

Decision No. 114

Hans Agerschou,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A.K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F.K. Apaloo, R. A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received October 1, 1991 by Hans Agerschou against the International Bank for Reconstruction and Development. The Respondent filed requests, which were granted, to separate jurisdictional issues from the merits and to file an answer limited to the jurisdictional issues. Thereafter the usual pleadings were exchanged on the jurisdictional issues. The case was listed on August 3, 1992.

The relevant facts:

2. The Applicant, a Danish national, was a Senior Ports Engineer when at the age of 47 he terminated his employment with the Bank as of May 30, 1980, after nine years of service. Under the Staff Retirement Plan the Applicant's entitlement to a pension became vested with payment to begin on August 1, 1987.

3. When the Applicant filed Form 159, "Application for Payment of Pension", dated June 30, 1987, he indicated that the decision whether to commute his pension and the decision as to the currency in which his pension should be paid would be made later and requested the Respondent not to "start payments until currency etc. instructions received." However, the Applicant also indicated that the effective date for the commencement of his pension payments was August 1, 1987. On the basis of this application the Respondent decided to "hold his application till other papers received."

4. The Applicant under covering letter, dated September 28, 1987, submitted to the Respondent completed forms Nos. 751 and 953 relating respectively to the selection of the currency of payment and the commutation of pension. The receipt of these forms was acknowledged by the Respondent by letter dated October 13, 1987. By letter, dated November 13, 1987, the Respondent, among other things, informed the Applicant that in accordance with the rules a copy of which had been sent to the Applicant his pension effective date would be November 1, 1987.

5. By telex, dated November 23, 1987, the Applicant advised the Respondent that he had validly requested an August 1, 1987, pension effective date. The Respondent answered by telex, dated November 25, 1987, that because the commutation option must be elected before the pension effective date and the Applicant's election was received on October 6, 1987, the pension effective date was the first day of the month following the latter date, namely November 1, 1987. Later, by letter, dated December 22, 1987, the Respondent offered as an exception to grant the Applicant's request for an August 1, 1987 effective date provided the Applicant returned the commutation lump sum amount of \$52,147.91 with the result that he would be treated as if he had never opted to receive a commuted pension. By letter, dated February 1, 1988, the Applicant rejected this offer, arguing that an administrative error had been made. By letter, dated March 3, 1988, the Respondent replied that because the Applicant had rejected its offer, the Respondent would continue to administer his pension on the basis of the November 1, 1987 effective date.

6. By letter, dated April 25, 1988, the Applicant requested administrative review of the Respondent's decision, giving his address in Copenhagen. By letter, dated May 23, 1988, the Administrator, Staff Retirement Plan, of

the Respondent approved the decision of the Respondent, explaining that, if the Applicant did not accept the letter as a final disposition of the issues raised for administrative review, he should submit within 30 days a written request for review by the Pension Benefits Administration Committee (PBAC) or, alternatively, within 90 days file an appeal with the Tribunal.

7. By letter, dated September 21, 1988, the Applicant opted to appeal to the PBAC, stating also that the Respondent's letter had "recently reached me at my temporary address in Portugal." By letter, dated November 23, 1988, dispatch to the Applicant's Copenhagen address, the Respondent sent the Applicant copies of a draft memorandum with attachments which it intended to circulate to the PBAC and requested him to submit before December 9, 1988, any further comments or documents for the PBAC's consideration. The Respondent received a return receipt showing that the letter was received in Copenhagen on December 2, 1988. The Respondent also sent a telex, dated November 23, 1988, to the Applicant in India informing him that a letter had been sent to him in Copenhagen, that the Respondent had learned that he was in India, that if a fax number were sent to the Respondent copies of the letter and documents would be transmitted to him in India and that the deadline for the Applicant's response to the letter was December 9, 1988. This telex included, among other things, a telex number for the reply, which due to a clerical error was the wrong number. The Applicant sent a telex, dated December 6, 1988, to the wrong number given requesting the Respondent to fax the materials to him in India.

8. By letter, dated January 4, 1989, the PBAC informed the Applicant that his appeal had been dismissed and that, if he wished, he could, within 90 days of the receipt of the letter, appeal to the Tribunal.

9. By telex, dated March 3, 1989, the Applicant advised the PBAC that he could not appeal to the Tribunal because he had no documents and correspondence in India and that his telex, dated December 6, 1988, had either been disregarded or not received. He also requested that the matter be reopened by the PBAC after he had had time to submit additional information to the PBAC, noting that he would return to Copenhagen in mid-April, 1989.

10. By letter, dated May 1, 1989, the Respondent advised the Applicant that delivery of documents to his permanent address was valid notice of the presentation of his case to the PBAC, whether or not the documents or their contents were relayed to him or he received the telex message. The Applicant was also informed that the decision of the PBAC should be considered its final decision, that the reopening of the matter would be opposed by the Respondent's Pension and Legal Departments and that an application to the Tribunal could be opposed on grounds of failure to file in a timely manner.

11. By letter, dated August 31, 1989, replying to a letter of the Applicant, dated June 30, 1989, the Respondent reaffirmed its conviction that the communication to him at his permanent address in Denmark constituted valid notice to him of the impending action, apologized for its error in giving him the wrong telex number and, nevertheless, invited him to submit further documentation to the PBAC, noting that the Pension and Legal Departments would view further submissions as untimely.

12. By letter, dated July 15, 1990, to the PBAC the Applicant requested reconsideration of his appeal because he had insufficient notice and could not present his case.

13. By letter, dated August 3, 1990, the Respondent stated that the PBAC would be asked to consider the issue whether to reconsider the Applicant's case provided comments and documentation from the Applicant relating to the issue were received by the Respondent before August 31, 1990. The Applicant replied by letter, dated August 21, 1990, from Indonesia, that he did not receive the submission of the Respondent to the PBAC "until a few days before the matter was considered," at which time he was working in India, so that fact alone would justify reconsideration because he had no opportunity to present his case. He also stated that he did not have his files with him and could not do anything before he returned to Copenhagen in October or November.

14. By letter, dated April 28, 1991, to the PBAC the Applicant requested that it reconsider its decision of December 1988. By letter, dated July 13, 1991, the Respondent responded to the Applicant that the reply was

being sent to both addresses given in his letter of April 28, 1991 and that, since he had not submitted documents and comments by August 31, 1990, the deadline given him if the PBAC was to consider the issue whether it should reconsider its earlier decision, nothing further could be done regarding his appeal.

Respondent's main contentions on the jurisdictional issue:

15. The application is out of time because it was filed more than 90 days after the PBAC communicated to the Applicant its decision to deny the relief he had requested. The date on which the notice of this refusal, dated January 4, 1989, was received was early in 1989 so that the 90-day period expired in the spring of 1989.

16. The refusal of the PBAC to entertain the issue of whether it should reconsider its decision which was communicated in the letter, dated July 31, 1991, was not the contested decision.

17. There are no exceptional circumstances in this case which would warrant a late filing of the application. The minor mistake made by the Respondent in communicating a wrong telex number to the Applicant in India did him no harm. Besides, the Applicant was properly notified of his opportunity to submit his comments to the PBAC. It was the Applicant's consistent failures to follow through on the appeals processes that he had initiated which caused the delay for which, therefore, the Applicant must accept full responsibility. Having submitted his July 15, 1990 request for reconsideration and knowing full well that the PBAC would require a good reason to reconsider its earlier decision he did nothing until April 28, 1991, at which time he merely asked the Committee again for reconsideration. The Applicant slept on his rights and has no basis for asking the Tribunal for exceptional treatment.

18. Even if there are exceptional circumstances which warrant granting the Applicant more than 90 days to file his application he should not be permitted to file his application more than two years after the 90-day period had expired in the spring of 1989.

19. The application was not filed in January 1990, as contended by the Applicant, but in October 1991. Even if it has been filed in January 1990, this would have been nine months after the statutory deadline, which is too long anyway. If this submission was either incomplete or defective, the Applicant has not explained why it took another 21 months for the application to be completed or corrected.

The Applicant's main contentions on the jurisdictional issue:

20. The Applicant has been harmed by the error of the Respondent by the loss of his pension during three months, by a lower US dollar to Danish krone exchange rate and by the loss of interest since August 1987.

21. In any event the Respondent gave a totally unreasonable deadline for the submission of the Applicant's reply to the Respondent's submission to the PBAC, even if the Applicant had been in Denmark when the Respondent's communication arrived.

22. The Applicant believed that common sense would prevail in the long run and wanted to avoid bothering the Tribunal. He therefore, repeatedly tried to have the matter reconsidered by the PBAC.

23. The application was made within 90 days after the Applicant considered all other remedies to have been exhausted. In fact the first application to the Tribunal was made in January 1990.

Considerations:

24. According to Article II 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 the remedies available within the Bank group, that the relief asked for ... will not be granted.

Regarding 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.

25. The Respondent maintains that it is by letter of January 4, 1989 that the Applicant received notice, after he had exhausted all internal remedies, of the final decision by which in December 1988 the Pension Benefits Administration Committee (PBAC) affirmed the decision previously taken by the Actuarial and Pension Benefits Division to make his pension effective November 1, 1987 (and not, as requested by the Applicant, August 1, 1987). Consequently, the Respondent argues, the application should have been filed within 90 days of the receipt by the Applicant of the letter of January 4, 1989; absent any exceptional circumstances which might justify a derogation from the prescribed time limit, the application dated September 9, 1991 and received October 1, 1991 (i.e., some 34 months later) is time-barred.

26. The Applicant, on the other hand, contends that the decision he contests is the letter from the PBAC, dated July 13, 1991, informing him of the decision by the PBAC not to reconsider, as several times requested by him, its earlier decision of December 1988 and letting him know that “there is nothing further that can be done regarding your appeal”. Consequently, as the Applicant puts it, the application “was made within 90 days after the Applicant considered all other remedies to be exhausted”. Moreover, according to a statement in the Applicant’s Reply, “[i]n fact the final application to the Administrative Tribunal was made in January 1990”.

27. The Tribunal’s decision on the jurisdictional issue raised by the Respondent depends primarily on the determination of the event from which the 90-day time limit prescribed by the Statute and the Rules has to be reckoned. Is it the January 4, 1989 letter by which the Applicant received notice of the “final disposition of his request” by the PBAC, or the July 13, 1991 letter by which the PBAC advised the Applicant of its refusal to reconsider its previous decision and informed him that “there is nothing further that can be done regarding your appeal”, or some other event? As to the question of the date of the application – January 1990 or October 1991 – it is a minor one, as will be seen, and one without any material consequence to the solution of the matter raised.

28. In order to identify what may be called the critical date, it appears necessary briefly to recall the most important stages of the rather long and complicated procedural sequence set out in greater detail above (paras. 2 ff.).

29. (a) By decision of November 13, 1987 from the Actuarial and Pension Benefits Division the Applicant was granted an early retirement pension with the options elected by him (in particular, with a partial commutation election, which under the applicable rules has to be made prior to the effective date of the pension, and had in effect been made only on September 28 and received by the Bank on October 6). Hence, November 1, 1987 was the first possible pension effective date in that case. Nevertheless, in view of what may have been on the Applicant’s part a mere misunderstanding of the required procedure, the Respondent offered to accept withdrawal of this commutation election, to accept the return of the commutation lump sum already paid, and to process his pension with effect from August 1, 1987 as if he had never made such election. The Applicant having rejected this proposal, the Actuarial and Pension Benefits Division confirmed its decision on March 3, 1988.

30. (b) On April 25, 1988 the Applicant requested an administrative review of the decision making his pension effective November 1, 1987 on the ground that a “procedural error” had been made. The request was rejected by a letter dated May 23, 1988 from the Pension Plan Administrator. This letter, which described itself “as [a] final disposition of the issues you have raised for administrative review”, advised the Applicant that he could either request within 30 days that the PBAC review his case or, alternatively, apply within 90 days to the Tribunal.

31. (c) The Applicant chose to submit his case to the PBAC. Although he did so only on September 21, 1988, i.e., well beyond the expiration of the 30-day time limit on June 23, 1988, the Respondent did not object to the

Committee's review of the case. After several difficulties flowing from the frequent changes in the Applicant's whereabouts, the details of which are set out above (para. 7), the Applicant was advised by a letter dated January 4, 1989 from the PBAC that the Committee had in December 1988 "affirmed the decision taken by the Actuarial and Pension Benefits Division to make your pension effective November 1, 1987". The letter added that "[t]his determination represents a final disposition of your request by the Committee" and pointed out that "appeal may be made to the World Bank Administrative Tribunal within 90 days of receipt of this letter".

32. (d) Instead of following that course, the Applicant advised the PBAC on March 25, 1989 by telex that he was "unable to appeal to WBAT" because he had no documents or correspondence with him in India. Since the PBAC appeared not to have received a telex he had sent to the wrong telex number indicated to him by the PBAC, in which he had asked for some materials to be faxed to him in India, the Applicant requested reconsideration of the matter by the PBAC after allowing him time to submit additional information. By letter of May 1, 1989 the PBAC responded by stating that the Applicant had been "given adequate opportunity in the appeal proceedings to present your case to the Committee" and that the Committee's decision to affirm the November 1, 1987 effective date of his pension "should be considered its final decision". The letter added that "[t]he Pension and Legal Departments would oppose any request that the Committee consider your case further" and that "[a]n appeal to the Administrative Tribunal would also be opposed on grounds of failure to file timely".

33. (e) Apparently ignoring this suggestion, the Applicant reiterated on June 30, 1989 his request for reconsideration by the PBAC of its December 1988 decision. No additional comment or documentation was submitted. On August 31, 1989 the Pension Plan Administrator responded in the following terms:

You are free to submit to the Committee any further documentation regarding the merits of your case. However, it should be understood that any further submission will be viewed by the Pension and Legal Departments as untimely. If the Committee concurs with this view, it may decline to reconsider the case.

34. (f) Appearing to change his course, the Applicant in January 1990 by letter appealed the decision of the PBAC before the Tribunal. Since this letter, dated January 4, and received by the Executive Secretary of the Tribunal on January 10, 1990, did not fulfil the requirements of an application, the Executive Secretary called upon him to submit at least a pro forma application and drew his attention to the fact that, for the purposes of computing the time limits, the relevant date would be that of the filing of that application.

35. (g) Instead of filing an application, as required, the Applicant chose to request once again, several months later, by letter dated July 15, 1990, the reconsideration by the PBAC of its December 1988 decision. Once again, no additional comment or document was submitted. Confirming his previous position, the Pension Plan Administrator advised the Applicant by letter of August 3, 1990, that

[T]he issue of whether to reconsider your case will be put before the PBAC when it next meets provided that we receive comments or documentation from you for Committee distribution ... not later than close of business August 31, 1990, stating why you believe reconsideration is warranted and why you believe the previous decision should be changed. If the PBAC agrees to reconsider your case, the matter will be reviewed.

In the view of the Pension Plan Administrator, however, "[n]othing has come to light in the intervening time that ... would warrant a different decision".

36. (h) Far from submitting any new argument or document, the Applicant confined himself, in a letter from Indonesia dated August 21, 1990, to stating: "I do of course not have my file here and therefore cannot do anything until I return to Copenhagen in October or November". No documentation or comment whatsoever was submitted in the fall of 1990.

37. (i) Several months later, by letter dated April 28, 1991, the Applicant requested yet another time the reconsideration by the PBAC of its December 1988 decision. By letter dated July 13, 1991, sent to both addresses indicated in the Applicant's letter, the PBAC responded as follows:

As (the Pension Plan Administrator) explained in his August 3, 1990 letter to you, the issue of putting your case before the PBAC for reconsideration of its earlier decision required that you submit your comments or documentation by August 31, 1990... As you did not respond by that time, there is nothing further that can be done regarding your appeal.

38. (j) On October 1, 1991 the Administrative Tribunal received the application dated September 19, 1991 to the admissibility of which the Respondent raised the objection set out above.

39. From this recital of the main facts of the case it clearly appears that it is by the January 4, 1989 letter from the PBAC that the Applicant received notice that the relief asked for – i.e., the change of the pension effective date from November 1 to August 1, 1987 – would not be granted. Prior to the review of the case by the PBAC the Applicant had requested an administrative review, which resulted in the affirmation of the previous decision. “The date of the communication of the contested decision” of the PBAC under Rule 22 is no less clearly the date of receipt of the January 4, 1989 letter. Thus, both under Article II of the Statute and Rule 22 of the Rules, it is from the date of receipt by the Applicant of the January 4, 1989 letter that the 90-day time limit has to be reckoned. It appears from the Applicant’s telex of March 25, 1989 that he had received this letter prior to that date. Therefore, it is within 90 days reckoned from March 25, 1989 at the latest that the application to the Tribunal should have been filed. Thus, the application of September 9, 1991, received October 4, 1991, is manifestly time-barred.

40. As mentioned above, the Applicant maintains, however, in his Reply that his first application had in fact been already made in January 1990. This allegation is both unfounded and irrelevant. It is unfounded because, even if corrections have to be made, an application must first be properly filed before it can be considered an application for purposes of time limit calculations. As seen earlier, instead of filing the necessary and proper application, the Applicant waited several months and then asked again, on July 15, 1990, for the reconsideration of the December 1988 decision of the PBAC. Moreover, the application of September 1, 1991 does not even mention the so-called application of January 1990 and does not contend that the September 1991 application relates to a decision of July 13, 1991. Be that as it may, the so-called application of January 1990 itself was already manifestly untimely.

41. The Applicant also argues that it is not the January 4, 1989 letter which he actually contests but the letter dated July 13, 1991 from the PBAC advising him that, because of his failure to submit any comments or documentation in due time, “there is nothing further that can be done regarding your appeal”. Thus, the Applicant maintains, the application received by the Tribunal on October 1, 1991 was filed within the prescribed time limit.

42. The Tribunal cannot accept this contention. The only decision taken by the PBAC on the pension effective date is the decision taken in December 1988 and notified to the Applicant by the January 4, 1989 letter. As explicitly stated by this letter, the Applicant had 90 days to submit the matter to the Tribunal. The Applicant chose, however, to request several times the reconsideration by the PBAC of its December 1988 decision, without submitting any new element which might have led the PBAC to such reconsideration. The July 13, 1991 decision was a mere confirmation of the December 1988 decision. 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 the Tribunal for the Tribunal to be able to concur in such a destructive view.

43. The Tribunal, therefore, concludes that the application, dated September 9, 1991, filed more than two and a half years after the Applicant received notice of the final decision of the PBAC affirming the Bank’s decision to make his pension effective November 1, 1987, is time-barred and inadmissible.

44. Even though the Applicant only indirectly invokes the exceptional circumstances exception under Article II of

the Statute, the Tribunal may examine whether any such circumstances might, nevertheless, allow it to rule on the application.

45. The only “exceptional circumstances” that might be invoked by the Applicant in fact amount to no more than his own casual treatment of the relevant legal requirements. To the PBAC’s letter reminding him of the 90-day time limit for filing an application with the Tribunal the Applicant simply responded that because he did not have his files with him in India he was unable to appeal to the Tribunal. Later on, when the Executive Secretary of the Tribunal called upon him to make the necessary formal application in response to the Applicant’s letter of January 1990, the Applicant did not respond but, instead, requested once again a reconsideration by the PBAC of its earlier decision, and waited another year and a half before applying to the Tribunal. And when he was advised that the PBAC would decide on a possible reconsideration of its earlier decision on the basis of new comments or documentation, if any, he simply submitted none. During all these crucial years, his whereabouts changed in such a way that, to whatever lengths the Respondent went to reach him at least at his official address in Copenhagen or to locate him in some other place, allegedly he did not receive the Respondent’s communications at the right place, or did not have his files with him, or considered that whatever the statutory time limits any further procedural step might well wait until his return to Copenhagen.

46. This attitude strongly contrasts with the patience persistently shown by the Respondent, for instance, when the Respondent proposed to the Applicant that he cancel retroactively his partial commutation option with a view to allowing him to correct what he regarded as a procedural error; or when the Respondent accepted that the PBAC examine the case however late it had been brought before it; or when the Respondent did its best to locate the Applicant throughout the world and even telephoned his mother in Copenhagen to ascertain his whereabouts at the moment; or when the Respondent agreed that the PBAC be given an opportunity to rule upon a possible reconsideration of its previous decision, although, in the Respondent’s view, such reconsideration was legally objectionable.

47. It may be added that the Applicant was no less casual during the proceedings before the Tribunal. Whereas the Tribunal’s Rules explicitly provide that an application “shall set out the facts and the legal grounds on which the pleas are based”, the Applicant wrote “I am not a lawyer and I not know what you mean by legal grounds. I do not know which laws are governing the matter, if any”. Later on the Applicant requested the Tribunal to grant him an extension of time, because of the holiday season and because his counsel was on leave, to file his comments on the Respondent’s request to separate the jurisdictional issues from the merits – which extension the Tribunal granted him.

48. On more than one occasion the Tribunal has emphasized the importance of the provisions of the Statute governing time limits. To these rules the Statute itself introduces the necessary flexibility when it provides for a possible derogation because of exceptional circumstances. In the present case there are certainly no circumstances that might have put the Applicant under pressure and prevented him from complying with the prescribed 90-day time limit. It is exclusively to his own conduct that he can ascribe the extraordinary two and a half years which separate the final decision of the PBAC on his pension from the appeal to the Tribunal. As in Mendaro, this delay is “the result of conscious choice (of the Applicant) ... and could in no way be attributed to exceptional circumstances”. (Mendaro, Decision No. 26 [1985], para. 33)

Decision:

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

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C.F. Amerasinghe
Executive Secretary

At Washington, D.C., November 13, 1992