

Decision No. 232

Barbara Thomas,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of Robert A. Gorman, President, Francisco Orrego Vicuña and Thio Su Mien, Vice Presidents, and A. Kamal Abul-Magd, Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges, has been seized of an application, received on February 23, 2000, by Barbara Thomas against the International Bank for Reconstruction and Development. The Respondent filed a request on March 16, 2000 to separate jurisdictional issues from the merits and to file an answer limited to the jurisdictional issues. This request was granted and the usual exchange of pleadings thereafter took place on the issue of jurisdiction. In addition, a filing by the World Bank Group Staff Association of an Amicus Curiae Brief was accepted by the Tribunal and both parties were given an opportunity to comment on this Brief. The case was listed on July 20, 2000.

2. This case concerns a claim by the Applicant about misclassification of her position as a Long-Term Consultant with the Bank and the unfair denial of participation in the Staff Retirement Plan (SRP) and related benefits for the whole period of her service with the Bank in that capacity.

Relevant facts

3. The Applicant joined the Bank on January 2, 1985 to serve as a Long-Term Consultant for the English Language Program of the Personnel Management Department. She had previously worked for the Bank for about a year as a Short-Term Consultant. The Applicant was appointed as an instructor in the English Language Program.

4. The Applicant was initially appointed for a period of six months. At the end of this period, her contract was thereafter regularly extended. The Applicant's appointment as a Consultant was categorized as non-regular, and under the Staff Rules as in effect at that time she was not eligible to participate in the SRP or to qualify for retiree medical benefits. She was not entitled to make contributions to the SRP and her period of service in this category did not count towards pension benefits.

5. The Applicant claims that during the whole period of her service she continued to do essentially the same job, though the title and responsibilities of the position changed to some extent. She received strong performance evaluations.

6. On April 22, 1996, the Applicant's position was converted to that of a regular Fixed-Term appointment as a Training Officer, level 22. As a result, she became eligible to participate in the SRP and she commenced to make contributions to it. She contends that in this new type of appointment she continued basically to do the same work as she had done as a Consultant.

7. In 1998, significant reforms to the Bank's Human Resources Policy were enacted. These reforms included changes to the SRP, and in particular the right of Non-Regular Staff (NRS) to participate in the pension scheme as from April 15, 1998, and to qualify for retiree medical coverage. During the consideration of these reforms, the Staff Association had requested that pension credit be granted to NRS for their past service prior to the introduction of the reforms. This request, however, was denied as the Executive Directors expressly decided

that no credit would be granted for past service of NRS prior to April 15, 1998.

8. On November 10, 1999, the Applicant's position was converted from that of a regular staff Fixed-Term appointment to a regular staff Open-Ended appointment, with effect from July 1, 1999. This did not alter in any way her eligibility in respect of the SRP. She continued to perform essentially the same work as before, and currently holds the title of Communications Training Officer.

9. At about this time, a number of staff members requested administrative review or Pension Benefits Administration Committee (PBAC) review of the denial of benefits attributable to their past service as NRS. On November 29, 1999, these staff received from the Bank generic denials of their requests. In the denials, it was indicated that the staff members could file applications directly with the Tribunal, but that the Bank would argue that such applications were untimely and inadmissible on jurisdictional grounds. It was added, however, that the Bank would not raise jurisdictional objections on account of a failure (from November 29, 1999) "to exhaust internal remedies either internal to the Bank Group or with the PBAC." The Applicant states that she learned of the November 29, 1999 denials soon thereafter.

10. On February 23, 2000, the Applicant filed an application with the Tribunal. She claims that she was unfairly denied participation and service credit in the SRP for her service as a Long-Term Consultant from January 2, 1985 to April 22, 1996, and in determining her retiree medical eligibility. She claims in particular that her service up to that date should have been classified as that of regular staff and as such considered as pension plan service and as service towards retiree medical benefits. In the alternative, she claims the monetary equivalent. In her argument, the event or decision contested is that of November 10, 1999, when she was notified of her conversion to a regular staff Open-Ended position.

Objections to jurisdiction

11. The Respondent has objected to the Tribunal's jurisdiction in this case on the grounds that the Applicant has failed to exhaust internal remedies and to contest the circumstances of her appointment as NRS in a timely manner, as is required by Article II, paragraph 2(i), of the Tribunal's Statute.

12. The Bank argues that the Applicant voluntarily accepted the terms of her appointment, knowing that they did not include participation in the SRP. She took no action whatsoever to challenge those terms until filing her Application with the Tribunal and has failed to explain this long delay. Neither did she join the 200 staff members with non-regular past service who, in November 1999, sought additional time in which to request administrative review of the Bank's failure to include their past service as NRS towards their entitlements under the SRP.

13. As to the delay in contesting her appointment, the Respondent argues that the Applicant had in fact become eligible for participation in the SRP in April 1996 and had elected to commence participation at that date. The Respondent relies on various documents available to staff in support of its contention that the Applicant was aware at least from that time onwards that her past non-regular service would not be counted towards her pension or retiree medical benefits and that if she sought to challenge her earlier classification that was the proper time to do so.

14. For her part, the Applicant acknowledges that she did not expressly request administrative or PBAC review. She argues that in the light of the Bank's November 29, 1999 decision denying NRS their administrative and PBAC review requests, it would have been futile for her to do so.

15. In raising the issue of futility, the Applicant appears to take the position that she indirectly exhausted internal remedies. In this respect, the Applicant suggests that when she learned of the November 29, 1999 denials – at which point she realized that it would be futile for her to make administrative or PBAC review requests – she was for all practical purposes included among the recipients of the denial letters, all of whom were told by the Bank that it would not raise jurisdictional objections to applications filed with the Tribunal on account of a failure (from November 29, 1999) "to exhaust internal remedies either internal to the Bank Group

or with the PBAC.” The Applicant then reasons that she timely exhausted administrative review because she learned of the November 29, 1999 denials within 90 days of the conversion of her appointment to Open-Ended. In other words, it is the Applicant’s position that the 90-day administrative review limitation period began to run from the date on which her position was converted to Open-Ended; this conversion, she argues, was an acknowledgement by the Bank that it had misclassified her. In making this argument, the Applicant relies on the Tribunal’s reasoning in Caryk (Decision No. 214 [1999], para. 16) and Madhusudan (Decision No. 215 [1999], para. 23). With respect to PBAC review, the Applicant asserts that there is no time limit for requesting such review and that staff are, therefore, entitled to request review of their pension entitlement or benefits at any time.

16. The Staff Association has submitted an Amicus Curiae Brief in support of the Applicant. This Brief submits that the starting point for initiating administrative review must be an individual and not a policy decision. Therefore, it also argues that it was not until the Applicant received an individual decision of conversion to an Open-Ended appointment that the limitation period for administrative review began to run. The decision relating to the conversion of the Applicant was the proper starting point for her individual complaint and such decision was timely contested.

17. The Staff Association also argues, relying on the Asian Development Bank Administrative Tribunal (ADBAT)’s judgment in Amora, that the “appropriate appeal period applicable to claims of entitlement to pension credits for misclassified past service does not expire until 90 days after staff members depart the Bank.” (For the ADBAT’s discussion of this issue, see Amora, ADBAT Decision No. 24 [1997], paras. 47 and 48.)

18. The Respondent has answered the Staff Association’s submission, arguing that the Applicant should have taken steps while she was holding Consultant appointments before April 22, 1996, to request the prospective conversion of her non-regular appointment type, as was possible in accordance with stated criteria under Staff Rule 4.01 during that period. She might then have been in the position to appeal any resulting denial of the requests. Having failed to do so, she cannot now for the first time contest her earlier NRS appointments.

19. The Respondent also argues that the Staff Association has overlooked that the decision to convert the Applicant’s Fixed-Term position to Open-Ended on November 10, 1999 had no effect on her pension service or retiree medical credits, which had begun when she received her Fixed-Term appointment on April 22, 1996. The Respondent asserts also that the Applicant cannot argue that she only first realized in late 1999 that she would not receive pension service credit for her NRS employment before April 22, 1996.

20. The Respondent further submits that the conversion of NRS appointments to Term or Open-Ended appointments in 1999 does not establish any presumption that the Applicant had earlier been improperly classified. The conversion decisions, the argument follows, were not relevant to that issue. In the Bank’s view, the Applicant must have been aware much earlier of the public discussion concerning the Bank’s policy on NRS appointments, which had continued for several years, and is therefore precluded from an untimely claim about misclassification or the benefits attached to each type of appointment.

Whether internal remedies were exhausted

21. Under Article II, paragraph 2(i), of the Statute of the Tribunal, an application will be inadmissible unless “all other remedies within the Bank Group” are exhausted, save in exceptional circumstances as decided by the Tribunal or if the applicant and the respondent have agreed to submit the application directly to the Tribunal. Where an applicant has made a claim to the PBAC in respect of pension entitlements or benefits under the SRP, a three-year time-limit applies to such kind of claims and related review (Staff Rule 11.01, para. 2.01). However, for reasons set out below, the Tribunal considers that the issues in this case are not issues which are to be determined under the rules applying to pension entitlements or benefits, but concern decisions about the allocation of staff to specific types of appointments. As such, the 90-day administrative review limitation period (as it was in effect prior to February 2000) applied to these decisions.

22. As noted earlier, the Applicant acknowledges not having expressly sought any internal remedies before applying to the Tribunal. She did not apply to the PBAC, nor did she at any time seek administrative review in respect of the denial of benefits attributable to her past service as NRS.

23. The Tribunal is of the opinion that the requirement that applicants should pursue the internal remedies that are available to them is a fundamental one in the context of grievance procedures and due process. (See, e.g., de Jong, Decision No. 89 [1990].)

24. Prima facie, the failure of the Applicant to pursue any internal remedies should make her application inadmissible. As also noted earlier, however, the Applicant suggests that she indirectly exhausted internal remedies as she was, for all practical purposes, a recipient of the Bank's form letter of November 29, 1999 denying requests made by other staff members for PBAC and administrative review. For her to have requested such reviews, she asserts, would have been futile. The Tribunal notes that in its reply to those NRS who had requested review, the Respondent, in denying their requests, said that it would not raise jurisdictional objections on account of failure (from November 29, 1999) to exhaust administrative remedies internal to the Bank Group or with the PBAC.

25. If the Applicant had sent in the standard form used by very many of her colleagues in requesting review, she would almost certainly have received the same reply. It is on this basis, and the rejection of those other claims, that she submits that resort by her to the internal remedy of administrative review would have been futile at the time. In the circumstances of the case, the Applicant's claim of futility is not implausible. However, the Tribunal need not rule on that claim because it considers that the dispositive issue is whether the Applicant met the timeliness requirements of Article II(2)(i) of the Statute.

Whether internal remedies were timely exhausted

26. The Applicant relies on the Caryk and Madhusudan cases as establishing that decisions on conversion are the appropriate starting point for review. In the alternative, she argues that if the denial of pension benefits is the relevant date, there is no 90-day time limit applicable to a request for PBAC review. As noted above, the Staff Association has also invoked Amora in support of its submission either that there is no 90-day time limit applicable to a request for PBAC review or that the "appropriate appeal period applicable to claims of entitlement to pension credits for misclassified past service does not expire until 90 days after staff members depart the Bank." (Referring to Amora, ADBAT Decision No. 24 [1997], paras. 47 and 48.)

27. It appears to the Tribunal that this case is to be distinguished from Amora, where the initial categorization of the Applicant as an independent contractor was clearly an abuse of discretion. The substance of this case is closer to the Caryk and Madhusudan cases, where the substantive issue was whether "an initial ostensibly innocent appointment ultimately matured into an impermissible retention of the Applicant in an inappropriate classification." (Caryk, Decision No. 214 [1999], para. 16, and Madhusudan, Decision No. 215 [1999], para. 23.)

28. So far as the Applicant argues that there were no time limits on PBAC review, this issue was considered in detail by the Tribunal in a prior case (see Mitra, Decision No. 230 [2000], paras. 12-14), where the Tribunal pointed out that claims relating to alleged misclassification are to be determined in accordance with the Bank's grievance procedure, including the appropriate time limits. The time limits applicable to PBAC review were also discussed in that case.

29. That leaves for determination the question of how to establish the relevant date when the Applicant ought reasonably to have been aware that there could have been a misclassification, that this had adverse effects on her participation in the SRP and that she should challenge the Bank's failure to assign her to the appropriate type of position where she would be entitled to so participate in the pension scheme. It is from that date that the 90-day time limit for administrative review began to run.

30. The Applicant contends that she initiated the grievance procedures within 90 days of November 10, 1999. She claims that this was the appropriate date from which time should run because it was the date on which the

Bank acknowledged her misclassification by converting her to an Open-Ended position. The Applicant argues in this connection that the wrongfulness of her original classification could be determined retrospectively only on that date, when she was finally converted to an Open-Ended position. This is on the basis that when she was converted from a regular staff Fixed-Term appointment to a regular staff Open-Ended appointment "her expectancy increased of being able to retire when she desired rather than be terminated at the end of her term appointment." She was considering filing a request for past pension credits for her entire period of NRS service when she learned that any application for past pension credits for her entire period of service would be refused.

31. It is not at all clear why the Applicant claims that she was not aware of the position in regard to her past service until her Fixed-Term appointment was converted to an Open-Ended one in November 1999. Nor is it credible to assert that her previous NRS service had become valuable to her only when she was notified of that conversion. She had been converted into a regular staff Fixed-Term appointment in April 1996, and was then entitled to and did commence participation in the SRP. The Tribunal finds in this respect that she must have been aware at the latest at that time that she would not receive pension credits for the previous periods when she was not entitled to participate in the SRP because of the type of appointment she had held.

32. The conversion of the Applicant to an Open-Ended regular staff position in November 1999 did not create a new situation in regard to her participation in the SRP, as she had commenced participation in 1996. There was no material change in that regard, nor were there circumstances relating to her participation in the SRP of which the Applicant was not aware in 1996. Nor was a new situation created in regard to her classification as regular staff. This had occurred in 1996, and it was at that point that she ought to have considered whether her earlier classification (which excluded her from SRP) was inappropriate. She did not avail herself of the opportunity to challenge her earlier classification at that time, and, in the absence of circumstances found by the Tribunal to be exceptional, the conclusion is inescapable that she has failed to meet the criteria established by Article II, paragraph 2(i), of the Statute of the Tribunal.

Decision

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

Robert A. Gorman
President

Nassib G. Ziadé
Executive Secretary

At Washington, D.C., November 10, 2000