

Decision No. 336

**B (No. 2),
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. The World Bank Administrative Tribunal has been seized of an application, received on January 10, 2005, by B against the International Bank for Reconstruction and Development. The Bank has raised a jurisdictional objection to be decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, and composed of Bola A. Ajibola (President of the Tribunal) as President, Jan Paulsson (a Vice President of the Tribunal) and Francisco Orrego Vicuña, Judges. The usual exchange of pleadings with respect to jurisdiction took place and the case was listed on March 22, 2005 to decide the issue of jurisdiction only.

2. This case concerns a claim by the Applicant for past pension credit and related compensation. The Applicant argues that the Bank's decision to limit the granting of past pension credit to those Non-Regular Staff (NRS) in service on January 1, 2002 is arbitrary. She also claims compensation for misclassification during the period of her employment with the Bank.

3. The Applicant joined the Bank in October 1992 under a full-time Temporary appointment. On June 12, 1998, she was given a Long-Term Consultant appointment which, after several short extensions, expired on November 30, 1999.

4. The Applicant first filed an application with the Tribunal on December 13, 2000, claiming that the Bank had discriminated against her and abused its discretion in not extending her contract or regularizing her position. She also claimed that her performance evaluation for the period 1998-99 was unfair. The Tribunal dismissed these claims on the merits (*B*, Decision No. 247 [2001]).

5. After an exchange of correspondence with Bank officials, the Respondent agreed, by a communication of September 24, 2004, that the Applicant could submit her present claim concerning the NRS eligibility date for past pension credit directly to the Tribunal, without submitting the matter first to the Pension Benefits Administration Committee. The Bank, however, made clear that this agreement would not apply to the Applicant's other claims and would be effective only for ninety days. The Respondent also expressly reserved its "right to raise any applicable jurisdictional objections."

The Applicant's claims

6. The Applicant argues that the Bank's decision to grant past pension credit only to NRS who were in continuous service with a pensionable appointment lasting until January 1, 2002 is arbitrary. In respect of this claim, the Applicant requests that the Bank be ordered to grant her pension credit for her service from October 19, 1992 to April 14, 1998.

7. The Applicant also claims that she was misclassified throughout her service in the Bank, and requests compensation on that account. The Applicant further requests compensation for any violation of due process, as well as costs.

8. The Bank objects to the Tribunal's jurisdiction and contends that the application should be summarily dismissed.

9. Before considering the arguments of the parties, it is important to recall the relevant regulations on pension entitlement in force at different periods in time and how they have evolved. Under the Staff Rules as in effect at the time the Applicant joined the Bank, she was not eligible to participate in the Staff Retirement Plan (SRP); she could not contribute to the SRP and her period of service did not count towards pension benefits.

10. Following the Bank's 1998 Human Resources Policy Reform, NRS were allowed to participate in the SRP from April 15, 1998. On that date, the Applicant commenced participation in the SRP. Upon her separation from the Bank, she received the pertinent retirement benefit on account of her SRP service.

11. Further changes to the SRP were introduced in its Schedule F, which became effective on December 12, 2002. Under this new policy, past pension credit was granted to NRS meeting certain defined criteria, particularly that of being in continuous service with a pensionable appointment lasting until January 1, 2002. The Applicant's contract of employment with the Bank, as noted, ended on November 30, 1999.

The claim for past pension credit: arguments on jurisdiction

12. The Respondent's first objection to jurisdiction is that the Applicant cannot now pursue a timely claim for pension service, as five years have passed since her separation from the Bank and nearly seven years since the end of her period of non-participation in the SRP. The Respondent further argues that the Applicant does not satisfy the requirements for eligibility for past pension credit because she did not hold an eligible appointment as of January 1, 2002.

13. The Applicant believes that the Bank has in respect of her service breached Principle 2.1(c) of the Principles of Staff Employment, which obliges the Bank to refrain from any action depriving a staff member retroactively of compensation in any form for services already rendered.

14. The Applicant has argued that her claim has been timely filed. She considers first that this is so in the light of the applicable 120-day limit established under Article II(2) (ii)(b) of the Tribunal's Statute. The Applicant does not consider the ninety-day period envisaged in Rule 7(8) of the Tribunal's Rules to be applicable and denies having made an agreement with the Bank concerning direct submission to the Tribunal.

15. The Applicant considers next that her application (dated January 5, 2005) was timely filed under Staff Rule 11.01, paragraph 2.01, because less than three years had then lapsed since the date on which the Executive Directors approved the past pension policy, i.e., September 17, 2002. She considers that her application was thus filed within the three-year statute of limitations provided under that Staff Rule which covers claims concerning any refund, allowance or payment due but unpaid, or any benefit not credited.

16. The Applicant also argues in this respect that the time allowed to file a complaint under common law is three years from the date on which the plaintiff becomes aware of his or her loss or claim. The Applicant also asserts that the Bank failed to give her notice of her non-inclusion on the list of staff members eligible for past pension credit.

17. The Applicant considers the Bank's objections to jurisdiction to be unfair because they are premised on the proposition that pension entitlement was fixed at the date of termination, but ignore the fact that it took ten years to decide the issue of NRS past pension credit. The Applicant also argues that it is unfair to treat the situation of NRS in the same way as that of Regular staff insofar as the fixing of pension entitlement by the date of termination is concerned.

18. Finally, the Applicant asserts that the cut-off date of January 1, 2002, laid down in Schedule F, is arbitrary as it does not take into consideration the fact that the Applicant did not receive any benefits concerning past

pension credit upon her separation from the Bank in 1999. This, in the Applicant's view, has caused her permanent damage of the kind considered by the Tribunal in *Lavelle*, Decision No. 301 [2003]. It is also argued that her claim is different from that considered by the Tribunal in *Brebion (No. 2)*, Decision No. 212 [1999], as that case concerned only the applicant's entitlement to the application of the Rule of 50 and not to past pension credit.

The claim for past pension credit: the Tribunal's considerations in respect of jurisdiction

19. The Tribunal notes in respect of the Applicant's contention about past pension credit that both parties have made jurisdictional arguments in parallel with a discussion of issues going to the merits of the case. The Tribunal will consider these arguments and issues separately as matters of jurisdiction and admissibility.

20. There is no doubt that the parties agreed to allow the Applicant to submit her application directly to the Tribunal. At the Applicant's request, the Office of the Executive Secretary of the Tribunal consulted with the Legal Department, which agreed to the Applicant's request and so informed the Applicant in writing. The Applicant cannot now argue that there was no such agreement.

21. It follows that the filing is governed by the ninety-day period established by Rule 7(8) of the Tribunal's Rules, and not by the ordinary 120-day time limit provided under the Statute. The Legal Department's reply expressly indicated that the agreement would be effective for 90 days from September 24, 2004, and would not apply to other claims. The Applicant was so informed in writing.

22. The Applicant's application was filed on January 10, 2005, and postmarked January 6, 2005. Given a two-week extension for filing granted by the Tribunal, the Applicant complied with the applicable 90-day period.

23. This fact, however, does not dispose of the matter. As noted in paragraph 5, the Bank expressly reserved its right to raise any applicable jurisdictional objections. It has since done so, objecting to the Tribunal's jurisdiction on the basis that the Applicant brought her claim more than three years after her separation from the Bank.

24. The Tribunal must thus determine whether the three-year period envisaged in Staff Rule 11.01, paragraph 2.01, is applicable to this case and, if so, whether the Applicant is right in arguing that she brought her action within it.

25. Staff Rule 11.01, paragraph 2.01, does indeed apply to claims for benefits under the SRP (see *Biswas*, Decision No. 262 [2002], para. 25), but does not in itself deal with the determination of substantive rights (see *Prescott*, Decision No. 253 [2001], para. 31). Such a determination, however, is relevant to jurisdiction because an applicant must at the very least show *prima facie* that he is entitled to a certain right. The three-year period will begin on the date that the identifiable right arose, this normally being the date of retirement or the date on which the applicant became aware of the deficiency he or she is claiming (see *Taborga (No. 2)*, Decision No. 324 [2004], paras. 21-24).

26. The Applicant has not provided any evidence of an entitlement to past pension credit existing either on the date of her retirement or before. Nor is there room for an argument concerning a right, a breach thereof, or a harm of continuing nature because such a right needs to be specific and identifiable at a certain point in time, and the claim cannot be extended indefinitely into the future (*id.* at para. 22).

27. It follows from the above that the three-year time limit cannot be counted from a date unconnected to a specific right enjoyed by the Applicant, such as the date of past pension credit approval by the Executive Directors or the enactment of Schedule F. If the Applicant did not meet the requirements of Schedule F, as she objectively did not, there is no right at all, and no point from which a time limit can be counted. Nor could a right have risen from the Bank's contractual relationship with the Applicant, or otherwise from a duty of the Bank beyond the specific terms of Schedule F (see *Lavelle*, Decision No. 301 [2003], para. 29). As the Tribunal held in *Prescott*, "the three-year statute of limitations would only apply, if at all, as from the date of the decision

establishing the right" (*Prescott*, Decision No. 253 [2001], para. 31).

28. As the Applicant has not met the relevant jurisdictional requirements for timely filing under any of the applicable rules, whether the Staff Rules or the Tribunal's Statute, this claim must be dismissed.

The claim for past pension credit: the Tribunal's considerations on admissibility

29. It is appropriate to examine briefly the parties' arguments on the merits, as they relate to the question of admissibility and request for summary dismissal.

30. A question of admissibility was considered by the Tribunal in *Gress*, where it was decided at the jurisdictional stage that one of the claims was so devoid of merit that it could be summarily dismissed at that point (*Gress*, Decision No. 269 [2002], para. 11). The question here is whether the Applicant's claim on past pension credit is so devoid of merit that it should be summarily dismissed, as argued by the Respondent.

31. The first issue concerns Principle 2.1(c) of the Principles of Staff Employment, invoked by the Applicant in arguing that she has been deprived retroactively of compensation for services already rendered. The Tribunal held in *Lavelle* in respect of this Principle that it is "related to past compensation and benefits to which the staff member had a right, but does not refer to benefits unavailable at the time the service was rendered" (*Lavelle*, Decision No. 301 [2003], para. 19). The Tribunal sees no reason to depart from this reasoning in the present case, and can therefore conclude that the Principle in question is not applicable to the Applicant's circumstances.

32. A separate issue raised by the Applicant is that notice of her non-inclusion on the list of staff entitled to benefit from Schedule F was not given to her. The Tribunal sees no reason why a staff member should be notified in respect of a right to which he or she is not entitled. Such a notification could only be relevant in respect of staff who do hold the right in question.

33. The core claim of the Applicant is that the eligibility date of January 1, 2002, established by Schedule F for past pension credit, is arbitrary. The Tribunal has decided this and related issues in various cases. It has held in particular that the conditions of Schedule F are not arbitrary (*Bernstein*, Decision No. 309 [2004], para. 22; *Elder*, Decision No. 306 [2003], paras. 12, 13 and 25); that it is not arbitrary to establish reasonable limits and conditions on the benefits allowed (*Elder* at para. 12), including the number of years served (*Lavelle*, Decision No. 301 [2003], para. 16); that continuous service and other restrictions of such kind are normal requirements of pension plans (*Yang*, Decision No. 252 [2001], paras. 19-20; *Elder*, Decision No. 306 [2003], para. 25); and, finally, that it is not for the Tribunal to decide which alternative would have been better or more effective to achieve the objectives of the pension reform (*Crevier*, Decision No. 205 [1999], para. 17).

34. The Tribunal sees no reason to depart from these conclusions. In their light it would make no sense for the parties to proceed to discuss the merits of the case. Here too the claim is devoid of merit and must therefore be summarily dismissed.

The claim of misclassification: discussion on jurisdiction

35. The claim concerning misclassification remains to be considered. The Tribunal has held that in cases of non-regularization or termination, such as that of the Applicant, the time limit for challenging the misclassification starts to run from the date when the applicant is notified that he or she will not be regularized or will be terminated (*Huber*, Decision No. 270 [2002], para. 14). The Tribunal has also concluded that this challenge should be undertaken through the normal grievance procedure and that Staff Rule 11.01, paragraph 2.01, does not apply to this kind of claim, as it properly concerns only SRP claims (*Singh*, Decision No. 240 [2001], para. 22).

36. Whichever time limit, i.e., one-hundred and twenty days or three years, were to be considered for this issue, it has long since passed. Such is the case whether one takes the Applicant's separation from the Bank

as the starting point, or instead takes the date on which the Applicant commenced her participation in the SRP. On either basis, this claim fails for lack of jurisdiction.

37. The Bank has rightly argued, in addition, that nothing has happened since that time that could possibly have given rise to an awareness of earlier misclassification, and that nothing has been argued by the Applicant to this effect. The fact that the Applicant was aware of her employment conditions is, moreover, confirmed by the fact that in 1999 she challenged the Bank's refusal to regularize her position or to extend her appointment, both by requesting administrative review and later by resorting to the Appeals Committee.

38. This challenge, as noted, was brought to the Tribunal in December 2000 and led to its decision in *B*. Although it is true, as the Applicant claims, that she did not raise the issue of misclassification in those proceedings, the fact is that by challenging the decision not to regularize her position or to extend her appointment, she was dealing with the very same questions that a misclassification claim would have involved, namely her entitlement to a different type of appointment or its prescribed duration. The nature of the claim does not change because it can be labeled differently.

39. This leads to the question raised by the Respondent of *res judicata* barring the Applicant's claim of misclassification. As the Tribunal held in *C (No. 2)*, Decision No. 312 [2004], two conditions must be met for the application of *res judicata*, these being that the parties are the same in both cases and that the substance of the claim is essentially the same in both applications (see *id.* at para. 10). This is very much the situation here. The parties are indeed the same and the substance of the applications in respect of this claim are also essentially the same. The Tribunal accordingly concludes that this claim is barred by the application of *res judicata*.

The claim of misclassification: considerations on admissibility

40. The Applicant has also raised arguments concerning the merits which need to be dealt with as an issue of admissibility. She argues in this respect that, like in *Prescott*, she should have been regularized after having completed four years of service. As has been clearly explained in the Executive Secretary's published notes on filing claims for misclassification in the light of the *Prescott* case, that case relates only to NRS who were in fact converted to a Regular position and hence involves a determination with respect to the timing of this conversion in accordance with the Bank's policy. In addition, *Prescott* was filed in time.

41. The circumstances of the present case are quite different. There was no conversion and hence there is no issue of when such conversion should have been made. While in *Prescott* the possibility of earlier misclassification became evident only after the conversion, this is not the case in respect of the present claim. The *Prescott* rationale was also applied in *Yang*, Decision No. 233 [2000], para. 28, where it was noted that conversion of an appointment could imply an earlier misclassification. The Applicant's circumstances are quite different.

42. The Tribunal concludes that this claim does not meet the basic requirements of admissibility and must be summarily dismissed.

The claim of a lack of due process

43. The Applicant has also argued that the Bank violated her right to due process in directing her to bring the claim to this Tribunal and not to the Pension Benefits Administration Committee. Another violation of due process is claimed because a 90-day instead of 120-day time limit for filing with the Tribunal was required by the Respondent. The Tribunal does not accept that these claims rise to a conceivable violation of due process. At any rate, in light of the facts explained they are irrelevant.

Decision

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

/S/ Bola A Ajibola
Bola A. Ajibola
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At London, England, May 13, 2005