

Decision No. 309

Janis D. Bernstein,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of Francisco Orrego Vicuña, President, Bola A. Ajibola and Elizabeth Evatt, Vice Presidents, Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges, has been seized of an application, received on July 17, 2003, by Janis D. Bernstein against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. A meeting of the President of the Tribunal with the parties to obtain oral statements, pursuant to Rule 12(3) of the Rules of the Tribunal, was held on April 23, 2004. The case was listed on April 27, 2004.
2. The Applicant challenges the Bank's decision to deny pension credit for her past service as a Non-Regular Staff (NRS) because of a break in service between a series of appointments as both Long-Term and Short-Term Consultant. The Applicant alleges gender discrimination; she says that the break was the consequence of decisions made at a time when she was due to deliver her first child.
3. The Applicant began her career with the Bank on December 15, 1982, as a Short-Term Researcher in the Urban Development Department. This appointment was extended until June 30, 1983. On July 1, 1983, the Applicant received a Long-Term Consultancy appointment that was extended continuously until January 31, 1986. She then left the Bank to work for a private firm.
4. The Applicant rejoined the Bank on February 1, 1989, as a Short-Term Consultant. This appointment lasted until April 1989. Beginning on May 1, 1989, her appointment was converted to a Long-Term Consultancy expiring on April 30, 1990.
5. Shortly after this last date the Applicant gave birth to her first child. She was not eligible for paid maternity leave under her Long-Term appointment. The Applicant explains that she therefore had no choice but to let her contract expire, although her managers expressed their intention to renew it upon her return.
6. After a Short-Term Consultancy in August and September 1990, the Applicant was again brought into Bank service as a Long-Term Consultant beginning on November 15, 1990. This appointment was continuously extended until November 14, 1994.
7. On October 1, 1990, the Bank introduced a rule under which Long-Term Consultants and Temporaries appointed on or after that date would be eligible for extensions lasting in total not more than four years. Long-Term Consultants or Temporaries in continuous service as of September 30, 1990 were not subject to this limitation.
8. As the Applicant was not in service as a Long-Term Consultant on September 30, 1990, this limitation applied to her. Her Long-Term Consultancy, which had begun on November 15, 1990, therefore expired after four years on November 14, 1994. (There is an unimportant discrepancy as to this last date; the Applicant considers that the contract expired on December 1, 1994.)
9. Following the expiration of her Long-Term Consultancy because of the four-year rule, the Applicant was

converted again to a Short-Term Consultant. She served in this capacity in various Bank units until the end of 1996. On January 2, 1997, the Applicant was yet again appointed as a Long-Term Consultant when a partial abolition of the four-year rule came into effect. She was converted to a Term appointment on June 22, 1998, and ultimately to an Open-Ended appointment on January 10, 1999.

10. The Applicant's participation in the Staff Retirement Plan (SRP) began on April 15, 1998, following the Human Resources Policy Reform that allowed NRS to accrue prospective pension credit. But given the unusual sequence of her appointments and breaks in service, the Applicant did not qualify for past pension credit under the terms of Schedule F to the SRP, as approved on December 12, 2002. The key feature of this Reform, as relevant to the present case, is that in order to qualify, NRS must have been in continuous service with a pensionable appointment lasting until January 1, 2002. Service occurring before a break of more than 120 days is not taken into account.

11. Under Schedule F, a "Break in Service" is defined as a "period of more than 120 consecutive calendar days before January 1, 2002 during which the individual did not hold (i) a Non-Regular Appointment" A Non-Regular Appointment is defined as including Long-Term Consultants and other specific Long-Term appointments. Short-Term Consultant appointments do not fall under this definition. Moreover, the Schedule specifically provides that if a would-be participant "incurred one or more Breaks in Service, no days on or before the last day of the latest Break in Service shall be considered, or included within, a Period of Eligible Employment."

12. Schedule F also requires NRS to have worked more than 730 days before April 15, 1998, in order to qualify for past pension credits. The number of days that followed the Applicant's return to Long-Term service on January 2, 1997, until April 15, 1998, the date of her commencing SRP participation, could not be computed as qualifying for credit under the new rules because the Applicant's number of days of eligible employment was less than 730. The 730-day figure is the equivalent of a notional two-year work period during which a staff member's Short-Term appointment is not to be recognized as pensionable service.

13. On September 19, 2002, the Applicant was given preliminary notice that she would not receive past pension credit under the rules described. The period between December 1994 and December 1996, during which the Applicant was a Short-Term Consultant, was considered a Break in Service exceeding 120 days. The period before December 1994 was excluded because it preceded the Break. The period from January 2, 1997 through April 14, 1998 was disqualified because it was less than 730 days. The Applicant wants past pension credit for the seven years and five months extending from November 15, 1990, the date she rejoined the Bank as a Long-Term Consultant following the birth of her first child, to April 14, 1998, the day before she began participation in the SRP.

14. The Applicant's request for reconsideration of that determination was rejected by the Past Pension Credit Implementation Team on October 1, 2002. After the Bank declined to submit the dispute to mediation, the Applicant filed an appeal with the Appeals Committee on December 19, 2002. The Appeals Committee determined on March 11, 2003 that it lacked jurisdiction over the matter. But since the Bank had agreed to waive the requirement that the Applicant seek review by the Pension Benefits Administration Committee before proceeding to the Tribunal, the Applicant was able to file her application directly with this Tribunal.

15. The Applicant first contends that the Bank's definition of a Break in Service does not bear any relationship to the continuity, quality or amount of work performed by the affected NRS. It therefore constitutes an unfair and arbitrary *détournement de pouvoir* and differentiates in an unjustifiable manner between individuals or groups of staff. The Bank retorts that its policy is based on fairness, and that it could only be implemented by means of general rules; it would be impossible to consider each case separately.

16. The Tribunal has had the occasion to consider this issue in two cases. In *Lavelle*, Decision No. 301 [2003], at para. 14, the Tribunal upheld the validity of general rules on the basis "that an endeavor to examine each staff member's career history would result in an administrative nightmare, not to mention the practical difficulties and a much greater risk of arbitrary differentiation between like staff members." That case also held

that the Bank may legitimately grant benefits pursuant to criteria such as the number of years served. *Id.* at para. 16.

17. In *Elder*, Decision No. 306 [2003], a case somewhat similar to the present one, the Tribunal specifically upheld, at para. 12, the Bank's decision to exclude service falling before a disqualifying break although the staff member held Short-Term appointments during the break. In neither that case nor this did the applicant complain of an incorrect application of the rules; the rules themselves are questioned.

18. The Tribunal finds no ground to alter its conclusions in those prior cases as far as the current Applicant's contention of a *détournement de pouvoir* is concerned. As held in *Crevier*, Decision No. 205 [1999], at para. 17, it is not for the Tribunal to consider which alternative would have been best or more effective, but only to decide whether the outcome violates an applicant's rights. Here, the Applicant's rights were not in fact affected by the Bank's decision with respect to past pension credit eligibility. Under strict application of the rules in force, she had no entitlement to the benefit. Other considerations must be taken into account, however, as explained below.

19. The Applicant contends that her work as a Short-Term Consultant during the period December 1994, through December 1996, was in fact a full-time assignment materially identical to her previous tasks under Long-Term appointments. The use of Short-Term appointments was thus in her view an artifice to bypass the limits imposed by the four-year rule on the duration of Long-Term appointments. The Bank replies that the distinction between Short-Term and Long-Term appointments is a legitimate exercise of discretion relating to staffing needs, budgetary questions and other matters related to a business rationale.

20. The Tribunal has accepted this element of discretion in the Bank's decisions whenever they are embodied in rules of general application having a reasonable policy justification. The Tribunal held in this respect in *Elder* that

[t]he merit of general rules lies precisely in granting the same treatment to all staff members falling within the same category. The Bank's differentiation between Short-Term and Long-Term appointments had a clear business justification in the Bank's practice and was a topic considered throughout the discussion concerning NRS past pension credit.

Elder, Decision No. 306 [2003], at para. 19.

21. Yet the Bank's prerogative to develop policies by rules of general application does not preclude the Tribunal from examining specific instances of arbitrariness or unreasonableness in the application of such policies. Although it would be improper for the Tribunal to require that the Bank adopt policies on a case-by-case basis without setting general rules, it would be equally wrong for the Tribunal to decide specific cases without considering extraordinary circumstances. The Tribunal has often conducted a fact-specific review in respect of the business rationale invoked in the application of a policy in question. See *Prescott*, Decision No. 253 [2001], *Lavelle*, Decision No. 301 [2003], and *Elder*, Decision No. 306 [2003].

22. The Tribunal believes, as it held in *Elder*, that continuity of service is a normal requirement of pension plans. Exceptions are to be considered in a very restrictive manner. *Elder*, Decision No. 306 [2003], paras. 23, 25-26. The Bank's rules on past pension credit are thus not unreasonable as such. The facts of the Applicant's case are sufficiently unusual, however, to warrant review of their application even under this stringent standard.

23. The Tribunal agrees with the following characterization by the Applicant's counsel in his oral presentation: "We believe that the case here is an extraordinary one. It is entirely unique to the circumstances of Ms. Bernstein's employment with the Bank and her history of work here." Indeed, the Tribunal finds important differences between the facts in the present case and those in *Elder*. The first comparison corresponds to the Applicant's decision to let her contract expire on April 30, 1990. In *Elder*, the Tribunal found, at paragraph 19, that "there was no other option at the time of the Applicant's appointment to a Short-Term position or else the Applicant would have had to leave the Bank's service altogether." In the present case, the expiry of the Applicant's Long-Term Consultancy was a matter of pure happenstance. She could very well have been mid-

way through a longer-term appointment, and taken an unpaid leave of absence. The Applicant has readily persuaded the Tribunal that her change in status as of April 30, 1990, was the result of her imminent maternity and nothing else.

24. The second comparison relates to the expiry of the Applicant's subsequent Long-Term Consultancy on November 14, 1994, due to the four-year rule described in paragraphs 7 and 8 above. In *Elder*, the applicant recognized that his change in status to Short-Term was the result of modifications of the budget process and in the management of his unit. As the Tribunal held in that case, at paragraph 22, the change in his status was "connected with both the budgetary situation and the work program in his unit." No such factor is at play in the present case. The Tribunal is persuaded by the Applicant's demonstration that her work between December 1994, through December 1996, a period during which she held Short-Term appointments, was materially identical to her work as a Long-Term Consultant immediately before and immediately afterward. That different Bank units might have been involved during this period did not affect the material identity of her work. The parties' meeting with the President of the Tribunal confirmed the unchanging nature of the Applicant's work prior to her maternity absence, during her absence, and after her return to the Bank.

25. Statements from her supervisors confirm this conclusion. The Applicant's supervisor during a relevant part of this period has stated that the Applicant worked continuously for her between February 1995 and the time the supervisor left the Bank in 2000, in a unit that underwent successive changes in name. In particular, the supervisor explains that

[t]he reason I offered her a short term consultancy rather than a long term consultancy was because Ms. Bernstein had already served for four years as a long term consultant which, at that time, was the maximum period an individual could hold this type of appointment.

The manner in which I assigned her work was not in any way affected by Janis' short-term consultant status. I would have given her the same assignments whether she was an STC, LTC, or regular staff for that matter.

This also appears to have been the understanding of the Bank. A Personnel Action Form explained that the termination date of the Applicant's Long-Term appointment had been changed on July 16, 1994 "to reflect the 4-year limitation as per Staff Rule 4.01, paragraph 6.01(B)."

26. It is evident from the record that the Applicant's Short-Term appointments during the period 1994-96 were, as the Applicant has argued, a mere "artifice" to comply with the four-year limitation on Long-Term Consultancies then in force. The Bank's observation that the Applicant arranged for "stringing together a number of [Short-Term Consultancy] assignments from a number of divisions within the Bank" is unconvincing in the light of the record. Aside from the continuous changing of unit names, which in itself does not give rise to a business rationale for the Applicant's treatment, the fact that various other units were briefly involved does not alter the nature of the Applicant's work.

27. The Respondent has argued that the Tribunal found an abuse of discretion in the *Prescott* case because the applicant's managers in that case had neglected to abide by the provision of Staff Rule 4.01 requiring that the Bank consider regularization of the applicant's appointment after he had served four years in the same position. The Respondent believes that it cannot now be found at fault because it adhered to that very Staff Rule in ending the Applicant's Long-Term Consultancy after four years. In the present case, the issue is not, however, whether regularization took place or not after a four-year appointment in a given position. The Applicant raised no such complaint. The issue is instead whether the Tribunal should consider the Applicant's continuing employment, even as a Short-Term Consultant, as equivalent to a Long-Term Consultancy for the purpose of past-pension recognition because of its unchanging nature.

28. In the Applicant's view, moreover, all adverse consequences of the application of the past pension credit policy to her stem from the fact that she became pregnant while holding a Long-Term Consultant contract. As no paid maternity leave was granted for Consultants, the Applicant had no option but to let her Long-Term Consultant contract expire before she gave birth in 1990. Otherwise, the Applicant asserts without challenge

from the Respondent, her Long-Term Consultant contract would have been extended and her employment status unaffected by the four-year limitation introduced in her absence. Ultimately, the Applicant contends, she would have had no Break in Service with respect to the new past pension credit rules.

29. The Applicant's complaints of gender discrimination are based on the proposition that it was only her pregnancy that interrupted her Long-Term service. It was certainly not the intention of the Bank to discriminate against female staff members in enacting the four-year limitation on Long-Term Consultancies; nor could the Bank have foreseen all of the implications of this general policy for future entitlements to certain benefits. The Bank argues that under the Rules the same result could have occurred if a male staff member had for any reason to leave the Bank before October 1, 1990 and found himself affected by the four-year limitation when he rejoined at a later point. The Tribunal observes that, as noted by the Past Pension Credit Implementation Team, the 120-day period in Schedule F is longer than that of the Bank's paid maternity leave; in fact, the 120-day figure was designed to ensure that in the usual case maternity would not result in a Break in Service.

30. Nevertheless, the Tribunal notes that under recognized international standards, absence from work due to pregnancy and childbirth should not result in loss of continuity of employment, seniority or status. Here, it is clear that it was only because of her pregnancy and childbirth that the Applicant lost her status as a Long-Term Consultant and was consequently affected by the four-year rule.

31. There is one aspect which is unique in the circumstances of the Applicant's unpaid maternity leave. As the Applicant's supervisor at the time of the maternity leave later stated:

[T]he Division was forced to allow her long-term contract to expire because she had to leave work to have a baby. When she left, it was with the understanding that she would return to work full time after she recovered from childbirth. ... If Ms. Bernstein did not leave at that time to have her baby, her contract would have been extended automatically.

The Applicant's colleagues in the Division appear to have had regular communications with her during her absence. An office was kept for her in the Bank. Work was sent to her home. A Short-Term contract was even issued to her for work in August-September 1990, when complications following her delivery prevented her from rejoining the Bank in her former full-time capacity. This work occurred before the four-year limit was introduced effective October 1, 1990.

32. In the light of these extraordinary circumstances, the Tribunal concludes that the Applicant had an expectation to rejoin the Bank in her former capacity as a full-time, Long-Term Consultant without any limits placed on her appointment. This was not only the Applicant's perception and belief; it was also that of the Bank. It also became apparent in the course of the meeting of the President of the Tribunal with the parties that neither the Applicant nor her managers had any information about the enactment of the four-year rule when she re-entered the Bank's service in 1990. While general policies might be changed by the Bank, a prior expectation must be respected when created by the acts of management itself.

33. For these reasons, the Tribunal considers that the Bank should have treated the Applicant as if her Long-Term contractual status was continuous in effect, without regard to the breaks which were the consequences of her pregnancy and childbirth, for the purposes only of the application of pension benefits. The result is that the four-year rule should not be applied to her; her service from November 15, 1990, through April 14, 1998, qualifies for pension credit.

34. The Tribunal wishes to record its appreciation of the constructive and professional interventions of both parties and their counsel in the special meeting convened on April 23, 2004. This was a case of considerable complexity. Both sides defended their positions cogently, and provided valued assistance to the Tribunal throughout the proceedings.

Decision

For the above reasons, the Tribunal decides that:

- (i) the Bank shall award past pension credit to the Applicant for the period from November 15, 1990, through April 14, 1998, from which 730 days' credit shall be deducted in accordance with the Staff Retirement Plan;
- (ii) the Applicant shall make any necessary contributions in this respect in accordance with the relevant regulations in force;
- (iii) the Respondent shall pay the Applicant costs in the amount of \$15,000; and
- (iv) all other pleas are dismissed.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

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

At London, England, June 18, 2004