

Decision No. 209

David Bigman,
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 May 12, 1998, by David Bigman against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on February 17, 1999.

2. This case concerns a complaint by the Applicant that the conditions under which he was recruited by the Bank on a fixed-term appointment were not honored and that, as a result, his appointment was neither regularized nor extended. Issues relating to breach of promise and breach of contract have been raised in this connection, together with allegations of arbitrariness and abuse of discretion.

3. The Applicant joined the Bank in 1994 as a Senior Economist in the Human Resources Division of the Africa Technical Department (AFTHR) on a three-year fixed-term appointment. At the time of his recruitment by the Bank, the Applicant was on a two-year contract as a Senior Economist with the International Monetary Fund (IMF), a position he had held since 1992. He was also at that time on sabbatical leave from the Hebrew University of Jerusalem. The Applicant maintains that this sabbatical leave had prevented him from accepting a regular staff appointment when he joined the IMF.

4. In order to accept the offer made by the Bank, the Applicant had to take two important steps in the pursuance of his professional career. The Applicant explained that he had first to inform the pertinent Department at the IMF that he would not seek extension or regularization of his appointment. The second, and more important, step was to take early retirement from the Hebrew University. The Applicant further explains that he took these steps and accepted the Bank's offer of employment because of the nature of the work offered by the Bank and the conditions discussed for his appointment. An examination of the circumstances of the Applicant's appointment and of the conditions that might have intervened are, therefore, crucial aspects that need to be considered by the Tribunal.

5. The Applicant was interviewed and recruited by Mr. X – a senior officer and technical specialist who served as supervisor of the Poverty Unit in AFTHR – and was assigned to Mr. X's Unit when he joined the Bank. During the process of his recruitment, he was also interviewed by the Division Chief of AFTHR and the supervisor of the Food Security Unit in that Division. The Applicant contends that during the recruitment process he was given assurances by Mr. X that his appointment would be regularized after one year if his performance was satisfactory. The Bank is of the view, however, that the Applicant only accepted an offer of a three-year fixed-term appointment and that, in accordance with the letter of appointment, such fixed-term appointment was not subject to automatic regularization or extension. The Bank further argues that Mr. X had only offered an opinion and not a promise of any kind and that, in any event, Mr. X had no managerial authority to make promises.

6. The first question that the Tribunal must address is whether there was in fact a promise made by Mr. X relating to the Applicant's appointment, and if so the nature of the promise. The record is abundantly clear that such a promise was in fact made. In an electronic message addressed to the Technical Manager of the Africa Technical Department, Institutional and Social Policy Division, regarding discussions about the Applicant's

confirmation, dated September 29, 1996, Mr. X stated: "My dilemma is that I assured David almost two and a half years ago when he joined the Bank that he would be confirmed given my assumption that his work would be good." In the Report of the Appeals Committee on the Applicant's appeal, dated February 19, 1998, it was further recorded that "Mr. [X] testified that he recalls 'assuring' Appellant, based on his understanding of common practice at the Bank, that if all went well, Appellant could expect to be regularized toward the end of his contract term." In yet more unequivocal terms, Mr. X signed a written statement on September 10, 1998, confirming that

[a]s the person in charge of the Poverty Unit and responsible for recruiting for this position, I assured David that under normal conditions he would be made regular staff if his performance was satisfactory I expected the regularization to take place within one to two years after his entry on duty and certainly well before the end of his contract.

7. Contrary to the Respondent's assertions in its pleadings, the Bank itself acknowledged that a promise of regularization was in fact made to the Applicant, conditioned upon his satisfactory performance. In particular, the Acting Vice President for the Africa Region, in his administrative review of July 30, 1997, stated: "It is regrettable that you were promised regularization in one year. This was an unauthorized promise and this matter was clarified with you after you accepted the appointment." In the light of the above, it is well established that Mr. X made a promise to the Applicant with respect to the terms and conditions of the Applicant's appointment, beyond and in addition to what was included in the letter of appointment. Mr. X's authority to make a promise of regularization will be discussed further below.

8. The question that follows is whether such terms and conditions were decisive in the Applicant's acceptance of employment with the Bank. Again on this point, the Tribunal finds that this was so. It is hardly conceivable that a well-established professional such as the Applicant would forego a possibility of regular employment with the IMF or take early retirement from the Hebrew University in order to accept a limited three-year fixed-term appointment with the Bank. The assurances about his regularization made a crucial difference for his acceptance of employment with the Bank. This conclusion is based not only on the Applicant's statement of events, but also on the opinion of Mr. X. Indeed, Mr. X, in his written statement of September 10, 1998, confirmed that:

I encouraged David to apply for the position in the Africa Region's Poverty Unit, which matched his qualifications and experience. I knew that David would have to make important career decisions in accepting the position in the Bank on the basis of a fixed term contract since he had a position in the IMF that could be regularized, and he was still a tenured professor at the Hebrew University. Therefore, he relied on my assurances about the nature of the position and the good prospects for regularization given sound performance.

9. The Tribunal must now turn to the question of Mr. X's authority to make a promise of the kind discussed above. In the Bank's view, Mr. X did not have such authority since he "was not a 'Senior Staff Member with management responsibilities,' a 'recruiter,' or in any other position which would authorize him to offer or promise terms of appointment or conditions of employment, as Applicant has portrayed." (Respondent's Answer at para. 56.) As was stated in the administrative review of July 30, 1997, "[t]his was an unauthorized promise...." In the Applicant's view, however, Mr. X was the officer responsible for the Poverty Unit, supervised its work and recruited for it, and was relied on by the Division Chief for this and other administrative tasks relating to the Division. Mr. X himself indicated in his statement of September 10, 1998 that he was "the person in charge of the Poverty Unit and responsible for recruiting for this position...."

10. There can be no doubt that Mr. X was the Applicant's main contact with respect to recruitment for, and discussions about, the offered position. Furthermore, it appears that Mr. X was in charge of a number of administrative aspects relating to the work of the unit concerned, a matter on which his advice was followed by the Division Chief. The Applicant, therefore, had every reason to rely on the terms discussed with Mr. X and no reason whatsoever to doubt Mr. X's authority or clearance to this effect. However, even assuming that Mr. X acted without authority or that he exceeded his competence, this does not relieve the Bank of its responsibility vis-à-vis the Applicant. It is a well-established principle of many legal systems, as well as of international law, that the act of an official who is acting within the scope of his or her actual or apparent authority will be

attributable to the relevant entity. It follows that also the act of a Bank official who is acting within his or her apparent authority will be attributable to the institution, particularly if this act was relied upon in good faith. Whether the question of Mr. X's authority was explained to the Applicant and discussed with him after his acceptance of the letter of appointment, a matter which the Bank affirms and the Applicant denies, does not change the fact that the Applicant relied on the conditions offered for accepting his employment with the Bank.

11. The promise made to the Applicant was, however, expressly conditional on his performance being satisfactory. In the interim performance evaluation of January 25, 1995, the Applicant's Division Chief concluded that the Applicant "has demonstrated that he has the required technical knowledge, analytical capability to work under pressure and initiative to perform well in this Division." A similar evaluation was recorded in the Applicant's Performance Review Record (PRR) for the period of June 1994 to June 1995, that is, covering the first full year of his association with the Bank. In both evaluations, it was noted that the Applicant needed to improve his interpersonal skills with other members of the Division; in the PRR, it was also observed that the Applicant needed to adapt more readily to "the operational focus and requirements." These comments did not involve any negative criticism of the Applicant's performance and it was precisely because his "performance [had] been very good" during this first year that the Applicant's original probationary appointment was confirmed by the Management Review Team on recommendation of the manager, as was provided for under Staff Rule 4.02, paragraph 3.02(a). Such a recommendation is made if the "staff member is considered suitable for continued employment with the Bank Group," as provided under Staff Rule 4.02, paragraph 3.01(a), as then in force.

12. On the basis of the Applicant's satisfactory performance, Mr. X – who was of the opinion that the Applicant's performance had been "excellent" – recommended that the Applicant be given a regular appointment, just as he had promised during the recruitment process. It was at this point, however, that problems associated with the regularization of the Applicant's contract began to emerge.

13. In the PRR for the period of February 1995 to December 1995, it was again concluded that the Applicant's performance had been satisfactory. In this PRR, it was indicated that the Applicant brought "analytical rigor in operational and own-managed work" and that there had been "considerable improvement" in the Applicant's "interpersonal skills and in team collaboration." On this basis, the Applicant was given a full satisfactory merit increase rating of "3" for that year, a rating given to most of the staff in the Division. Notwithstanding its agreement with this evaluation, the Management Review Team decided to reserve its recommendation regarding regularization on the ground that it "could not find a rationale for early regularization." It was expressly stated by the Management Review Team that "[t]his is not a negative comment on Mr. Bigman's performance, which was satisfactory." The practical result of this decision was that the Applicant was not regularized after his various evaluations, even though his performance was satisfactory.

14. After efforts by both the Applicant and Mr. X to have the issue of regularization addressed, the Vice President for the Africa Region informed the Applicant, by memorandum of June 28, 1996, that the issue would be determined "through the regular process and procedures applicable to such cases" and that a decision would be taken at least six months before the end of his contract in June 1997.

15. The PRR for 1996 also reflected satisfactory performance by the Applicant, but the question of his teamwork effectiveness was again raised. On this basis, and having also considered the Applicant's technical work, the Management Review Team decided in March 1997 that there "was not an adequate case to regularize Mr. Bigman, nor to extend his fixed-term contract for a multi-year period." This language was changed in the final version of the Management Review Record after the Ombudsman intervened. In the final version, it was stated that the Management Review Team "had high regard for Mr. Bigman's technical skills and capacities," but that it did not see a possibility of extending the contract "since there has not been a sufficient match between the experience that Mr. Bigman offered and the operational needs of the Africa Region." A six-month extension of the contract was recommended instead. At this point it should be noted that – according to the terms of the application – a two-year extension of the Applicant's contract could have been acceptable to him as an alternative fulfillment of the promise made. An administrative review did not change the conclusions of the Management Review Team, and the Applicant's ability to work as part of a team was

invoked as a reason. Neither was relief obtained by the Applicant from the Appeals Committee, in the findings of which it was indicated that the decision not to regularize the Applicant “resulted from a shifting of the priorities in the Region, that took place during Appellant’s tenure in the Bank.” The various evaluations of the Applicant support the conclusion that the Applicant’s performance was satisfactory throughout his term of service.

16. Some criticisms relating to the Applicant’s interpersonal relations and to the need to demonstrate his effectiveness in operational work were made, but these criticisms did not change the overall evaluations. Moreover, the criticisms made were not consistent. In fact, early references to interpersonal problems were followed later by an observation that there had been “considerable” improvement in this respect. The Applicant’s interpersonal skills were then again criticized and were initially listed as one of two reasons for not regularizing or extending his contract. The Applicant’s technical work was mentioned as the other reason even though his evaluations were unanimous in commending his skills and experience. In fact, the final version of the Management Review Record was changed to reflect the Management Review Team’s “high regard” for such skills. Concerns about the Applicant’s operational work were also raised, but, again, such concerns were not important aspects of his evaluations. A change of priorities in the Africa Region and a mismatch between experience and operational needs have also been invoked, aspects that are entirely unrelated to interpersonal relations or professional skills. From these contradictions, it follows that there was no clarity at all with respect to the reasons that led to the decision not to regularize or extend the Applicant’s employment. However, it is clear enough that such a decision was not related to the Applicant’s performance but to new priorities in the region.

17. A professional controversy between the Applicant and the Research Department about a Special Program of Assistance for Africa appears to have had some influence on the decisions taken. Differing views were expressed about the orientation of this program and the matter was discussed with a group of the Bank’s donors at a meeting held in Bern in September 1996. Criticism of the Applicant’s approach was made by staff of the Research Department and concerns were expressed about the implications that this discussion could have outside the Bank. This situation was not fully addressed until after regularization had already been turned down. While the Applicant argues that his contribution was ultimately approved, the Tribunal need not address this question as it is reasonable to conclude that non-approval of his contribution would not have affected his overall performance or the evaluations of his many other tasks, which occupied more than two-thirds of his time.

18. As noted above, the Appeals Committee found that the decision not to regularize the Applicant’s contract resulted from a shifting of the priorities in the Africa Region. In fact, following a reorganization of that Region in mid-1996 the Applicant was transferred to the Institutional and Social Policy (ISP) Unit, the supervisors and managers of which participated in the Management Review Team that decided against regularization or extension of his contract. The question of research capability versus operational needs was again brought to the fore during the Applicant’s stay in ISP. This was indicated in the Appeals Committee Report, where it was concluded that the “Appellant’s managers in the reorganized ISP unit were interested in hiring outside consultants to perform the type of work that Appellant had been doing, and they did not foresee demand for Appellant’s services as a staff member.”

19. This last conclusion confirms that the decision not to regularize the Applicant’s contract was unrelated to his performance and responded to the change of priorities mentioned above. Not only was the Applicant’s contract not regularized or extended despite his overall continuing satisfactory performance, but it is quite evident that the Applicant’s interpersonal problems, teamwork performance and professional skills were not, in fact, the main reason for the final decision not to convert or extend his contract. Rather, it appears that the main reason for the decision was the shifting of priorities that took place during the third and last year of the Applicant’s employment. The operational needs of the ISP Unit and the managers’ preferences for hiring consultants were absent from all of the Applicant’s evaluations. Until the late shifting of priorities took place, the Applicant had satisfied the condition (i.e., satisfactory performance) that had been attached to the promise of conversion of his fixed-term appointment.

20. As rightly argued by the Respondent, and as often held by the Tribunal, there is no absolute right to conversion or extension of a fixed-term appointment. (Mr. X, Decision No. 16 [1984].) But this is so in ordinary circumstances, which are not present in this case. The Applicant accepted employment with the Bank in the light of specific conditions offered to him. This offer constituted a legally valid promise as it was made by an official with at least the apparent authority to do so and is, therefore, attributable to the Bank. The Applicant relied in good faith on this promise to accept the Bank's offer of employment and passed up other opportunities outside the Bank.

21. The promise was conditional on the Applicant's satisfactory performance. His performance was not only satisfactory but commended throughout the period of his appointment, as is clearly evidenced by the record. The reasons invoked for the decision not to convert or extend the Applicant's contract were not adequately reflected in the Applicant's evaluations, nor were they meaningful in the context of such evaluations. Only a change of priorities and a different preference by the managers, unrelated to the Applicant's performance, appear to have been at the very heart of the decision taken.

22. As the Tribunal held in another case involving the question of a promise, "[t]he discretion exercised by the Respondent as to whether the Applicant met the requirements of the position must, therefore, be scrutinized by the Tribunal in order to ensure that it is not vitiated by an abuse of discretion..." (Matthew, Decision No. 103 [1991], para. 29.) While evaluations of the Applicant were in the present case fair and reasonable, such evaluations were not duly taken into account in reaching the final decision, which was based on considerations different from his performance. The process of reaching a decision was, therefore, vitiated by an abuse of discretion. This led to the breach of a legally valid promise, the conditions of which had been properly met.

23. The Tribunal must now consider the question of remedies. While normally a vitiated decision would be quashed by the Tribunal, this has not been requested by the Applicant. It follows that the Tribunal shall award compensation for the damage that the Applicant has suffered as a result of the breach of the promise made by the Respondent.

Decision

For the above reasons, the Tribunal unanimously decides that:

- (i) the Respondent shall pay the Applicant compensation for the breach of promise in the amount equivalent to eighteen months' net salary;
- (ii) the Respondent shall remove from the Applicant's file all the documents relating to the Management Review Record dated May 8, 1997, in the event that this has not already been done; and
- (iii) the Respondent shall pay costs to the Applicant in the amount of \$9,974.48.

Robert A. Gorman

President

Nassib G. Ziadé

Executive Secretary

At London, England, May 14, 1999