

Decision No. 146

Valora Addy,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of A.K. Abul-Magd, President, E. Lauterpacht and R.A. Gorman, Vice Presidents, and Bola A. Ajibola, F. Orrego Vicuña, Thio Su Mien and P. Weil, Judges, has been seized of an application, received on March 30, 1995 by Valora Addy, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on September 5, 1995.

The relevant facts:

2. The Applicant held a regular appointment from June 1978 to December 1988 as a Personnel Assistant in the Europe, Middle East and North Africa (EMENA) Personnel Team. When in December 1988 the Vice President, EMENA, decided to abolish one of the Personnel Assistant positions and to convert the other to a Personnel Officer position, the Applicant volunteered to have her position abolished. The Applicant was separated from the Bank under the provisions of Staff Rule 7.01, paragraph 8, and received the standard severance payments.

3. By electronic mail, dated June 22, 1992, from the Director, Personnel Management Department (PMD), to the Principal Recruitment Officer, Recruitment Division, PMD, the former authorized the hiring of the Applicant for a six-month consultancy assignment. He also stated that he would be unlikely to approve rehiring to a permanent position in cases where a staff member had left the Bank with a full redundancy package, should such an issue arise with the Applicant.

4. The Applicant's letter of appointment, dated July 14, 1992, included, among others, provisions on an initial six-month duration of her assignment, on the Bank's discretion to adjust the terms of the assignment by shortening or extending its duration, on the Bank's guidelines for a total duration of long term consultant appointments up to four years, and on relocation expenses and their status in case the Applicant's appointment was converted to a regular or fixed-term one within a year. The Applicant's appointment commenced on August 3, 1992. After her initial six-month appointment expired, it was renewed for one year, through February 2, 1994 and then for six additional months, through August 2, 1994.

5. On January 21, 1994 the Applicant applied for a regular position, announced through the Vacancy Information Service (VIS), of Senior Recruitment Officer. The Applicant was not selected for that position.

6. In April 1994, Staff Rule 4.01, paragraph 8.03, was amended. It now stated that a former staff member whose employment had been terminated with the payment of severance payments under Rule 7.01, "Ending Employment", would not be reappointed to a Regular or Fixed-Term appointment and might be reappointed with the approval of the manager to a Consultant appointment for periods not to exceed 120 working days in the aggregate in any twelve months.

7. By memorandum, dated April 6, 1994 to the Deputy Director, PMD, the Applicant asked for an explanation as to why she could not return to the Bank in a regular capacity. The Deputy Director, PMD, responded by memorandum, dated April 8, 1994, to the Applicant informing her, among other things, that a new policy had been introduced under which, in effect, she could not be rehired to a regular staff position and there was a limit

of 120 days service for consultants in any one year.

8. By memorandum, dated May 17, 1994, to the Director, PMD, the Applicant requested administrative review of the decision that her consultant appointment was limited to 120 days per year and that her appointment could not be converted to a regular one.

9. By memorandum, dated May 23, 1994, to the Applicant the Director, PMD, confirmed the two decisions of which the Applicant had requested reversal and added that at the time of the Applicant's employment with the Bank there was no promise of a regular appointment and that although in her letter of appointment there was a reference to a "four-year cap" for consultancy appointments this was not meant as a guarantee. Furthermore, he stated that staff were bound by the Staff Rules in effect when they were hired and as they were amended.

10. By memorandum, dated June 29, 1994, the Deputy Director, PMD, officially informed the Applicant of the amendment of Staff Rule 4.01, paragraph 8.03, which was declared to be effective as of April 15, 1994, and the manner in which it would apply to her.

11. In the meantime, on June 22, 1994 the Applicant filed an appeal with the Appeals Committee in which she stressed, among other things, that, when the Bank terminated her regular appointment under Staff Rule 7.01, paragraph 8.01, it did not have at the time a policy of prohibiting staff from rejoining the Bank on a regular appointment provided that they had not left the Bank on terms and conditions applied to those who left because of the 1987 Reorganization. Nor did the Staff Rules in effect when the Applicant had accepted reappointment by the Bank as a consultant prohibit her from rejoining the Bank as a regular staff member or limit the number of consultant working days per year.

12. In its report, dated December 23, 1994, the Appeals Committee found, among other things, that the amended Staff Rule was very unfair with regard to the Applicant and that grandfathering should apply to consultants whose previous regular employment had been terminated with the payment of severance payments under Rule 7.01 so that they would be able to work on a full time basis up to four years if they entered employment before April 1994. The Committee also found that the Applicant's ability to apply for a regular position should not be grandfathered. Therefore, the Committee recommended that

(a) The Appellant's requests for (i) a regular position and (ii) compensation, be denied.

(b) The Appellant's request to continue to benefit from the Rule which allowed her to work continuously, without the 120 days restriction, until the four year cap expires, be granted.

13. By letter, dated January 3, 1995, to the Applicant the Acting Senior Vice President, Management & Personnel Services (MPS), stated that he accepted the recommendations of the Appeals Committee and that he would therefore allow the Applicant "to work continuously until the four-year cap expires, without the 120-day- per-year limitation". On January 12, 1995, however, the Applicant was informed that her employment would not be extended.

14. By memorandum, dated January 18, 1995 to her Division Chief the Applicant stated that she had been told that her contract would not be extended, pointed out that there was a conflict between this decision and that of the Acting Vice President, MPS, and requested clarification on the matter. By memorandum of the same date, her Division Chief informed the Applicant that he did not need the services of a Long-Term Consultant since there was a freeze on the recruitment of support staff and a slow down in higher level recruitment and, therefore, her contract could not be extended.

15. There followed, in January and February 1995, an exchange of letters between the Applicant or her attorney and the Senior Administrator, MPS, in which disagreement was expressed as to whether the Bank, in accepting the recommendation of the Appeals Committee, had committed itself to retaining the Applicant as a consultant for a full four-year period or whether it had merely waived any 120-day-per-year ceiling on her employment for what could be a maximum of four years.

16. By letter, dated February 28, 1995, to the Applicant's attorney, the Senior Advisor, MPS, indicated that, if the Applicant was claiming that she had a right to a total of four years of employment with the Bank and that the Bank's decision not to renew her contract violated that right, she would first have to exhaust the internal remedies required by the Staff Rules. He further stated that his decision to accept the Appeals Committee's recommendation did not create a moral and legal obligation to provide the Applicant with an additional 18 months of employment.

17. By letter, dated March 23, 1995, the Applicant submitted through her attorney a request for administrative review of (1) the decision not to honor the intent of the Appeals Committee's decision that the Applicant was entitled to continued employment to the end of the four year cap which was accepted by the Bank, (2) the decision of the Director, PMD, not to renew the Applicant's contract; and (3) the decision of non-renewal and termination of her contract without reasonable notice in violation of the promise in her letter of appointment. There was a request that the Bank reinstate the Applicant to her former position or an equivalent position in the Personnel Department for a period of 18 months and for compensation or, in the alternative, pay the Applicant for the 18 months of lost employment opportunity and attorney's fees.

18. By letter, dated April 21, 1995 to the Applicant's attorney, the Director, PMD, stated that the Applicant was not entitled to continuous Bank employment on the basis of the results of her appeal, as such entitlement did not exist for any consultant. He concluded that there was no basis to reinstate the Applicant or to pay her for eighteen months of service.

The Applicant's main contentions:

19. It was an abuse of authority to deny the Applicant the right to be considered for the position in the VIS announcement, because her performance was at all times satisfactory and she clearly met the criteria required for qualified external candidates.

20. The Applicant should, both in law and in equity, be treated in accordance with the provisions of the Staff Rule as it existed prior to April 1994.

21. The fact that the Applicant was told that the new Staff Rule on consultants, promulgated in April 1994, limits the number of days she could work in any one year to 120 days is a violation of her contract, which contained no such restriction. The retroactive application to the Applicant of the new Staff Rule was unlawful and was a violation of an essential condition of her contract.

22. Relying on the Recruitment Division's representations to her that she would be given a full-time consultancy contract and the possibility of reappointment as a regular staff member, the Applicant incurred great expense to relocate permanently to the Washington, D.C., area, giving up the opportunity to benefit from the contacts and associations which she established in certain major organizations in Chicago, and exceptional costs in trying to complete her studies for a college degree on a long-distance basis.

23. In the light of the Appeals Committee's recommendation that the Staff Rule limiting consultant appointments should not be applied to the Applicant, which the Respondent accepted in terms which confirmed the Applicant's right to continue in her employment through to the end of the four year period originally envisaged, the termination of her employment was a reprisal against her for having asserted what she considered to be her rights and violated Principle 2.1 (d) of the Principles of Staff Employment.

24. The Applicant made the following pleas:

(i) payment of \$139,000 equal to 3 years net salary for unfair treatment in refusing to consider the Applicant for a regular staff position;

(ii) payment of \$69,500 equal to 18 months employment and benefits for wrongful termination; or, in the alternative;

(iii) return to service with the Respondent for 18 months and payment for lost months of employment and right to apply and be considered for regular staff vacancies; and

(iv) payment of legal costs estimated at \$5,000.

The Respondent's main contentions:

25. The Applicant was subject to the amendments of the Staff Rule in question which did not touch on essential conditions of her employment and were fully consistent with the requirements enunciated by the Tribunal in de Merode (Decision No. 1 [1981]) for amendments of non-essential conditions of employment, so that she could not rely on the Staff Rule as in effect prior to the 1994 amendments.

26. Even in the absence of these amendments a consultant staff member such as the Applicant does not have any right, express or implied, (i) to be reappointed to a regular or fixed-term appointment or (ii) to continue to work as a consultant, after the expiration of the appointment, on a full-time basis or for an unlimited number of days in any twelve month period.

27. The Applicant's letter of appointment expressly stated that her appointment was that of a consultant for a period of six months and does not contain any representations or understandings regarding (a) her eligibility for conversion to another type of appointment or (b) her right to work full-time as a consultant beyond the initial six-month period.

28. Even before she accepted her appointment the Applicant was clearly on notice of the restriction on the conversion of her appointment to a regular one which in fact existed even before the amendment of the Staff Rule.

29. No representations or promises were made by the Respondent and no other special circumstances exist in the present case that would justify, on equity grounds or otherwise, exempting the Applicant from the application of the amended Staff Rules.

30. The Applicant was in fact considered for the position for which she had applied and announced in the VIS in January 1994 but she was not deemed to have the skills, qualifications and experience required for this position.

31. The Applicant has failed to state a claim that falls within the Tribunal's competence, because she has only challenged in a general way the wisdom of a policy reflected in the Respondent's adoption of an amendment to a Staff Rule which applied equally and without discrimination to all former staff members who had previously left the service of the Respondent with severance payments.

32. The amended Staff Rule is not being applied retroactively to the prior periods of the Applicant's consultant appointment.

33. The Appeals Committee's recommendation was that the Applicant be exempted from the new 120-day restriction so long as her consultant appointment continued to be extended, which extension was limited to a total period of four years at a maximum, and the Bank, in accepting the recommendation, assumed no obligation to extend the Applicant's consultant appointment for a total period of four years.

34. The Applicant has not exhausted all remedies available within the Bank Group with respect to the claim, which, therefore, is not admissible, that she has a right to a four-year appointment which the Respondent has not respected.

35. The Applicant had not sought administrative review of her salary increases or salary level and, thus, the claim relating to them is inadmissible.

36. The Applicant is not entitled to costs, because she has failed to show any exceptional circumstances that would warrant an award of costs and has not submitted an itemized statement of costs.

Considerations:

37. There are two main complaints of the Applicant in this case, namely:

- (i) that the Applicant was entitled to be considered for appointment to a regular staff position and that the Bank in failing to do so was in breach of her terms of employment; and
- (ii) that the Applicant was entitled to be appointed consultant for a 4-year period and the Bank's refusal to grant her an extension for such a period was a breach of her terms of appointment.

38. On the first claim, the Applicant contends that she was entitled to be considered for appointment to a regular staff position under her contract of employment which also incorporated the Staff Rules of the Bank; and that she was deprived of this right by the Bank in attempting to apply the amended Staff Rules to her.

39. The Applicant left the Bank in 1988 and re-joined the Bank as a consultant in 1992. After her initial 6-month appointment as a consultant, the Applicant was given a 12-month appointment which was extended for 6 months to expire on August 2, 1994 and another 6 months expiring on January 31, 1995. On January 21, 1994 the Applicant applied for a regular position with the Bank. She was informed by an officer of the Bank that she was not entitled to be considered for such a position, because she had left the Bank's employment in 1988 with financial assistance under Staff Rule 7.01. The Bank again informed her by letter dated April 8, 1994, that a new policy had been introduced under which she could not be re-hired to a regular staff position because she had earlier left the Bank with a financial package. This reason was reiterated by the Bank in its letter of June 29, 1994.

40. The relevant rule that was in effect prior to April 1994 (Staff Rule 4.01, Section 8.03 -the old rule) provided that any re-employment of a staff member requires the written authorization of the departmental director or vice president of the hiring unit.

41. In April 1994 the Bank amended Staff Rule 4.01, Section 8.03, of the Staff Rules (the new rule) to preclude persons whose contracts had been terminated pursuant to Staff Rule 7.01 from being considered for a regular appointment.

42. The legal issue here is whether the Bank could apply the new rule to the Applicant. As the Tribunal decided in de Merode (Decision No. 1 [1981], para. 31), the Bank may not apply an amended rule to existing staff, if this rule changes conditions of employment which are fundamental and essential.

43. The Tribunal is of the view that the right to be considered for a regular appointment is not a fundamental or an essential element of the terms of employment of the Applicant. The reason is that any employee of the Bank who chooses to leave with a separation package is hardly likely to be anticipating reemployment or the conditions that the Bank would place upon such reemployment. That is particularly true in a case such as this, when the Applicant's reemployment as a consultant took place some four years after she left the Bank, and when her reemployment was initiated by inquiries from the Bank rather than from her. The circumstances and terms under which a departing staff member is to be reemployed are too peripheral, speculative and remote to be regarded as fundamental and essential elements of his or her terms of employment.

44. Having concluded that the right to be considered for a regular appointment is non-fundamental and non-essential, the Tribunal has to consider whether the new rule was applied to the Applicant retroactively.

45. The Tribunal finds that in invoking as the legal ground for its decision of January 1994 not to consider the Applicant for regular reemployment a rule which was not in force in January and was going to be effective only in April, the Bank was in effect applying the new rule to the Applicant retroactively. This breach is not affected

by the later argument made by the Bank that the Applicant was not considered because she lacked the skill, qualifications and experience required for the regular position concerned.

46. The Applicant's second claim was that she was entitled to be employed as a consultant for the maximum period of 4 years, as set out in the old rule.

47. The Bank contends that such claim was inadmissible because the Applicant had not exhausted all internal remedies, as required by Article II, paragraph 2(i) of the Statute of the Tribunal. However, there are exceptional circumstances here that warrant the Tribunal's disposition of this claim on the merits. The claim regarding a four-year term as consultant is closely related to the claim that the Applicant had a right to serve in that capacity longer than 120 days per year, and the latter claim was in fact made the subject of administrative review and was addressed by the Appeals Committee. Indeed, the claim for a four-year term is based squarely on one of the recommendations of the Appeals Committee which was accepted by the Bank.

48. The Appeals Committee had recommended that the Applicant be allowed to continue to benefit from the old rule which allowed consultants to work continuously up to a maximum of 4 years without the 120 day restriction. The Bank accepted this recommendation. However, the Bank interpreted the recommendation to mean that, although the limitation of 120 days did not apply to the Applicant, it did not imply that the Applicant was entitled to a consultancy for a full four years.

49. The Tribunal is of the view that prior to the 1994 amendment to the old rule the Applicant did not have a right to 4 years' appointment as a consultant. The 4 year period is only a maximum allowable period for such an appointment. There is, thus, no basis for the Applicant's claim on this score.

50. The Applicant also contends that she has suffered from discriminatory treatment and unfair labor practices. She argues that she was employed at a level of salary lower than she was entitled to under the Bank's guidelines. She also alleges that she should have been given more notice of termination of her contract. The Tribunal is of the view that these claims are inadmissible because the Applicant did not exhaust internal remedies.

51. In view of the fact that the flaw, noted in paragraph 45, in the Respondent's communication of its decision to the Applicant not to consider her for a regular appointment negates the right that she then had, the Tribunal orders the Bank to pay reasonable compensation. It would be improper to quash the Bank's decision both because its refusal to consider her for a regular appointment cannot practicably be undone and because, even had she been considered, the rehiring might not have materialized on other grounds.

Decision:

For the above reasons, the Tribunal unanimously decides:

- (i) to order the Bank to pay the Applicant compensation equitably assessed in the amount of \$8,000;
- (ii) to order the payment to the Applicant of legal costs of \$2,000; and
- (iii) to dismiss all other pleas.

A. K. Abul-Magd

/S/ A. K. Abul-Magd

President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At Washington, D.C., November 9, 1993