

Decision No. 98

Yolanda M. Arellano,
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 November 10, 1989, by Yolanda M. Arellano, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on June 25, 1990.

The relevant facts:

2. The Applicant joined the Bank in May 1977 as a Secretary, level D, on a regular appointment.

3. On May 20, 1983 the Applicant informed the Respondent that because of extreme financial difficulties she had to resign from the Bank in order to have access to her contributions under the Staff Retirement Plan. On May 23, 1983 her Personnel Officer informed her that her resignation was accepted, and that the Bank, as a special case, agreed to employ her as a Temporary Secretary subject to medical clearance. He also stated that that temporary assignment was liable to be terminated at any time, and that it was in no way an assurance or promise of regular employment in the future.

4. On June 15, 1983 the Bank offered the Applicant a temporary appointment from July 1, 1983 through May 31, 1984 which subsequently was extended through June 28, 1985.

5. Meanwhile, in February 1985, the Applicant was diagnosed as having leukemia and took sick leave from January 29, 1985 until June 28, 1985, the date of the expiration of her temporary appointment. Because she had overdrawn 62 days sick leave, the Bank for compassionate reasons on December 3, 1985 decided to write off those 62 days of sick leave.

6. In November 1985 the Applicant, having recovered from her illness, was hired as an agency temporary and was assigned to the Latin America and Caribbean Projects Department of the Bank.

7. In June 1986 the Applicant applied officially for a regular appointment at the Bank. On June 25, 1986 the Medical Department determined that the Applicant: "does not meet the required medical standards. The assessment may be reviewed after treatment and an improvement in her health status, which in this case would be 5 years from the time of diagnosis." Consequently, on July 1, 1986 the Bank's Personnel Management Department (PMD) informed the Applicant that, because the Medical Department had not cleared her for appointment, the contingent offer of employment she had received had to be withdrawn.

8. The Applicant continued working with the World Bank in the capacity of an agency temporary during the years 1986 and 1987.

9. In June 1987 she wrote to the President of the World Bank asking him for his support to obtain permanent employment because the Bank's Medical Department would not clear her for regular employment despite the fact that medical evidence had showed that she was free of cancer and physically able to work. She stated that

the Bank was employing her as an agency temporary and indirectly profiting from this situation by utilizing her services and experience at less cost since she did not enjoy the benefits of a regular staff member.

10. In reply, the Vice President, Personnel (VPP), assured the Applicant on July 17, 1987 that at the end of the five-year waiting period she would be offered employment. He explained that the five-year requirement was based on the United Nations Guidelines and on the Bank's own experience which showed that it was prudent to allow this passage of time before considering the readmittance of those candidates for employment with medical case histories of a serious nature.

11. On February 19, 1988 the Applicant wrote to the VPP to let him know, *inter alia*, that having read the Guidelines he referred to in his last letter, she had found nothing specifically spelling out that because of her medical history she could not be reemployed. Furthermore, she stated that a Section Chief was hired in the Office of the Director of the Economic Development Institute (EDIDR) who not only had had a cancer history, but was continuing to receive treatment at the time of her recruitment and thereafter.

12. On March 17, 1988 the VPP replied that the Bank's medical policy concerning medical clearance for Bank employment was based upon the "consultations with the UN employment guidelines and our own judgment as prudent employment policies." He added that he had to respect the privacy and confidentiality of staff members and, therefore, could not comment on the case of the Section Chief of the EDIDR that the Applicant had mentioned in her letter.

13. The Applicant, who was still working with the Bank as an agency temporary, unsuccessfully sought administrative review of the decision denying her permanent employment, and on April 22, 1988 filed an appeal with the Appeals Committee.

14. On June 26, 1989 the Appeals Committee rendered its report concluding that the Bank did not act incorrectly in treating her as a new staff member and in applying to her the rules relating to the hiring of new staff. Nonetheless the Committee recommended that the Bank should reconsider its decision not to hire the Applicant and should consider some financial assistance on compassionate grounds due to the hardship suffered by the Appellant.

15. In a letter to the Applicant, the Senior Vice President, External Affairs and Administration (SVPEA), expressed his agreement with sentiment expressed by the Appeals Committee and said that he had asked the VPP to offer the Applicant a regular appointment as soon as a suitable vacancy could be identified, with eligibility to join the medical insurance plan, and that he had also authorized the VPPER to waive the short time remaining on the original 5-year waiting period for eligibility for medical benefits. He concluded that, since the Committee did not find any breach in the terms of her employment, there was no basis for the Bank to extend to her any other financial assistance.

16. The Applicant obtained regular appointment with the Bank as of March 12, 1990, as Secretary grade 14 in the Cofinancing and Financial Advisory Services Departments.

The Applicant's main contentions:

17. The Bank violated the Applicant's legitimate expectancy for continued employment by denying her permanent employment for several years solely because of her history of cancer.

18. The Bank's Medical Department violated the terms and conditions of the Applicant's employment, because at the time she applied for employment, without giving her a complete medical examination, it refused to give her medical clearance. Therefore, the Medical Department had violated its own rules and deprived the Applicant of the right to be evaluated on the basis of her medical condition at the time of the decision.

19. The Bank's Medical Department also arbitrarily refused to declare the Applicant eligible for a five-month renewable appointment, notwithstanding that she had furnished the required medical certificate from her

personal physician and that she was willing to pay for her medical insurance.

20. The Medical Department did not properly follow its own Guidelines in reviewing her case when it declared the Applicant “medically unfit” by classifying her as a candidate for employment instead of considering her as a staff member who fell sick “during employment”.

21. The Bank acted in violation of the Applicant’s Terms and Conditions of Employment by accepting the recommendation of its Medical Department. The Bank’s financial justification for the application to the Applicant of the five-year rule because of her history of cancer provides little support for its position.

22. The Bank’s five-year rule would constitute illegal employment discrimination and is contrary to public policy under both the D.C. Human Rights Act and the Federal Rehabilitation Act of 1973.

23. The Applicant requested the following relief:

- (i) retroactive rescission of the decision withdrawing the offer of employment made in 1986 to the Applicant;
- (ii) compensation of:
 - \$7,000 representing 3 1/2 months of vacation pay which the Applicant would have been entitled to between 1986 and the present had she been hired as a permanent staff member in July 1986;
 - \$20,000 for emotional and mental distress during the four years of the Bank’s improper conduct; and
 - \$2,000 for attorney’s fees.

Respondent’s main contentions:

24. At no time had the Applicant held any entitlement to a regular appointment. She held a regular appointment, resigned, and in June 1986 applied for a regular appointment. Under the circumstances the Respondent had to treat her as any other external candidate.

25. The Respondent not only never undertook any obligation to reemploy the Applicant on a regular appointment, but expressly disclaimed any such obligation in a letter addressed to her by her Personnel Officer.

26. Had the Applicant’s Personnel Officer made misrepresentations to her concerning the consequences of her resignation, the Applicant could have attempted to set the record straight, write back or even withdraw her resignation owing to such a fundamental misunderstanding. However, the Applicant did nothing. Moreover, the Appeals Committee made no finding of any misrepresentation on the Personnel Officer’s part. Even if the latter had promised to rehire the Applicant in one year, there was no reason why the usual conditions that apply whenever the Bank hires any person would not apply in the Applicant’s case.

27. The Respondent denied the Applicant regular appointment in 1986 because the latter failed to obtain medical clearance from the Respondent’s Medical Department because of the episode of leukemia she had experienced in January 1985. The Applicant was denied medical clearance, because of the medical uncertainty as to the duration of the remission of her illness, notwithstanding the fact that at the time of the requested clearance she was completely well.

28. The Respondent did not perform a complete medical examination of the Applicant as provided for by Staff Rule 4.04(a), because she was medically unfit as a result of her uncontested episode of leukemia, and because of the Bank’s policy that medical clearance could not have been given until the five-year period had expired.

29. The Medical Director’s judgment was determined by reference to the “Guide to Medical Fitness Standards for Application by the International Organization in the United Nations when Awarding Regular Contracts” known as the “UN Guidelines”. In accordance with those “UN Guidelines” the Applicant, who had resigned from the Bank in 1983, was classified in the category of candidates for employment and the Medical Director’s

judgment was not based on arbitrary, capricious or irrelevant grounds, in denying her medical clearance.

30. The Applicant had undoubtedly gone through a difficult period in her life. However, that harm is not a compensable harm since it did not result from any improper action on the Bank's part. The Bank sought to ameliorate the difficulties resulting from the Applicant's illness by forgiving her overdrawn sick leave, by assigning her to work at the Bank as an agency temporary, and, finally, by granting her a regular appointment to the staff as of March 12, 1990.

31. The Applicant's request for compensation and costs should be denied.

Considerations:

32. The present proceedings have been brought with a view to securing a determination that the Bank's original decision, communicated to the Applicant on July 1, 1986, not to reemploy her was wrong and entitles her to compensation. The other relief sought by the Applicant in the proceedings before the Appeals Committee was, in effect, given by the Bank when, on March 12, 1990 the Bank reemployed the Applicant as a regular employee.

33. It will be recalled that between February and June 1985 the Applicant had suffered from leukemia but that after treatment in hospital she had obtained remission from the illness and by November 1985 was sufficiently recovered to return to work as a temporary secretary hired on a month to month basis. In June 1986 the Bank offered her permanent employment subject to medical clearance. The offer was withdrawn after this clearance was denied without a medical examination having been conducted. It is out of this failure to conduct a medical examination that the Applicant's present complaint arises.

34. The relevant provision of the Staff Manual was Staff Rule 4.01 which provides in Section 4.04 as follows:

Before an appointment to the staff of the Bank becomes effective, the Director, Medical or a physician assigned to the Health Room or retained by the Bank Group, shall have cleared the person for appointment under the following conditions:

(a) In the case of candidates selected for all appointments except as provided in subparagraph (b) below, based on the results of a complete medical examination.

(b) In the case of candidates selected for Temporary; Local Temporary; Consultant; and Local Consultant appointments of a specified duration of more than one month, but less than six months, whose positions do not require international travel, after they have submitted a certificate from their personal physician indicating that they are in good health and have no communicable diseases, and have provided any pertinent medical information which may be needed in case of a medical emergency.

The exception in sub-paragraph (b) relates to prospective temporary staff and consultants, into neither of which categories did the appointment offered to the Applicant fall, and is therefore not pertinent.

35. The requirement that clearance be preceded by "a complete medical examination" is clear. The Applicant has interpreted this provision as requiring examination by the Medical Department of the Bank to take place at or about the time when clearance is sought from the Medical Department. The Bank has replied to this contention in terms which require full quotation:

14. Applicant argues that the Bank violated its own rule when it denied her medical clearance based on its review of medical records, without performing a medical examination. She reads para. 4.04(a) of Staff Rule 4.01 as requiring that 'any decision related to medical clearance shall "be based on the results of a complete medical examination"'... Applicant misreads the provision, which must be read in the context of the general provisions of para. 4.04. Those provisions plainly provide that 'before an appointment to the staff of the Bank Group becomes effective, the Director ... Medical, shall have cleared the person for appointment ... based on the results of a complete medical examination'. The Rule plainly provides that medical clearance is a condition precedent to any appointment becoming effective. However, Respondent

did not in Staff Rule 4.01 undertake the obligation to perform a complete medical examination even in the case of candidates that are otherwise medically unfit, as in Applicant's case, due to an uncontested prior illness. Under the Bank's policy, medical clearance could not have been given until that five-year period had expired, regardless of what findings a medical examination might have yielded. It would not have served any purpose for Respondent to have undertaken to perform a medical examination in those circumstances. It could not alter the central fact that Applicant was disqualified from medical clearance because she had experienced an episode of leukemia within the previous five years.

36. As can be seen, the Bank is, in effect, saying that although medical clearance is a condition precedent to an appointment, and the giving of that clearance is a matter for the Medical Department, that Department is not under an obligation to perform a complete medical examination before denying appointment for medical reasons to an otherwise qualified applicant. The Tribunal does not see how this approach can be reconciled with the plain words of para. 4.04 of the Staff Rules, namely, that there shall have been a complete medical examination. That is what the Rule prescribes and it is to that that the Applicant is entitled. The right reserved by the Bank to reject an otherwise acceptable individual after medical examination necessarily implies an obligation upon the Bank not to reject such an individual without conducting a medical examination.

37. The attempt by the Bank to support its approach by saying that no purpose would have been served by an examination "in the case of candidates that are otherwise unfit, as in the Applicant's case, due to an uncontested prior illness" is not convincing. What matters is not whether in the particular case an examination may medically "serve any purpose" but the fact that the relevant Staff Rule prescribes that there shall be a complete medical examination. The requirement is mandatory. If the Bank had intended that the conduct of an examination should be a matter for the discretion of the medical staff in the light of the medical history of any candidate for employment it could have expressed Section 4.04 of Staff Rule 4.01 in terms which would have permitted the medical staff to base their clearance "either on the results of a complete medical examination or on their assessment of the candidate's medical history." But the Staff Rule does not say this and it is not open to the Bank to interpret the existing words in this way.

38. The Bank also argues that even if a medical examination had taken place at the time of assessment, "under the Bank's policy, medical clearance could not have been given until that five-year period had expired." The Bank goes on to say that the refusal of medical clearance to the Applicant was "a reasoned, deliberate application of established policy." The Tribunal sees two objections to this argument.

39. The first objection is that an "established policy" is something which should be capable of identification by the persons affected prior to any occasion on which it is to be applied. But in the present case no such identification was possible. At no point in its pleadings does the Bank suggest that "the established policy" was a generally known one. The closest that the Bank comes to the point is in the following statement:

The policy that resulted in Applicant's being found medically unfit rests at bottom on a medical judgement. The medical judgment was made with reference to the Guide to Medical Fitness Standards for Application by the International Organization in the United Nations when Awarding Regular Contracts (the 'UN Guidelines'). The judgment was based on the UN Guidelines as well as the Medical Department's own assessment of all the facts and circumstances presented by Applicant's case ...

By implication, perhaps, the Bank is saying that the policy is to be found stated in the UN Guidelines. If that is the Bank's argument it is defective. There is no reference to the role that the Bank attributes to those Guidelines in anything that can be regarded as forming part of the applicable terms and conditions of service. The Applicant was unable to obtain the Guidelines from the Bank and only after considerable effort and delay was she able to obtain them from the United Nations. In short the "policy" was not published in any manner sufficient to vest it with the status of a rule governing an important aspect of the relationship between the Bank and the Applicant.

40. It is a mistake to introduce as a defence to a complaint an argument based upon a dictate of policy if that policy has not previously been identified in a clear and comprehensible manner as part of the system of rules applicable between the Bank and its staff. If the Bank insists that medical assessment should remain within the

realm of unreviewable medical discretion then it must not tie that assessment to guidelines that are claimed to be controlling. If, on the other hand, it wishes to reduce the risk of any arbitrariness or unfairness in medical judgment by requiring medical staff to adhere to pre-established guidelines then the role of those guidelines must be specified, they must be made readily available for inspection and the manner of the application to any particular case must be clear.

41. The Tribunal sees a second objection to the Bank's invocation of the "application of an established policy" of which the UN Guidelines appear to form a significant part. While, in principle, the adoption by the Bank medical staff of a policy contained in the UN Guidelines or any other internal guidelines, cannot be questioned, it is essential that the application of the policy should be fully consistent with the provisions of the Staff Regulations which require a complete medical examination.

42. This is enough to dispose of the substance of the case. The Applicant should have been medically examined and she was not. It is unnecessary, therefore, to consider her other contentions.

43. The Applicant seeks rescission of the original decision of the Bank not to employ her in a permanent position. Such rescission is unnecessary because she has already been given a permanent position.

44. The Applicant also seeks compensation under three heads: (a) \$7,000 said to represent three and a half month's vacation pay to which she would have been entitled if she had been hired as permanent staff in July 1986; (b) attorney's fees in the amount of \$2,000; and (c) \$20,000 for emotional and mental distress that she has suffered as a result of the Bank's action. The Tribunal notes that the Applicant has made no reference to the fact that at the time of her illness the Bank gave her an additional 62 days of sick leave which the Bank ultimately wrote off. While the amount thus waived by the Bank was not large, it was, at the same time, not negligible. Taking into consideration all the circumstances of the case, the Tribunal will order the payment to the Applicant of compensation equitably assessed at \$6,000.

Decision:

For the above reasons the Tribunal unanimously decides that:

- (i) the Respondent shall pay to the Applicant the amount of \$6,000 net of tax;
- (ii) the Respondent shall pay to the Applicant costs in the amount of \$1,000; and
- (iii) all other pleas be dismissed.

Prosper Weil

/S/ Prosper Weil
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe
Executive Secretary

At London, England, September 28, 1990