formal job evaluation assumes the lower grade upon the effective date of the evaluation. However, for a period of 24 months thereafter, she will be eligible for increases as if the salary range formerly applicable to the position, adjusted for any increases in the salary structure, had remained in effect.... If after 24 months the staff member has not been selected for a position at his previous or a higher level, future increases in his salary will be administered within the range of his new grade. If at this time the staff member's salary exceeds the maximum of the salary range of the position occupied, the salary will remain unchanged until the maximum of the range exceeds that amount.

43. In de Merode (Decision No. 1 [1981], paras. 111 and 112) the Tribunal found “that a consistent practice of periodic adjustment has been established, and that the Bank makes these adjustments out of the conviction that it is legally obliged to do so”. The Tribunal concluded:

[I]n consequence the Bank is obliged to carry out periodic reviews of salaries, taking into account various relevant factors [T]he established practice, and statements confirming that practice, have created a legal obligation to make periodic adjustments reflecting changes in the cost of living and other factors. In the opinion of the Tribunal such an obligation is a fundamental element in the Applicant's conditions of employment which the Bank does not have the right to change unilaterally.

In Pinto (Decision No. 56 [1988], para. 40), the Tribunal held:

The Tribunal concludes that the freezing of the Applicant's salary, from September 30, 1987, would deprive her, without justifiable cause, of the right to benefit from periodic adjustments reflecting changes in the cost of living and other factors, which the Tribunal has found to be a fundamental element in the Applicant's conditions of employment which the Bank does not have the right to change unilaterally. This is not to suggest that a staff member may under no circumstances have his or her grade reduced or salary frozen, for example, when this is done for cause as for disciplinary action. In the present case, however, the downgrading of the Applicant and her position was done not because of her misconduct but because of the organizational needs of the Bank; in such circumstance, the staff member is reasonably entitled to more equitable treatment, as appears to be contemplated by Staff Principle 5(1)f.

The Tribunal will apply the same ruling in this case and decides that the Applicant should as from September 30, 1987 receive the periodic salary review increases approved by the Respondent for staff members in grade 27, the grade which he held before his position was regraded.

44. The Applicant has further requested compensation for additional injuries which include anguish, loss of time in seeking relief and loss of standing in the eyes of Bank staff. This claim has not been supported by evidence and the Applicant has not specified the amount of compensation claimed, as required by Rule 7(d) of the Rules of the Tribunal.

45. While the Applicant has made a request for costs he has not submitted to the Tribunal an itemized statement of costs at the conclusion of the proceedings. In these circumstances the Tribunal decides to award the Applicant costs in the amount of \$1,000.

46. Finally, the Tribunal considers that there are no exceptional circumstances justifying in the present judgment the omission of the Applicant's name.

Decision:

For the above reasons the Tribunal unanimously decides that:

1. the Respondent shall pay the Applicant a sum equivalent to two months net base salary;
2. the decision of the Vice President, PA, of May 11, 1987 is rescinded so far as it does not provide for the payment to the Applicant, as from September 30, 1987, of the periodic salary review increases approved by the Respondent for staff members in grade 27;
3. the Respondent shall pay the Applicant costs in the amount of \$1,000; and
4. all other pleas in the application are dismissed.

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga
President

C.F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, November 7, 1988