

Decision No. 176

Suzanne Barnes,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on August 16, 1996, by Suzanne Barnes against the International Bank for Reconstruction and Development. The case has been decided by a Panel of the Tribunal, established in accordance with Article V(2) of its Statute, composed of E. Lauterpacht (President of the Tribunal) as President, P. Weil, A.K. Abul-Magd and Thio Su Mien, Judges. The usual exchange of pleadings took place. The case was listed on October 30, 1997.

2. The Applicant complains that she was not fairly considered for conversion or extension of her fixed-term contract contrary to assurances allegedly given to her at the time of her recruitment and thereafter. She asserts that there were both procedural and substantive irregularities in decisions taken by the Respondent leading up, and related, to the decision neither to regularize nor to extend her contract. The Respondent's position is that the Applicant had no right of employment beyond her fixed-term appointment and that none of its actions were improper.

**DID THE APPLICANT HAVE A RIGHT TO CONVERSION
OR EXTENSION OF HER FIXED-TERM CONTRACT?**

3. The first question in this case is whether the Applicant had a right to conversion or extension of her fixed-term contract. Staff Rule 4.01, paragraph 2.01(b), defines a fixed-term appointment as an appointment for a specified duration. According to Staff Rule 7.01, paragraph 3.01, an appointment for a definite term expires upon completion of the term as specified in the staff member's letter of appointment. In the present case, the Applicant's letter of appointment offered her a three-year fixed-term contract as Energy Planner, level 22, in the Europe and Central Asia – Country Department III (EC3), effective the day on which she reported for duty. The Applicant reported for duty on April 20, 1992 and her fixed-term contract therefore expired on April 19, 1995.

4. As the Tribunal has previously held, "[a] fixed-term contract is just what the expression says: it is a contract for a fixed period of time" (*Mr. X*, Decision No. 16 [1984], para. 35; *Atwood*, Decision No. 128 [1993], para. 35; *Carter*, Decision No. 175 [1997], para. 13). It is, however, well recognized in this Tribunal (*Mr. X*, *supra* para. 38; *Mathew*, Decision No. 103 [1991] paras. 25-29; *Atwood*, *supra* para. 36; *Carter*, *supra* para. 13) and in other international administrative tribunals that the possibility exists that surrounding circumstances may create a right to conversion or extension of a fixed-term contract.

5. In this case, the Applicant has invoked a promise made to her by the Bank. It must, therefore, first be decided whether any such promise was made either to convert or to extend the Applicant's fixed-term contract (*Mathew*, *supra* para. 25). A review of the record does not show that any such promise was made to the Applicant.

6. First, nothing in the words of the Applicant's fixed-term contract could even remotely be construed as such a promise. Second, the former Personnel Officer for the Infrastructure, Energy and Environment Division of EC3 (EC3IV) (hereinafter "former PO") who recruited the Applicant has stated that he told the Applicant at the time of her recruitment that there was no guarantee of conversion to regular appointment. He has said that he was "particularly cautious" about providing information about regularization due to the "new and still uncertain work

program for the new Eastern European nations” that had joined the Bank. The Tribunal is satisfied that the former PO did not promise anything to the Applicant but only that he was presenting a possibility of conversion.

7. The Applicant alleges that the former PO, contrary to what is said in his statement, had given her a commitment that her fixed-term contract would be converted subject only to her satisfactory performance. A review of the record, however, indicates that she has not presented any evidence to support her allegation.

8. The only evidence pertaining to the question of an alleged commitment is found in the Management Review of the Applicant’s second annual performance evaluation (PPR) and in related correspondence. The Management Review of the Applicant’s PPR for the period of March 1, 1993 to February 28, 1994 stated that an interim performance evaluation would be conducted to “decide on future arrangements concerning her fixed term contract.” Following a subsequent request made by the Applicant to establish the specific criteria to be used in decision-making regarding the regularization of her contract, the Division Chief, EC3IV, presented criteria to be used. Here, it is clear that the Division Chief was making the Applicant’s performance a factor to be considered in reaching a decision on her fixed-term contract. This is not unusual as performance is consistently considered by the Bank in making employment decisions. However, while the Applicant’s performance was to be used in making a decision on her contract, there is no indication that it was to be the only factor considered. More importantly, this evidence does not show that a promise was given to the Applicant that her contract would be converted or extended if she satisfied the stated performance criteria.

9. In the light of the above, the Tribunal concludes that the Respondent conveyed to the Applicant at most a possibility of an extension or conversion of her fixed-term contract subject to a number of factors including her performance and that the expression of this possibility did not amount to a “promise.” As the Respondent did not “promise” the Applicant an extension or a conversion of her fixed-term contract, she had no right to conversion or extension.

DECISION NOT TO CONVERT OR EXTEND THE APPLICANT’S CONTRACT

10. Although the Applicant did not have a right to either conversion or extension of her fixed-term contract, the decision not to convert or extend her contract was nonetheless a decision which, like any other exercise of discretion by the Respondent, must be reached fairly and not in an arbitrary manner. The Tribunal has held that even where the “circumstances of the case do not warrant any right to a renewal of a fixed-term contract, the Bank’s decision not to renew the contract at the expiration of its predetermined term, however discretionary, is not absolute and may not be exercised in an arbitrary manner” (*Carter, supra* para. 15).

11. The Tribunal considers that the decision not to convert or extend the Applicant’s fixed-term contract was neither substantively nor procedurally flawed. The Tribunal is not persuaded that the decision was tainted by an abuse of discretion or that the Applicant was otherwise the subject of gender bias or discrimination. The Respondent took into consideration a number of factors in its decision including reductions in staffing and lending as well as the Applicant’s skills and her performance evaluations. The record indicates that the Applicant’s performance, attitude and ability to work well with other staff members were criticized by a number of staff members and management during the latter two years of her career with the Bank. There is also an indication that she was reluctant to complete assigned tasks during this period due to disagreements over her work program. The above facts could properly be taken into account by the Respondent in reaching its decision and lend support to its contention that its decision was a proper application of managerial discretion (see *Gyamfi*, Decision No. 28 [1986], para. 35, with respect to the Bank’s discretion to consider a staff member’s work relationships with colleagues, subordinates and superiors).

12. As noted above, a number of factors were considered in the decision not to convert or extend the Applicant’s fixed-term contract. Among these were the Applicant’s performance evaluations. Specifically, on February 8, 1995, the new Director of EC3 (the former Division Chief of EC3 Country Operations Division II (EC3C2)) informed the Applicant in writing that her contract would not be extended on the basis of her “*performance evaluations*, staffing needs of the Department and emerging skills requirements” (emphasis

added). As the Applicant's performance evaluations were thus taken into account, it is clear that any prior actions taken by the Respondent affecting the Applicant's performance or related to her evaluations have a bearing on the decision that was eventually taken. Consequently, such actions must also be reviewed by the Tribunal to ascertain whether they were tainted by substantive or procedural irregularities. Moreover, such actions must be reviewed to determine whether there exist any "discrepancies and inconsistencies in the treatment of the Applicant's case by the Respondent" (*Durrant-Bell*, Decision No. 24 [1985] paras. 35-36) or whether there is any behavior which, taken as a whole, constitutes "mismanagement of the Applicant's career" (*Chhabra*, Decision No. 139 [1994] para. 57). On this aspect of the case the Tribunal has concluded that there have been inconsistencies in the treatment of the Applicant's case by the Respondent and that there is evidence of mismanagement. These matters will now be addressed.

ALLEGED COMPLAINT FROM THE KAZAKHSTAN GOVERNMENT

13. In the Applicant's interim (six months) review (dated December 29, 1992) and in her subsequent first annual PPR (in April 1993) the Division Chief, EC3IV, rated the Applicant's performance as outstanding. The EC3 Management Review Group recommended that the Applicant be promoted to level 23 on the basis of her excellent performance and extensive outside experience.

14. In May 1993 the Applicant led a mission to Kazakhstan as task manager for the energy component of a Kazakhstan Petroleum Technical Assistance Program. During a meeting of June 8, 1993, the Division Chief, EC3IV, reallocated the tasks for the further work in Kazakhstan, at which time the Applicant's task management responsibilities were given to another staff member. While there is disagreement as to whether the Applicant was initially in agreement with the reallocation, she was clearly dissatisfied with the arrangement by the time of her return from annual leave in September 1993.

15. The Division Chief, EC3IV, later explained that, among the reasons for appointing a different individual as task manager for energy work in Kazakhstan, there was a need for a Bank staff member "with substantial operational experience to lead the Kazakhstan energy effort." In his view the Applicant lacked this experience. In support of his conclusion that the Applicant was unfamiliar with operational work, the Division Chief, EC3IV, referred, *inter alia*, to a complaint about the Applicant's inexperience that had allegedly been made by the Kazakhstan delegation during an Annual Meeting.

16. A review of the record indicates that the Division Chief thereafter denied the Applicant task management responsibilities based on a number of factors, including the alleged complaint from the Kazakhstan Government, notwithstanding the fact that this complaint had neither been verified nor investigated. It was not until early February 1994 that the former Director of EC3 orally informed the Applicant that there had actually been no complaint and that the allegation had been the result of miscommunication between him and the Division Chief. This statement was later recorded in a memorandum from the former Director of EC3 to the Applicant dated March 11, 1994.

17. In the opinion of the Tribunal the Applicant's work program was adversely affected due, at least in part, to the Respondent's handling of the unsubstantiated complaint from the Kazakhstan Government and was, thus, one of the reasons for the "lack of consensus over her work program" and for the resulting low quantity of output, both of which were noted in the Applicant's second annual PPR. The alleged Kazakhstan complaint was inconsistent with the Applicant's prior outstanding performance reviews and, thus, should have been carefully investigated prior to being used as a basis, however minimally, for altering her work program. Given the relative significance of the alleged complaint, the Applicant should have been at least informed of the miscommunication much earlier.

HANDLING OF THE APPLICANT'S WORK PROGRAM IN GENERAL

18. The record indicates that the Applicant, upon her return from annual leave in September 1993, made frequent complaints about her work program. Notwithstanding the Applicant's repeated complaints, the

Respondent generally did not substantively address the Applicant's work program until such time as it was, in effect, pressured into doing so.

19. In this respect, the Tribunal notes that subsequent to the reallocation of work in June 1993 a new work program was not agreed until November 1993. The agreement was concluded only after an informal advisory team had, on October 29, 1993, criticized the handling by the Division Chief, EC3IV, of the Applicant's work situation. Specifically, the informal advisory team, composed of the Chief Personnel Officer for EC3IV, the Ombudsman and the former PO, concluded that the exercise of the Division Chief's authority to determine and change the Applicant's work program could have been communicated in a much more satisfactory manner.

20. A mutually satisfactory work program was later agreed upon on April 26, 1994. However, it was concluded only after the Applicant had withdrawn a request (made on March 30, 1994) for administrative review following a meeting with the former Director of EC3 on April 1, 1994. At this meeting the former Director had told the Applicant that it was "not at all obvious" that her claims would be substantiated. As to this, the Tribunal recognizes that it is within the discretion of the Bank to decide upon a staff member's work program. However, the protracted manner in which the Respondent addressed the Applicant's concerns left her without a clear understanding as to her work program and her career with the Bank. This clearly contributed to the "lack of consensus over her work program" and to the resulting low quantity of output.

PROMISED INTERIM PERFORMANCE EVALUATION

21. In the Management Review of the Applicant's second annual PPR it was indicated that an interim performance evaluation would be conducted in early 1995 to decide upon future arrangements concerning her contract. The idea of an interim evaluation was reinforced when the Division Chief of EC3IV, in response to a request made by the Applicant for criteria to be used in the interim evaluation, provided, on June 29, 1994, the criteria that were to be used. Based on the Respondent's assertions, the Applicant was clearly led to believe that her performance would be a factor in the Respondent's ultimate determination and was thus fully aware that it was important to perform well if she had any hope of having her contract either converted or extended.

22. The record indicates, however, that no evaluation was undertaken prior to the Respondent's decision not to extend or convert the Applicant's fixed-term contract. The Applicant was orally informed by the former Director of EC3 on November 17, 1994 that her contract would neither be regularized nor extended. This was confirmed in writing by the new Director of EC3 on February 8, 1995. It was not until February 22, 1995, however, that the Division Chief of EC3IV actually completed his assessment of the Applicant's performance for the period of March 1, 1994 to December 31, 1994 (i.e., the Applicant's final PPR).

23. Both the oral notification of November 17, 1994 and the written notification of February 8, 1995 were clearly given to the Applicant prior to the completion of the final PPR, and there is no indication that the Applicant was informed before November 17, 1994 that any decision on her contract would not include a performance review or that there was even a possibility that her skills and background might no longer be needed in the Department. Thus, from June 29, 1994 (i.e., the date of the memorandum by the Division Chief, EC3IV, providing the performance criteria) to November 17, 1994, the Applicant was left to believe that her performance would be assessed in an evaluation and that such an evaluation would be considered in making a decision on her contract.

24. The Tribunal concludes that, while the Applicant did not have a right to either conversion or extension of her contract, the Respondent should have accorded the Applicant a formal performance review prior to reaching any decision on her contract. At the very least, the Respondent should have adequately communicated to the Applicant during this period the changes in the Division which ultimately affected her career prospects. As performance reviews were eventually a factor in the Respondent's final decision, the promised interim evaluation should have been completed. Such an evaluation would have provided the Applicant both with an opportunity to respond and with a management review prior to the Respondent's final decision.

ALLEGED COMPLAINT FROM THE RUSSIAN GOVERNMENT

25. There are also certain inconsistencies with respect to investigations into a complaint from the Russian Government regarding the Applicant's performance. In accordance with her work program of April 1994, the Applicant led missions to Russia in June/July and September 1994. By a memorandum dated September 28, 1994 a complaint about the Applicant's performance in Russia was communicated to the Division Chief of EC3IV. As indicated by the memorandum, the complaint had been made by the Executive Director for Russia to the Division Chief of EC3C2 and to the former Director of EC3.

26. In the light of this complaint, an investigation was undertaken by the Division Chief of EC3IV who concluded that the criticisms of the Applicant's performance were valid. Following this first investigation, a letter in support of the Applicant's performance was written and submitted by the First Deputy Minister of Economics of the Russian Federation, who was Chairman of the Governmental Oil Transport Task Force. He expressed gratitude for the Applicant's work on the Russia oil transport mission and noted that, although the issues had been contentious, the mission was led with exceptional professionalism and diplomacy and was able to assist in substantially deepening economic and oil sector policy reform.

27. This letter prompted the former Director of EC3 to request a second investigation into the complaint, which consisted of the questioning of the consultants who had participated in the mission to Russia. The Division Chief of EC3IV later indicated that none of the five consultants questioned had, among other things, recalled making any general complimentary statements to the Applicant about her performance. However, four of the consultants who were questioned later submitted statements strongly defending the Applicant's performance. These statements were sent on October 25, 1994, on November 3 and 21, 1994, and on March 29, 1996 and are not in accord with the statements given by Bank staff from headquarters and at the Resident Mission in Moscow who were questioned during the first investigation. The Tribunal also notes that there is no indication that the statements of the four consultants were ever considered during the course of the investigations.

28. These inconsistencies cast doubt on the objectivity of the investigations undertaken into the complaint from the Russian Government. They understandably led the Applicant to be concerned about the Respondent's motives and the veracity of the Russian complaint. It is clear that the complaint from the Russian Government was taken into consideration in the final decision not to convert or extend the Applicant's contract, as this was alluded to in the Applicant's final PPR that was completed by the Division Chief of EC3IV on February 22, 1995.

29. The Tribunal concludes therefore that, while the Applicant did not have a right to conversion or extension of her contract, the above inconsistencies and instances of mismanagement of the Applicant's career by the Respondent reveal "errors of judgment which taken together amount to unreasonableness and arbitrariness" (in this regard, see *Chhabra*, Decision No. 139 [1994], para. 57).

30. This unreasonableness and arbitrariness cannot be disregarded. Nonetheless, the Tribunal is not empowered to replace the Bank's "negative" decision in relation to the extension or conversion of the Applicant's contract by a "positive" decision that the Bank should give the Applicant a new employment contract. The Bank has the final decision as to whom it will employ, as is recognized by Article XII of the Tribunal's Statute, which contemplates the payment of compensation if the President of the Bank decides that an Applicant shall be compensated without further action being taken. Therefore, the Tribunal must determine the compensation to be paid to the Applicant. This compensation will not be for the loss of future employment prospects with the Bank but only for the consequences of the elements of mismanagement that could have influenced the Bank's eventual decision not to extend or convert her contract.

31. There have been a number of cases in which the Tribunal, though finding that there has been an irregularity or defect in the Bank's treatment of a staff member, has concluded, in circumstances where such a conclusion was appropriate, that rescission of the decision contested or specific performance of the obligation invoked was not a remedy appropriate to the injury done (*Broemser*, Decision No. 27 [1985], para. 40). Although rescission or specific performance are not options which are available in the present case, the same

principle is applicable in this case, namely, that the payment of compensation should be ordered for the intangible injury suffered by the Applicant. In the circumstances of the present case the Tribunal will order the payment to the Applicant of compensation equitably assessed at one year's net base salary, together with costs.

DECISION

For the above reasons, the Tribunal unanimously decides that the Respondent shall pay the Applicant:

- (i) compensation in the amount of one year's net base salary, and
- (ii) costs in the amount of \$20,000.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At Washington, D.C., November 18, 1997