

## Decision No. 238

Ava Virginia Tucker,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on May 22, 2000, by Ava Virginia Tucker against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of Robert A. Gorman (President of the Tribunal) as President, Elizabeth Evatt and Jan Paulsson, Judges. The usual exchange of pleadings took place, in which the Respondent both challenged admissibility on jurisdictional grounds and raised defenses to the merits of the application. The case was listed on February 14, 2001.

### **The relevant facts**

2. The Applicant seeks review and reversal of a decision made by the Pension Benefits Administration Committee (PBAC) to deny her a disability pension. The Applicant joined the Bank in April 1985 as a Staff Nurse with the Medical Department, and she remained in that position until the ending of her employment in 1998. In 1986, she began treatment with a rheumatologist, Dr. Rothenberg, and in the early 1990s she began to experience more diffuse pain and body aches, which led to difficulty in sleeping, daytime fatigue, a rapid heart rate and other ailments.

3. In 1996, Dr. Rothenberg diagnosed the Applicant's condition as fibromyalgia, a condition of unknown origin that affects the soft tissues around the body joints and is manifested in fatigue and pain. The Applicant continued her work with the Respondent, but her sick days for that year increased to 24.5 days. On January 24, 1997, Dr. Rothenberg examined the Applicant and described her condition in writing: "She suffers from multiple medical problems including fibromyalgia syndrome, arachnoiditis [chronic pain syndrome] of the lumbosacral spine with chronic and severe back pain, chronic gastritis, chronic anxiety and chronic tachycardia. ... recurrent urinary tract infections and sinus infections." It was Dr. Rothenberg's opinion that the Applicant should reduce her work schedule from 40-50 hours a week to 30-35 hours in order to allow for adequate rest.

4. One month later, the Applicant was admitted to a hospital complaining of a prolonged headache, back pain, fever, dizziness and vomiting. Upon Dr. Rothenberg's recommendation that she be placed on one month of sick leave from the Bank, the Bank's Health Services Department so authorized, from February 24 to March 23, 1997. On March 25, after re-examining the Applicant, Dr. Rothenberg in a letter "to whom it may concern" wrote:

The patient continues to have multiple medical problems, including chronic arachnoiditis of the lumbosacral spine, fibromyalgia syndrome and clinical depression. The patient continues to have active and disabling problems associated with her illness which are chronic at this point. It is my professional medical opinion with a reasonable degree of medical certainty that Ava Tucker is permanently and totally disabled, such that she can no longer perform her duties as an occupational and tropical medicine nurse at the World Bank.

5. On April 22, 1997, the Applicant submitted an application for a disability pension to the PBAC under Section 3.4(a) of the Staff Retirement Plan (SRP) which then provided:

A participant making contributions to the Plan on the date his written application is received and who has not then reached his normal retirement date, shall be retired on a disability pension if one or more physicians designated by the Administration Committee certify, and the Administration Committee finds, that the participant was then totally incapacitated, mentally or physically, for the performance of any duty with the Employer which he might reasonably be called upon to perform and that such incapacity is likely to be permanent.

In her application to the PBAC, the Applicant, then 44 years of age, listed several adverse medical conditions, including acute back pain, chronic fast heart rate, excessive fatigue and chronic pain. These conditions, she wrote, made it difficult to work, caused anxiety, and made it painful to sit down for extended periods of time or to drive. She acknowledged that she could perform "a low stress job, with measured physical requirements, time allowed for regular daily stretching/exercising and rest periods." Stating that her present work demanded accuracy, and mental and physical agility, she concluded: "My body and mind can no longer meet the demands of my job."

6. The Applicant's claim for disability retirement was accompanied by Dr. Rothenberg's responses to a medical questionnaire. He listed what he believed to be the Applicant's ailments, including fibromyalgia syndrome, tachycardia, back pain, chronic fatigue, depression and migraine headaches. In describing the level of the Applicant's impairments, Dr. Rothenberg stated that there was no impairment of basic mental functions, mild impairment regarding "routine caretaking activities" and memory, and severe impairment in "moderate physical activities." He opined that the Applicant's condition would not improve. Although he concluded that she was "incapacitated to perform any full time work or work with a stressful or rapid pace," Dr. Rothenberg added that she was capable of working less than 20 hours a week "with frequent rest periods in a non-stressful, slow paced environment."

7. Pending a decision by the PBAC, the Applicant was placed on extended sick leave with pay. In the course of reviewing her disability claim, the PBAC's Medical Advisor, Dr. Fiscina, recommended that she undergo independent medical and psychiatric examinations. The medical examination was conducted on June 10, 1997 by Drs. Kuo and Ng of the National Rehabilitation Hospital Center for Spine, Sports and Occupational Rehabilitation. They concurred with Dr. Rothenberg's diagnoses of the Applicant's ailments and agreed that it was "improbable that she could function adequately to meet the demands of her current job." They opined, however, that she was not "functioning at her maximum capacity" and that she could "benefit from a comprehensive pain management and functional restoration program which combines pain and stress management with physical therapy reconditioning as well as systematic trial of medication."

8. Psychiatric evaluations of the Applicant were conducted on June 17 and 19, 1997 by Dr. Nover, who opined that the Applicant suffered from an adjustment disorder with mixed anxiety and depressed mood secondary to her general medical condition. He concluded:

It is my medical psychiatric opinion that Ms. Ava Tucker is not totally and permanently disabled. She and her internist Dr. Rothenberg both anticipate that she will be able to return to work part-time (up to four hours a day). It is my opinion that she has not had sufficient psychiatric treatment for her Adjustment Disorder and accompanying anxiety and depression. I believe there is a psychological overlay to her physical signs and symptoms and that with adequate psychiatric treatment these may lessen. ... [Her anxiety and depression] would substantially improve, with symptom relief, with appropriate psychiatric treatment.

9. On August 22, 1997, the PBAC Medical Advisor submitted to the Committee his report on the Applicant's disability pension claim, along with the medical evidence of record, including the reports of Dr. Rothenberg and of Drs. Kuo and Ng, and what appears to have been his oral summary of the opinion of Dr. Nover. The Medical Advisor concluded that the Applicant was "not totally and permanently incapacitated from performing any task that the Bank might reasonably ask of her," that she was not functioning at her maximum capacity, and that further improvement was likely with appropriate therapy if the Applicant was so motivated. He recommended that the application for disability retirement be denied.

10. On October 3, 1997, the Bank's Human Resources Department prepared a report which it submitted to the PBAC. The report stated in part that if the Applicant's claim for disability retirement was not approved, her department would recommend her termination on the basis of ill health, because "[a]lthough her doctors feel that she is capable of working 20 hours per week, [the Health Services Department] would be unable to accommodate a reduced work schedule for her."

11. The PBAC met on October 29, 1997 to review the Applicant's application. After considering the evidence and the report of the Medical Advisor, the PBAC concluded that the Applicant was "not totally or permanently incapacitated from performing any duty the Bank might reasonably ask of her." The Committee informed the Applicant the next day that her claim for a disability pension was denied.

12. Little more than two weeks later, on November 18, 1997, the Tribunal rendered its judgment in *Shenouda*, Decision No. 177 [1997]. There, the Tribunal reversed the decision of the PBAC denying the disability pension claim of a staff member also suffering from fibromyalgia. In its judgment, the Tribunal overturned the PBAC's decision to disagree with the conclusions of the applicant's physician, Dr. Rothenberg (the same physician as in the present case), as well as the PBAC's endorsement of the adverse recommendation of the Medical Advisor (the same person and recommendation as in this case). These conclusions by the PBAC were held by the Tribunal to be "contrary to the clear weight of the evidence actually before it." The Tribunal, in addition, itemized its concerns with respect to the procedural safeguards afforded to Ms. Shenouda throughout the course of the proceeding before the PBAC. The Tribunal in *Shenouda* declared that the applicant there was entitled to disability pension benefits.

13. Ms. Tucker's employment with the Bank was terminated on February 11, 1998, on the basis of her ill health and an inability on the part of her department to accommodate a reduced work schedule. At that time, the Applicant was paid a lump sum severance equal to 15 months' pay.

14. The Applicant asserts that it was not until late in the year 1999 that she first learned of the Tribunal's November 1997 decision in *Shenouda*. Thereafter, on November 8, 1999, she submitted to the PBAC a request for reconsideration of her original disability application. She alleged that her case was even stronger than that of Ms. Shenouda, and that the PBAC should have informed her of the Tribunal's judgment in that case and of the Tribunal's concerns regarding due process in PBAC proceedings. The Applicant supported her request with medical opinions by Dr. Rothenberg dated February 18, 1998 and August 12, 1999; in both, he attested to the Applicant's total and permanent disability.

15. The PBAC met in January 2000 and again in February 2000 to address the question whether new information warranted a change in its 1997 determination regarding the Applicant's incapacity. At the latter meeting, the PBAC reiterated that its 1997 decision was based on the Applicant's ability to work part time and the susceptibility of her condition to improvement under appropriate care and treatment. The PBAC concluded that the evidence submitted with the Applicant's request for reconsideration – medical assessments relating to her condition in 1998 and 1999, and reference to the Tribunal's decision in *Shenouda* – was not new relevant information that had any material bearing on that earlier decision, which addressed the Applicant's condition at the time she filed her PBAC application in April 1997.

16. By a letter dated March 9, 2000, the Applicant was informed by the PBAC of that conclusion and of its resulting denial of her request for reconsideration. On May 22, 2000, the Applicant submitted her application to the Tribunal. She there cites, as the contested decision, the "[d]ecision to deny [her] a disability pension."

### **Contentions**

17. The Respondent's principal defense to the application is that it was not timely filed. The pertinent requirement of the Statute and Rules is that review of a rejected disability pension claim must be sought within ninety days of receipt of the PBAC's decision; the decision having been received in late October 1997, an application to the Tribunal should have been filed no later than the end of January 1998, but instead it was filed

in May 2000, more than two years late. The Bank asserts that the fact that in the meantime the PBAC had considered, and rejected, the Applicant's request for reconsideration should not start a new running of the ninety-day appeal period. Alternatively, if the Tribunal were to consider the merits of the Applicant's appeal, the Respondent contends that, unlike the *Shenouda* decision, there is ample evidence to support the 1997 decision of the PBAC to deny the application for pension disability benefits, given the results of independent medical and psychiatric examinations which show that, although the Applicant was disabled in the performance of her then full-time work, the incapacity to perform work reasonably assigned by the Bank was neither total nor likely permanent.

18. The Applicant contends that her application to the Tribunal is not time-barred. She asserts that, given how soon the Tribunal decided the *Shenouda* case after the PBAC denied her disability pension claim, and given the flaws pointed out there by the Tribunal in PBAC practices, the PBAC was obliged to inform the Applicant of the *Shenouda* decision and of her right to appeal to the Tribunal. She also contends that when the PBAC denied her claim, she was on medical leave and incapacitated, which excuses any failure to seek timely review. She claims that she acted promptly in seeking reconsideration from the PBAC after the *Shenouda* decision came to her attention, and in thereafter filing an application with the Tribunal directed against the March 9, 2000 decision of the PBAC denying such reconsideration. With respect to the merits, the Applicant contends that the medical evidence before the PBAC, fairly interpreted, strongly supports the conclusion that she was totally and likely permanently unable to resume any Bank employment; and that this was confirmed by the Bank's own failure to retain her services for reasons of health. The Applicant therefore seeks, as a remedy, entitlement to a disability pension retroactive to the date on which she ceased to be a staff member, and attorney's costs.

### **Considerations**

19. The Tribunal must address the question whether the application has been timely filed. According to Article II(2) of the Statute of the Tribunal:

No ... application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless ... the application is filed within ninety days after ... receipt of notice, after the applicant has exhausted all other remedies available within the Bank Group, that the relief asked for ... will not be granted.

With respect to pension cases, Rule 22 of the Rules of the Tribunal provides that:

Where an application is brought against a decision of the Pension Benefits Administration Committee of the Bank, the time limits prescribed in Article II of the Statute are reckoned from the date of the communication of the contested decision to the party concerned.

The issue is therefore whether the ninety-day period for filing the application is to be reckoned from the date on which the Applicant learned of the October 30, 1997 PBAC denial of her application for a disability pension, or from the date on which she learned of the March 9, 2000 PBAC denial of reconsideration. Which is properly to be considered "the contested decision"?

20. The Tribunal concludes that, under Rule 22, the Applicant is clearly challenging the PBAC decision of October 30, 1997 to deny her application for disability pension benefits. At that time, the Manager, Pension Administration, wrote to the Applicant:

This is to inform you that the Pension Benefits Administration Committee, which met on Thursday, October 29, 1997, denied your application for a disability pension under the Staff Retirement Plan (Plan). This determination was based on consideration of the medical evidence submitted with your application. The Committee's conclusion was that your application did not meet the criteria for disability retirement as specified in Section 3.4(a) of the Plan. ...

This was an unequivocal statement that the PBAC, to which the Applicant had submitted her application for pension benefits in April 1997, had met and had decided to deny that application so that she would receive none of the benefits sought by her. This was a clear decision that adversely affected the Applicant, and both

the Statute and the Rules contemplate that any challenge to that decision is to be made promptly and is to be made directly to the Tribunal. (*Courtney (No. 2)*, Decision No. 153 [1996].) Instead, the Applicant took no further steps to assert her entitlement to pension benefits until more than two years later, on November 8, 1999 – after she had learned of the *Shenouda* decision by the Tribunal – and then, in the form of a request to the PBAC for reconsideration.

21. It is instructive to note that, in an important respect, the *Shenouda* case on which the Applicant so heavily relies, actually weakens her position on the jurisdictional issue. There, the decision of the PBAC was in early June 1996 and Ms. Shenouda filed her application to the Tribunal in early September 1996, within 90 days of the PBAC's denial of her disability pension benefits. There is no convincing reason why the Applicant in the instant case, acting more than a year later, could not have similarly pursued her appeal to the Tribunal in a prompt fashion. The Applicant here asserts that her delay should be overlooked because of her late awareness of the *Shenouda* decision, because it might have supported the merits of her claim. But on this defective logic, Ms. Shenouda would never have filed an appeal, because there was no relevant precedent. Yet she proceeded in a timely fashion to challenge her adverse PBAC decision.

22. In any event, the Tribunal has frequently held that unawareness of the Tribunal's precedents and of the time limits for pursuing review is no excuse. As was recently held with respect to the untimely invocation of administrative review proceedings:

[I]gnorance of the law is no excuse. ... Rather, it was the Applicant's obligation to keep himself apprised of his rights and to submit his request for administrative review in good time. ... Having worked at the Bank for more than five years, the Applicant was in a position to know of the time limits for making a request for administrative review. At the very least, he could have made a prompt attempt to assert his rights by contacting the obvious sources within the Bank, such as the Staff Association, the Office of the Ombudsman or the Ethics Office.

(*Levin*, Decision No. 237 [2000], para. 21.) The Tribunal would add, as obvious sources of pertinent information concerning rights of review or appeal, the Applicant's Human Resources Officer and the PBAC itself. True enough, the Applicant ultimately did seek recourse from the PBAC, in her request for reconsideration. But even that was not submitted until some two years after the initial denial of her application for disability pension benefits.

23. It is the Applicant's contention that the burden was upon the Respondent to inform her of her means of appealing the PBAC decision, and of the obviously relevant judgment of the Tribunal that was rendered so soon after that adverse determination. In view of the precedent-setting nature of the *Shenouda* decision, the arguably strong similarity between the two cases, and the closeness of that decision in time to the PBAC decision here, the Applicant's position is not unsympathetic. Indeed, the Tribunal encourages the PBAC, if it does not do so already, to inform rejected applicants of their rights of consultation and appeal within the Bank. Nonetheless, it is the conclusion of the Tribunal that for the Bank not to have done so in the instant case cannot be viewed as a denial of due process of law or as an arbitrary action, giving rise to a breach of the terms of employment. The burden remains with disappointed applicants before the PBAC to take the initiative to learn of whatever procedural and substantive rights they may have under the pertinent staff rules and Tribunal judgments.

24. Nor does the Applicant make a convincing case for medical incapacity as an excuse for untimely resort to the Tribunal. The Tribunal has indeed acknowledged that serious illness may constitute the sort of "exceptional circumstances" that warrant a waiver of the time limits set forth in Article II of the Statute. (*See, e.g., A*, Decision No. 182 [1997].) But there is no evidence that the Applicant, although on extended medical leave at the time of the PBAC decision of October 30, 1997, was unable to pursue her appeal to the Tribunal. Indeed, in November and early December 1997, the Applicant was engaged in discussions with her former director and with Human Resources regarding the terms of her separation from the Bank; this indicates not only that she was well enough to address personnel matters at that time, but also that she had natural interlocutors for any questions about her disability pension rights after the adverse decision from the PBAC.

25. The Applicant contends that any failure to take a timely appeal to the Tribunal of the PBAC decision of October 30, 1997 is effectively cured by her request for reconsideration presented to the PBAC in November 1999 and the timely application to the Tribunal when the PBAC decided in March 2000 not to modify its earlier decision denying disability pension benefits. The Tribunal, however, has frequently held that applicants may not circumvent the time limits set forth in the Statute by requesting a decision-maker within the Bank to reconsider a decision made long before, and then treating a refusal to reconsider as a new decision that may be reviewed by the Tribunal.

26. In one such judgment, the facts were very similar to those here. In *Agerschou*, Decision No. 114 [1992], the PBAC in January 1989 denied the applicant's request to modify the effective date of his pension, and also notified him in July 1991, after several intervening requests for reconsideration, that it adhered to its original decision. The Tribunal concluded that the only decision taken by the PBAC was the one notified to the applicant in January 1989, which was simply confirmed two and one-half years later. The Tribunal concluded, in paragraph 42:

If the possibility were given to the members of the staff, after having exhausted the internal remedies and having received final notice that their request is not granted, to ask time and again for a reconsideration of their cases and to argue that the subsequent confirmation by the Respondent of its previous decisions reopens the 90-day time limit for applying to the Tribunal, a mockery would be made of the relevant prescriptions of the Statute and the Rules. These prescriptions are far too important for a smooth functioning of both the Bank and Tribunal for the Tribunal to be able to concur in such a destructive view.

27. One aspect of the *Agerschou* case that might warrant its being distinguished here is that the PBAC's refusal to reconsider in that case was essentially peremptory, while in the instant case the PBAC actually reviewed its earlier decision and the additional medical assessments from Dr. Rothenberg put forward by the Applicant. The PBAC thus could be viewed as having indeed made a new substantive decision that should start a new ninety-day period for seeking review by the Tribunal. Rejecting appeals of peremptory PBAC decisions as untimely, while entertaining appeals from considered decisions, might of course encourage the PBAC, as well as other decision-makers within the Bank when they find themselves in a similar position, to treat reconsideration requests with less than an open mind. Such an outcome would hardly benefit the staff or the cause of fairness in personnel relations. Moreover, the distinction will in many cases be difficult to draw.

28. Even, however, if the Tribunal were to consider that the application in this case was directed against the PBAC's reconsideration decision, and to examine on the merits the PBAC's reaffirmation on March 9, 2000 of its denial of benefits, the Tribunal would sustain the PBAC as having acted well within its discretion. The PBAC, as manifested in the minutes of its January and February 2000 meetings, reviewed its determination that in mid-1997, when the Applicant applied to the PBAC, her disability was neither total nor likely permanent, and concluded that the 1998 and 1999 assessments of her medical condition and the reference to the Tribunal's decision in *Shenouda* were not "new relevant information ... that would have been material to the Committee's 1997 decision denying [the] application for a disability pension." It was not unreasonable for the PBAC to conclude that entitlement to disability pension benefits is to be determined, under Section 3.4(a) of the Staff Retirement Plan, as of the date of the application therefor, and that poor health a year or two thereafter (indeed, after separation from the Bank) may properly be given little or no weight.

29. The Tribunal concludes that the Applicant failed to comply with the ninety-day requirement of the Statute of the Tribunal in filing her application for review of the PBAC decision to deny her a disability pension. Accordingly, the application must be dismissed.

### **Decision**

For the above reasons, the Tribunal unanimously decides that the application is inadmissible.

/S/ Robert A. Gorman

Robert A. Gorman

President

/S/ Nassib G. Ziadé

Nassib G. Ziadé

Executive Secretary

At Washington, D.C., April 26, 2001