

Decision No. 51

Klaus Berg,  
Applicant

v.

International Bank for Reconstruction and Development,  
International Finance Corporation  
International Development Association,  
Respondents

1. The World Bank Administrative Tribunal, composed of E. Jiménez de Aréchaga, President, P. Weil and A. K. Abul-Magd, Vice Presidents, and R. A. Gorman, E. Lauterpacht, C. D. Onyema and Tun Suffian, Judges, has been seized of an application, received June 30, 1987, by Klaus Berg against the International Bank for Reconstruction and Development (the Bank), the International Finance Corporation (IFC), and the International Development Association (IDA). The Tribunal decided that oral proceedings requested were unnecessary and should not be ordered. After the usual exchange of pleadings the case was listed on October 1, 1987.

2. Several procedural decisions were taken in this case:

(i) Since the Applicant's application was submitted with fourteen other applications relating to similar subject matter, including the application of the World Bank Staff Association, the Applicant submitted in explanation of his application a consolidated memorandum covering all fifteen cases. The Respondents objected to the consolidation of the cases. The President ordered that the cases not be consolidated and that legal memoranda be submitted by each Applicant in each case separately but that "in order to economize on documentation, when identical legal arguments are made and corresponding annexes are filed in more than one case, cross-references in an individual application to arguments made and annexes filed in another application which has been submitted on the same date, are acceptable."

(ii) In view of the Applicant's request for expedited hearing of his case and the Respondent's willingness "to discuss mechanisms for expediting" the case the President shortened the time limits for the submission of pleadings and modified the application of the relevant Rules of Procedure with a view to having the case decided at the next session of the Tribunal.

(iii) In response to the Applicant's request for provisional measures the Tribunal, considering the arguments of the parties and because the question of the validity of the release was pending before it, the Tribunal would rule on the validity and interpretation of the release clause and, no irreparable harm to the rights of the Applicant would result from the application of paragraph 12.01 of Staff Rule 5.09, decided that there was no need to issue the provisional measures requested, namely the suspension of the application of paragraph 12.01 of Staff Rule 5.09.

The relevant facts:

(a) The background of the reorganization:

3. The general facts relating to the reorganization are as stated in paragraphs 3 to 42 of Decision No. 40.

(b) The particular facts of the case:

4. The Applicant, a German national, has been a Bank employee since January 13, 1969. From April 15, 1976,

he had held the position of Division Chief, first of Agricultural Division II, West Africa Projects Department (1976-1983), and then of Agriculture Division I, South Asia Projects Department (1983-1987). The level of the latter position was 26.

5. On May 4, 1987 the President of the Bank announced that he intended to adopt and move ahead with the proposal of the Steering Committee that the six Regional Offices be consolidated into four, and that 19 Country Departments as well as Regional Technical Departments be established. Under this reorganization of the Operations Complex, while the functions of the Sector Operations Divisions corresponded loosely to those of the Projects Divisions under the old structure, management opportunities for purely project-oriented work disappeared; managers of the new sector divisions were expected to have a strong capacity for policy dialogue in connection with the overall sector strategy.

6. By May 22, 1987, the Regional Senior Manager Teams (RSMTs) were in place and functioning. After the Vice President (VP), Personnel, had informed all Vice Presidents and Directors of the procedure for the selection of Division Chiefs, during the period between May 22 and June 3, preliminary selections were made by the RSMTs within each Region and reviewed by the Senior VPs and the VP, Personnel. Selections were made on the basis of a roster designed for use in the selection of persons to fill structured positions below the level of Department Director, and the views of former supervisors and performance records were also considered.

7. The Applicant's claims for an appropriate position in the new Asia Region, where there were only six divisions having responsibility for agricultural operations, were considered in the light of the position descriptions and selection criteria. The views of the Applicant's former Vice President were also sought and the Applicant's prior record was considered.

8. When final selections were made it was the view of management that the Applicant's strength lay more in the management of individual projects rather than in overall conceptualization required to conduct dialogues successfully with borrowing countries on policy issues and that, therefore, he was not as strong as other candidates. He was, consequently, not selected for a division chief position either in the Asia Region or elsewhere in the Operations Complex.

9. Soon after, the Applicant was orally informed of the decision and also, according to the Respondent, of the reasons therefor. The Applicant expressed disappointment with the process, particularly that no interviews with candidates had been conducted prior to selection. The RVP assured the Applicant that his former VP had advised him prior to selections being made of the latter's intention to modify a negative assessment of the Applicant's managerial capabilities set out in his most recent Performance Planning Review (PPR). The Applicant then asked to be considered for a level 26 Technical Specialist position, but after consultation with the Director, Technical Department, Asia Region, the RVP concluded that the Applicant would not be suitable for such a position.

10. By memorandum of June 23, 1987, to the Applicant the Chief Personnel Officer set out the Applicant's options at that stage, namely, going through Round 1 in the staff selection process, electing the Enhanced Separation Package, or placing his name on the roster for Round 2 of the staff selection process. The Applicant went through Round 1 of the staff selection process and was offered a Level 25 position as Principal Agricultural Credit Specialist, Agriculture Division, Technical Department, Asia Region. The Applicant's request for more time to consider the offer was granted.

11. The Applicant had requested on June 30, 1987 that the VP, Personnel, review the Applicant's non-selection as a manager. By memorandum of July 24, 1987, the VP, Personnel, stated that he had reviewed the matter had concluded that the Applicant had been given full and fair consideration and that no further consideration of the matter was warranted.

12. The Applicant later informed the Director of the Asia Technical Department that he was accepting the offered position but that he expected that his previous grade level of 26 would be retained. The said Director

reminded the Applicant that the position offered was at level 25 and that no guarantee would be given for maintaining him at level 26 beyond the usual two-year "grandfathering" period. Subsequently, in a Selection Decision Form dated September 25, 1987, the Applicant accepted the position offered at level 25 "subject to my right to pursue my claim to maintain my present level 26 grade via available mechanisms."

13. Before accepting the offer made to him the Applicant met with the Ombudsman but also with two hearing officers to discuss his complaint that he was not being given a level 26 position. These discussions had no positive results for the Applicant.

The Applicant's main contentions:

14. The Applicant makes the same general contentions as were made by the Applicant in Decision No.40 and which are stated in paragraphs 43 to 63 of Decision No.40.

15. Further, the Applicant, in bringing this action on his own behalf and on behalf of all other staff members, contends in his application that:

- (a) he has standing to sue as a member of the staff;
- (b) Staff Rule 5.09 was issued without appropriate consultation with the Staff Association and contains provisions amounting to a unilateral change of employment conditions which cause excessive and unnecessary harm to him and the staff generally;
- (c) an essential element of the Applicant's terms and conditions of employment, the right of review and access to the Tribunal, has been challenged and imperilled by paragraph 12.01 of Staff Rule 5.09;
- (d) no explanation was given to the Applicant as to why he was not selected as a Division Chief and no criteria for such selection were provided to him with the result that the decision of non-selection was wrong;
- (e) because of exceptional circumstances the requirement that internal remedies should be exhausted should be waived;

16. In his reply the Applicant additionally contends that:

- (a) he learned for the first time the reason for his non-selection as a Division Chief from the Respondent's answer in this case and he had not been given an opportunity to be heard before he was rejected; and
- (b) the negative assessment of the Applicant's previous VP which was subsequently revised played a crucial role in the Applicant's rejection when it should not have, because it was subsequently revised.

17. The Applicant requests the following relief:

- (i) An order granting the following interim measures to be effective as of May 19, 1987, and until the Tribunal renders a final decision:
  - (a) suspension of the Bank's efforts to obtain releases or waivers or in any other manner implement paragraph 12.01 of Staff Rule 5.09, and
  - (b) holding in abeyance the enforcement or use by the Bank in any way of releases or waivers given or signed by Bank staff pursuant to acceptance of any Separation Package offered by the Bank in the course of implementing its 1987 reorganization which is targeted to be completed, so far as termination of employment contracts is concerned, by September 30, 1987.
- (ii) Considering of this application on its merits on an expedited basis by convening a special plenary session, as provided for in Rule 5(2) of the Tribunal, or forming a panel to consider this case, as provided for in Article V of the Statute and Rule 6 of the Tribunal.
- (iii) A declaration that the Bank, during the reorganization and particularly with regard to the preparation of Staff Rule 5.09, has not observed its obligation to engage in effective and meaningful consultations with the

staff through their representative, the World Bank Staff Association, concerning matters affecting staff employment conditions.

(iv) An order that the Bank suspend to the extent necessary the application of Staff Rule 5.09 until modified in a manner that will ensure selection of qualified staff, and by implication termination of staff, on the basis of objective criteria, including detailed position and skills descriptions made known to staff, in a process designed to be free from prejudice, favoritism and discrimination.

(v) An order that the Bank revise the scope and availability of the Separation Packages as required to remove elements of discrimination and retroactive prejudice against staff members, including, but not limited to, provision for eligibility of staff at grade levels 26 and above for the Standard Separation Package, availability of the Enhanced Separation Package's increased payments for length of service to all staff who have accrued the necessary service, and extension of tax reimbursement to all staff who are subject to tax on receipt of payments under the Separation Packages.

(vi) An order that the Bank engage in meaningful and effective consultation with the Staff Association for the purpose of preparing appropriate amendments to Staff Rule 5.09 to correct the deficiencies noted in sub-paragraphs (iv) and (v) above.

(vii) An order that paragraph 12.01 of Staff Rule 5.09 be rescinded.

(viii) An order that the Bank cease and desist from any attempts to implement paragraph 12.01 of Staff Rule 5.09, or to obtain releases and waivers from individual staff members who are voluntarily or involuntarily leaving the service of the Bank as a result of the reorganization.

(ix) An order that the Bank make available to the staff the 1987 reorganization Separation Packages without requiring or implying a release of claims against the Bank or waiver of the right to review administrative decisions, including access to this Tribunal.

(x) An order that the Bank reimburse the Applicant for all fees, costs and disbursements incurred by the Applicant in connection with this application, including reasonable attorneys' fees.

#### The Respondents' main contentions:

18. The Applicant has no standing because he has not exhausted internal remedies as required by the Staff Rules. There are no exceptional circumstances which warrant the waiver of the requirement that internal remedies be exhausted.

19. The Applicant does not claim individual relief but requests declaratory relief as does the Applicant in Decision No. 40. The Tribunal has no power to grant such relief.

20. The Applicant has no standing to bring a claim on behalf of staff members other than himself.

21. The application against IFC and IDA should be dismissed, since the Applicant is not a staff member of either.

22. Although the Applicant has not opted for the Enhanced Separation Package, if he does, the applicable release clause which the Applicant would have to sign should be held to be valid.

23. The reorganization reflects a proper exercise of discretion, good faith, a proper consideration of the relevant facts, careful study of the proposed changes and the adoption of safeguards to avoid unnecessary or excessive harm to the staff. It was undertaken far from hastily. The formulation and implementation of the reorganization are consistent with the Bank's Articles of Agreement, the Principles of Staff Employment and the principles enunciated by the Tribunal in paragraph 31 of the de Merode decision.

24. The Bank's consultations with the staff and representatives of the Staff Association not only fully complied with Principle 10 and Staff Rule 10.01, but because of their frequency and the involvement of the Staff

Association representatives in all aspects of the implementation process, went far beyond the requirements of the relevant provisions of the Principles of Staff Employment and of the Staff Rules. The principle of consultation was not infringed because Bank management decided to adapt the process followed for the adoption of Staff Rule 5.09 to the circumstances and to decide that it was reasonable to provide a period of less than a week for consultation.

25. The tax allowance system and its operation does not discriminate in an unjustifiable manner against the Applicant or among staff members of different nationalities or residence. The Applicant's claim relating to tax allowances is not ready for adjudication and in any case it would not be covered by the release clause associated with the Enhanced Separation Package.

26. The Applicant should not be awarded costs, because he has not specified or substantiated expenditures and, even if a party wins, he is not entitled to costs save in exceptional circumstances.

#### Considerations:

27. The Applicant challenges the validity of Staff Rule 5.09 which sets forth the basic procedures for the comprehensive Bank reorganization. He claims that the rule was issued without meaningful consultation, that it is substantively discriminatory and otherwise unfair, and that in particular its provision for a waiver of claims on the part of staff members accepting certain compensation packages upon separation from Bank service is a violation of staff members' fundamental rights. To the extent that the Applicant purports to challenge Staff Rule 5.09 as that rule adversely affects staff members other than himself, the Tribunal has determined that such an application is inadmissible: Agodo, Decision No.41 [1987]. To the extent that the Applicant attacks the general terms of Staff Rule 5.09, apart from its implementation by the Respondent in a decision that affects the Applicant in particular, the Tribunal has held in the same decision that such an application is inadmissible.

28. The Applicant also, however, alleges that he has suffered a particular violation of his own employment contract as a result of the reorganization and the implementation of Rule 5.09. The Applicant, who had occupied the grade 26 position of Division Chief since 1976, was informed in June 1987 that he had not been selected for such a position in the reorganized Bank. He ultimately accepted, in September 1987 (subsequent to the filing of the application in this case), the position of Principal Credit/Institution Specialist in the Technical Department, Asia Region, a grade 25 position; he nonetheless insists that he is entitled to retain his former grade level 26, while the Respondent has informed him that he will be entitled to do so only for the two-year "grandfathering" period provided in Rule 5.09. The Applicant has not challenged his new grade-level 25 rating before this Tribunal (it was called to the attention of the Tribunal only in the Respondent's rejoinder to the Applicant's reply). His application does, however, challenge the Bank's failure to award to him a Division Chief position in the reorganized Bank. He contends that the Respondent never provided any criteria for the selection process, that he was never properly consulted or interviewed during the selection process, that the Bank's reasons for not selecting him were never explained to him, and that the Bank's decision was substantively wrong, particularly as it was affected by an erroneous evaluation by his supervisor, who corrected the evaluation only after the Applicant had been denied the appointment as Division Chief.

29. The procedural and substantive flaws alleged by the Applicant in the Bank's decision not to retain him as Division Chief are claimed to derive from the Respondent's improper adoption and implementation of Staff Rule 5.09. To that extent, the Applicant has alleged that a decision has been made by the Respondent that directly affects his work status, indeed the existence of his former position, at the Bank, and that such decision constituted a violation of his contract of employment or terms of appointment. His claim is thus within the coverage of Article II, para. 1 of the Statute of the Tribunal, unlike the claims of the Staff Association and of the Executive Committee members of the Staff Association, dismissed by the Tribunal in other cases decided this day.

30. The Respondent nonetheless contends that this application should be dismissed by virtue of the Applicant's failure to exhaust his internal remedies within the Bank, as required by Article II, para. 2. That provision states:



No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless: (i) the applicant has exhausted all other remedies available within the Bank Group, except if the applicant and the respondent institution have agreed to submit the application directly to the Tribunal

....

This statutory exhaustion requirement is of the utmost importance. It ensures that the management of the Bank shall be afforded an opportunity to redress any alleged violation by its own action, short of possibly protracted and expensive litigation before this Tribunal. In addition, the pursuit of internal remedies, in particular the findings and recommendations of the Appeals Committee, greatly assists the Tribunal in promptly and fairly disposing of the cases before it. The Appeals Committee permits a full and expeditious development of the parties' positions, including the testimony of witnesses, and often results in the announcement of recommendations that are satisfactory to both the Bank and to the aggrieved staff member.

31. The Applicant appears not to deny that he has failed to exhaust his internal Bank remedies, and the Respondent has declined to agree that he may submit this application directly to the Tribunal. Nonetheless, the Applicant contends that his failure should be excused by virtue of the "exceptional circumstances" contemplated in Article II, para. 2 of the Statute. He asserts that the internal processes for review are either not appropriate or not currently functioning. To summarize his contentions, the Applicant asserts that the internal channels of review are extremely unclear, or that they are overburdened or cannot function in a timely manner, or that they are unavailable to staff members of his grade, or that they are unavailable to challenge rules of general applicability, or that they are effectively unavailable to staff members not citizens or residents of the United States who will be forced promptly to resettle abroad after separation from the Bank.

32. Now that the Applicant has in fact remained on the staff of the Bank, this last objection to the use of internal remedies is not relevant. As to the remainder, for the reason set out below, the Tribunal concludes that there are no exceptional circumstances that warrant permitting the Applicant to invoke the jurisdiction of the Tribunal without first exhausting his remedies within the Bank.

33. The claim that the channels of review are unduly burdened or unduly protracted is not supported by the facts. The usual processes of administrative review within the management structure of the Bank have been condensed by Staff Rule 5.09, paragraph 11.01(c), into a single level, so that the staff member need only seek review of his complaint at the level immediately below the appropriate Senior Vice President. There is no proof that this level of review is unavailable to the Applicant in a prompt manner. Although Rule 5.09 contemplates the possibility of expanding the size of the Appeals Committee to handle claims arising from the Bank reorganization, such expansion does not appear in the event to have been required. In its answer filed on September 3, 1987, the Respondent asserts that it is "not aware of a single case relating to the reorganization having been filed with the Appeals Committee." Moreover, paragraph 11.02(b) of Staff Rule 5.09 provides for the creation of an appeals mechanism involving a hearing officer, which would be a more expeditious alternative to review by the Appeals Committee. The Applicant's other contentions supporting his claim of exceptional circumstances are equally unconvincing.

34. The Tribunal reiterates that the Applicant's claim that he has been improperly denied a Division Chief position within the reorganized Bank as a result of unknown and unreasonably applied criteria, as well as improper procedures, are cognizable by this Tribunal. But it is a claim that is also cognizable in the normal channels of administrative review-and, in particular, before the Appeals Committee, which has routinely and satisfactorily handled claims not significantly different from those of the Applicant here.

35. The Tribunal therefore agrees, as the Respondent argues, that the sole and appropriate procedure for the Applicant is to exhaust the remedies contemplated in Staff Rule 5.09. The Tribunal infers from the Respondent's position that, regardless of the passing of time since his application was filed here, administrative channels of review will not be barred to him on that ground, provided he proceeds within the prescribed time limits after receiving the decision in this case.

36. The Tribunal also emphasizes that those channels of review have not been barred to the Applicant by virtue of any waiver or release. Certain staff members whose employment was terminated as a result of the reorganization have chosen to leave with a compensation package more generous than that ordinarily awarded by the Bank to staff members involuntarily terminated on account of redundancy; acceptance of that package has required the staff member to sign a release of all preexisting claims and a waiver of access to the Appeals Committee and the Administrative Tribunal for the assertion of those claims. Although the Applicant here attacks the validity of such a waiver and release, he did not sign any such document. He therefore has no standing to challenge its validity and, more pertinently, he continues to have recourse to internal channels of review, including the Appeals Committee and ultimately this Tribunal, regarding the Respondent's withdrawal of his appointment as Division Chief.

Conclusion:

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

E. Jiménez de Aréchaga

/S/ Eduardo Jiménez de Aréchaga  
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe  
Executive Secretary

At London, England, October 27, 1987