

Decision No. 81

Trent John Bertrand
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

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. Onyeama and Tun Suffian, Judges, has been seized of an application, received January 30, 1989, by Trent John Bertrand, against the International Bank for Reconstruction and Development. There was an initial exchange of pleadings, but because the Applicant was late in submitting his reply, the Respondent opposed its receipt by the Tribunal, and the President decided to deny acceptance of the Reply without prejudice to the Tribunal's power to reconsider. The case was listed on August 11, 1989. The Applicant's subsequent request for oral proceedings was denied by the Tribunal, which decided that such proceedings were unnecessary.

The relevant facts:

(a) The Reorganization

2. The general facts relating to the 1987 Reorganization are as stated in paragraphs 5 to 40 of Decision No. 40.

(b) The particular facts of the case

3. The Applicant began his association with the Respondent as a consultant while he held a tenured professorship at a University in the U.S.A. Subsequently, starting February 7, 1983, he was given a regular appointment in the Bank, as a Senior Economist. Because of the Applicant's previous service, the usual one year probationary period was waived.

4. In January 1985 the Applicant resigned his tenured position at his university. In October 1985 he was promoted in the Bank to the position of Senior Economist (level 25), and in April 1986 he was again promoted to the level 26 position of Chief, Economics and Policy Division, Agriculture and Rural Development Department (ARDD), Operations Policy Staff (OPS).

5. While functioning as division chief the Applicant was responsible for several papers in the course of preparing which he had several disagreements on important policy and analytical issues with his director. In the Applicant's Performance Review (PPR) for 1986-87, his director noted the adverse effect of their disagreement upon their working relationship, and added: "For whatever reason – and it may be partly mine – Mr. Bertrand (sic) was less than full (sic) effective as a Division Chief. I regret that, for he is a person of considerable potential."

6. During the 1987 reorganization the Applicant was not offered a position at level 26 during the management-selection process set forth in Staff Rule 5.09. On June 12, 1987, prior to the start of the selection process for staff generally, the Applicant elected separation from the service of the Respondent with the Enhanced Separation Package (Package B).

7. The Applicant filed a timely appeal on March 28, 1988 with the Appeals Committee, challenging the fairness of the Bank's decision not to offer him a position at level 26. The Appeals Committee found that "(a) the

selection procedure which resulted in the non-selection of the Appellant was carried out on the basis of fair and unbiased criteria; and (b) the Appellant is not entitled to increased compensation to account for the loss of Appellant's tenured full professorship and disruption of his career." Consequently the Appeals Committee recommended that his appeal be rejected. The Committee's conclusions were accepted by the Respondent's Senior Vice President (SVP), External Affairs and Administration.

The Applicant's main contentions:

8. The non-selection of the Applicant in the reorganization for a managerial position at level 26 was the result of bias and vindictiveness, especially on the part of his director.

9. The Applicant requested compensation in the amount of three years salary or more, as the Tribunal may decide, for violation of his rights and for loss of a tenured full professorship given up in order to join the Bank, and the payment of reasonable legal fees.

The Respondent's main contentions:

10. The application of the selection process with respect to the Applicant during the reorganization was proper in all respects and did not evidence vindictiveness or any other improper action. Particularly, senior managers had the right and duty to select those managers who would help them most effectively in carrying out their department's mission in the reorganized Bank.

11. The Applicant has not proved financial loss. He has also not shown, in accordance with the Tribunal's ruling in Harrison, that the differential between what he would have received had he been separated under Staff Rule 7.01 and what he did receive with Package B (between \$30,000 and \$63,000) was inadequate to compensate him for any loss he had suffered as a result of his separation from the Bank under the reorganization.

12. The award of reasonable legal fees would be inappropriate, particularly because the Applicant had not been represented by counsel.

Considerations:

13. The Applicant filed his reply more than a month beyond the date provided in Rule 9 of the Rules of the Tribunal. He asks that the Tribunal exercise its authority under Rule 25 to modify this time limit, in view of the fact that he was on an extended trip abroad when the Respondent's answer was transmitted to his home in the United States and he did not receive the answer until his return. The Tribunal concludes that this fact does not constitute "exceptional" circumstances as required in Rule 25 to justify extending the time limit for filing the Applicant's reply. When the Applicant filed his application, he should have been able to anticipate when the Respondent would file its answer, and he could therefore have made some arrangements before leaving the country – either at his home or through an attorney or other representative – so as to assure his prompt receipt of the answer. Alternatively, he might in advance have filed a request with the Tribunal invoking grounds justifying a suspension of the running of time for filing his reply. Adherence to the time limits set forth in the Rules of the Tribunal is to be expected, and the Tribunal therefore confirms the decision of the President to deny acceptance of the Applicant's reply.

14. The Applicant contends that the Respondent acted arbitrarily and vindictively in failing to assign him to a managerial position in the course of the 1987 reorganization. He claims, in particular, that the personal hostility of his supervisors – his departmental director and his senior vice president – induced them and other senior managers involved in the selection process to single him out for adverse treatment.

15. The decision not to select the Applicant was taken in the exercise of a discretionary power. As the Tribunal has held in several of its earlier decisions, when the Respondent exercises its discretion "it is not for this Tribunal to substitute its own judgment for that of the competent organs of the Bank." (de Merode, Decision No. 1 [1981], para. 45; Pinto, Decision No. 54 [1988], para. 35). The Tribunal will not interfere with the exercise of

such discretion “unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.” (Saberi, Decision No. 5 [1982], para. 24; Suntharalingam, Decision No. 6 [1982], para. 27; Thompson, Decision No. 30 [1986], para. 24; Pinto, Decision No. 56 [1988], para. 36.)

16. The question in this case is whether there is evidence of the operation of any of these vitiating factors. There is evidence that the Applicant and his director disagreed strongly over certain substantive policy issues and that the Applicant sharply criticized his director, just as his director in turn sharply criticized him. There is also evidence that the director on occasion praised the Applicant.

17. The difficulty is that the Bank has not at any stage – either at the time of the reorganization or in the course of administrative review, including this proceeding before the Tribunal – provided any statement by the relevant senior managers involved in the management-selection process of the elements which entered into the decision not to select the Applicant for a level-26 position. The Respondent has stated that “it was legitimate for [the Applicant’s director] to take policy differences and Applicant’s effectiveness (or lack thereof) in arguing his views into account,” and also that “the simple truth is that the managerial selection process was a very competitive one and that the skills and talent of others were deemed superior to the Applicant’s.”

18. The Tribunal considers, as a matter of law, that it is not inappropriate for the Bank to take policy differences into account in choosing among eligible candidates in the reorganization. But this does not dispose of the issue presented in this case. In any particular case, though the management may be entitled to take a given factor into account, there must at the least be some plausible indication that there is factual support for the factor given negative weight, that such factor has not been weighed in a manner that is discriminatory when compared with its application to other staff members, and that the weight given to such factor is not otherwise arbitrary or manifestly unreasonable. Excessive reliance upon a given factor can lead to a distortion of the process of decision, and what might otherwise have been relevant and reasonable in a limited quantity could become unreasonable and improper in a greater quantity. Similarly, the weight given by senior managers to policy differences should properly turn upon such considerations as the level and responsibilities of the staff member, the position-relationship with his or her superior, and the traditions of the discipline or of the work unit and the manner in which such differences are articulated. It might also be the case that a negative assessment of a staff member’s performance might, even if relating to a minor matter, loom larger when the other staff members with whom he is competing for an assignment have especially strong credentials. Indeed, that the Bank designates certain staff members rather than another, in the course of a reorganization, need not in any way imply that the latter staff member is not qualified for the post or that he has rendered performance that is less than satisfactory; such a situation is in fact to be frequently expected in an organization with personnel standards such as those of the Bank.

19. Applying these considerations to the present case, the Tribunal notes that the Applicant was a division chief at the time of the management-selection round of the 1987 reorganization. Although this imposed upon him the duty to conform his decisions and actions to Bank policy, it is also true that staff members at this level can reasonably be expected frankly to air their differences with their superiors when preparing policy statements. Moreover, the record supports the conclusion that robust mutual criticism was quite characteristic of the working relationships within the Applicant’s department, and that the Applicant appears not to have been previously admonished therefor. It is also clear that by the time of the management-selection round, a personal element had crept into the relationship between the Applicant and his director and indeed that the director was candid enough to concede that he might have been partly to blame therefor.

20. The Tribunal concludes, in light of all of these factors, including the detailed allegations and factual support presented by the Applicant in his pleas, that his case should properly be treated as one in which the burden of proof moved to the Respondent to show that Bank management acted fairly to the Applicant, rather than resting upon the Applicant the burden to show that the Bank acted unfairly. In the typical case in which the Applicant points to specific reasons for casting serious doubt upon the fairness of the Bank’s selection process, it is for the Bank to dissipate this doubt by providing the facts that are readily available to it in order to show no more than that its discretion has been fairly exercised. The Bank has not attempted to discharge this burden,

other than with conclusory statements relating to the content and manner of assertion of the Applicant's policy views, and the perceived superiority of other candidates for managerial positions. The Tribunal believes that these statements are insufficiently detailed to discharge the Respondent's burden of demonstrating that its decision-making process was based upon giving no more than their due weight to legitimate factors.

21. The Applicant has requested compensation in the amount of three years salary or more for violation of his rights and for loss of his tenured professorship given up in order to join the Bank. He has also requested that the Tribunal order the payment of reasonable legal fees. Upon his non-selection to a level-26 position in the reorganization, the Applicant chose – as Bank regulations expressly permitted him to do – to leave the Bank with the Enhanced Separation Package (Package B). The Respondent estimates that by doing so, the Applicant received between \$30,000 and \$63,000 more than he would have received had he separated from the Bank under the usual terms provided in Staff Rule 7.01. The Respondent correctly points out that, under the Tribunal's decision in Harrison, Decision No. 53 [1987], this increment must be taken into account in any calculation of damages, such that an applicant must demonstrate that the injury suffered is in excess of that increment.

22. The Tribunal concludes that such a demonstration has been made. The Tribunal considers that, in the calculation of damages, weight should be given to the Applicant's extended service as a consultant to the Bank before he joined the staff full time, a factor that accounted for the Bank's waiver of the Applicant's initial probationary period and his quick rise to a position as division chief. Taking that factor into account, and taking into account the Tribunal's conclusion that the Bank has not demonstrated that the Applicant's non-selection in the management-selection round was consistent with his conditions of employment, and also considering the rule set down in Harrison, it is the conclusion of the Tribunal that the Respondent should pay the Applicant damages in the amount of \$80,000 net of tax. The Applicant's additional request for attorney's fees is denied. The Applicant prepared his application without the assistance of counsel, and counsel did not enter the case until the preparation and attempted filing of the reply, which the Tribunal has not accepted because of its untimeliness.

Decision:

For the above reasons the Tribunal unanimously decides that:

1. The Respondent shall pay to the Applicant the amount of \$80,000 net of tax.
2. All other pleas are dismissed.

E. Jiménez de Aréchaga

Eduardo Jiménez de Aréchaga
President

C. F. Amerasinghe

/S/ C. F. Amerasinghe

Executive Secretary

At London, England, September 22, 1989