

Decision No. 159

Sylvie Brebion,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal, composed of E. Lauterpacht, President, R. A. Gorman and F. Orrego Vicuña, Vice Presidents and P. Weil, A.K. Abul Magd, Thio Su Mien and Bola A. Ajibola, Judges, has been seized of an application, received on February 9, 1996, by Sylvie Brebion, against the International Bank for Reconstruction and Development. The usual exchange of pleadings took place. The case was listed on December 31, 1996.

THE RELEVANT FACTS

2. The Applicant joined the Bank in 1975 as a regular staff member. During the 1987 reorganization the Applicant was working as a Research Analyst, level 19, in the Infrastructure Department (INU), Water and Urban Development Division (WUD). Her duties involved, among other things, arranging the annual retreats for the Bank's staff in the Water and Urban Sectors, special training courses for Bank staff and high level policy seminars and conferences for government officials.

3. In her 1987-88 Performance Review the Applicant was given very favorable evaluations by all her managers. In the Management Review of her performance on May 26, 1988, the Director, INU, remarked that, with regard to her grade, the operational work the Applicant was doing justified a level 20 and her promotion was approved. He added that the Urban Division did not normally have a work program to support a level 20 position for operational support work and if an originally anticipated possibility of the Applicant's secondment to the Government of Mozambique did not materialize, other job alternatives for the Applicant would need to be explored. No such secondment or other job alternatives materialized for the Applicant.

4. By memorandum, dated January 24, 1989, to the Vice President, Sector Policy and Research (PRE), the Director, INU, informed him, among other things, that his department would need an urban transport specialist and that under the budgetary environment at the time, the only way of accommodating this specialist would be to reassign the position which was at the time filled by the Applicant, since it was the least costly to give up. By memorandum, dated February 7, 1989, to the Vice President, Personnel (PERVP), the Chief Personnel Officer of Policy, Planning and Research (PPRPE) requested and obtained his formal approval of the Director's, INU, request for abolition of the Applicant's office.

5. By letter to the Applicant, dated March 8, 1989, the Chief Personnel Officer, PPRPE, confirmed the conditions of the Applicant's leaving the service of the Bank on April 28, 1989 under a mutually agreed separation. Among those conditions were provisions that the Applicant would receive a lump sum equivalent to three years' net salary, a separation grant, three round trip economy class tickets to her home destination and resettlement benefits. The Applicant signed this letter on March 9, 1989.

6. As explained in a memorandum to the members of the Appeals Committee, dated November 18, 1994, from the Applicant's Division Chief at the time her position was abolished in April 1989, the Applicant was not happy about the decision to abolish her position but accepted the termination of her employment on the understanding that she would continue to work for the Bank as a consultant and that no limitations would be put on the number of days she could be so employed. By letter, dated November 23, 1994, the former Vice

President, PERVP, stated, among other things, that the Applicant had lost her employment because of a weakness in the budgeting system. He explained that, although the Applicant was a fully employed and needed staff member for a number of Bank departments, the department to which her position was assigned could not justify retaining the position when most of her time was contracted to other departments. He confirmed that he had agreed to a proposal by the Applicant under which she would accept termination but continue to serve her Bank clients as an outside contractor and that he had also agreed that, because of the circumstances of her case, restrictions on the number of days of her employment per year should not apply to her, and that this was recorded in her file. The Applicant continued to work on consulting assignments with the Bank after her separation.

7. Under Staff Rule 4.01, paragraph 8.05, as in effect in October 1988, there were no time restrictions on the use as consultants of former staff members whose employment was terminated by mutual agreement. But in April 1994, Staff Rule 4.01 was amended to provide that a former staff member whose employment terminated with the payment of severance payments under Rule 7.01 "Ending Employment" or Rule 5.09 "Implementation of Reorganization" could not be reappointed as Consultant for a period exceeding a total of 120 working days in any twelve months.

8. On May 17, 1994, the Deputy Director, Personnel Management Department (PMD), so advised the Division Chief, Industry and Energy Department (IEN), Telecommunications and Informatics Division (IENTI).

9. On June 29, 1994, the Deputy Director, PMD, informed the Applicant of the revision in Staff Rule 4.01, since she would be affected. He explained that the change had been made because of a recognition that it was inconsistent and illogical employment policy to pay staff to leave under one type of appointment, only to rehire them on another type of appointment for extended periods of time.

10. On July 7, 1994, the Director, IEN, sought an exemption for the Applicant from the 120-day restriction under paragraph 6.01(a) of the same Staff Rule. He based his request, among other things, on the fact that the Applicant was widely seen as meeting an essential need of the Bank in a cost effective and flexible manner in an area not easily or efficiently covered by regular staff. He added that the Applicant was involved in several activities in his sectors Bank-wide and that her employment would run over the 120-day limit. He also referred to the past agreement reached with the former Vice President, PERVP, that although the Applicant's position would be abolished, all the Regions would be allowed to hire her as a consultant whenever the need for her skills arose, without limitation.

11. On September 29, 1994, the Applicant requested administrative review of the application of the 120-day limit to her. On October 26, 1994, the Director, PMD, denied the Applicant's request to provide her with an unlimited exemption from the application of the newly-issued Staff Rule 4.01. He noted that the Applicant had received a generous severance package to compensate her for any loss she might have suffered as a result of her termination of employment in 1989, that although she had been offered many consultant appointments with various departments across the Bank they were all of limited duration, without a right of renewal, and that the Bank had always honored the terms of her previous appointments. He informed her that the Bank had changed its policy effective for appointments or renewals of consultants after April 9, 1994 and introduced the 120-day limitation because staff who received severance payments upon termination of employment should not be able to turn around and accept continuing full-time employment with the Bank; otherwise, the Bank would be making severance payments to staff who could continue or return to full-time careers at the Bank. He further stated that although the Bank was under no obligation to do so, he had decided to renew her appointment on an exceptional basis for an additional year without imposing the 120-day limitation in response to her manager's request. He stressed that the Applicant had thus been provided with a full year's actual notice of the 120-day limitation, which would be imposed upon any further renewal which the Bank might decide to offer her.

12. The Applicant appealed to the Appeals Committee on December 12, 1994. The Committee, in its report issued on November 14, 1995, concluded that there was no basis to exempt the Applicant from the application of the provisions of the revised Staff Rule 4.01. The Committee noted that the Applicant had a full year's notice of the limitation, which provided her with ample time to seek alternative employment, that like any other Bank

staff member the Applicant was subject to Bank policy as it might be modified from time to time, and that after separation, no former staff member of the Bank was entitled to unfettered employment with the Bank. On that basis, the Committee recommended that the Applicant's request for relief be denied. By memorandum to the Applicant, dated November 15, 1995, the Senior Vice President, Management and Personnel Services (MPS), informed her that he had accepted the Committee's recommendation.

THE APPLICANT'S MAIN CONTENTIONS

13. By retroactively applying a limitation on the number of the days the Applicant may consult for the Bank, the Bank abused its discretion and breached an essential term of the settlement agreement between the Applicant and the Bank.

14. According to the principles enunciated in *de Merode* (Decision No. 1 [1981]), the Bank does not possess an unrestricted power to amend even non-essential terms of its Rules and changes must be reasonably related to the objective which they are intended to achieve. Application of the amended Staff Rule to the Applicant, who separated before the Staff Rule was even contemplated, does not bear a reasonable relation to the objective which the amendment was intended to achieve and is, therefore, an abuse of discretion.

15. The Bank abuses its discretion by adhering to a false notion of uniform treatment and failing to recognize the distinction between the Applicant's situation as having separated long before the amendment of Staff Rule 4.01 and of those who separated after its promulgation.

16. The Bank's decision to apply the 1994 amendments to Staff Rule 4.01 to the Applicant impedes efficiency by preventing the Bank from employing a person acknowledged to be the most efficient and effective provider of a particular service required by the Bank.

17. No less than employment agreements, settlement agreements contain "essential terms" that must be respected.

18. The Applicant does not seek a "guarantee" of outside consulting contracts or of employment with the Bank but seeks to have restored to her the opportunity to contract freely within the institution to meet the demand for her services. That opportunity was the foundation of the Applicant's 1989 separation agreement and, thus, is an essential term of the agreement which the Bank may not unilaterally change.

19. The Applicant made the following pleas:

(i) rescission of the Senior Vice President's (MPS) decision, dated November 15, 1995;

(ii) continuation of the Applicant's short-term employment opportunities within the Respondent, to the extent permitted under the provisions of paragraph 8.03 of Staff Rule 4.01 as in effect on April 28, 1989; or

(iii) payment as compensation of the difference between the compensation she would have received had she been employed as a full-time outside consultant and the pay she may receive for 120 days' employment as an outside consultant, for three years, i.e., \$90,000; and

(iv) costs in the amount of US\$2,338.54.

THE RESPONDENT'S MAIN CONTENTIONS

20. It is settled that staff members are subject to the Staff Rules as they exist at the time of appointment and as they may be subsequently amended from time to time.

21. There is nothing in the Applicant's situation warranting an exception from the 120-day limit. The assurance

she relies on to make her situation unique was no more than a confirmation of the applicability of a Staff Rule existing at the time she sought the assurance and not a lifetime exemption from future Bank policy.

22. The imposition of the 120-day limit was occasioned by heightened concern at the illogical practice of paying staff considerable separation payments only to have the result be that these staff could, simply by virtue of a changed appointment type, accept continuing full-time employment with the Bank.

23. No issue of a unilateral change of a fundamental or essential condition of employment or of limitations on the Bank to amend a non-essential condition of employment or of retroactive application of a change in employment conditions arises in this case.

24. Even if the principles enunciated in the *de Merode* case were applied, the 120-day limit cannot be considered a fundamental element of the Applicant's conditions of employment since no one enjoys a right of unlimited guaranteed Bank employment or reemployment. To exempt the Applicant from the application of the 120-day limit would result in just the unjustifiable discrimination that the *de Merode* case precludes.

25. No question arises of a failure by the Respondent to observe the settlement agreement entered into with the Applicant.

26. No basis exists for the compensation the Applicant requests in the alternative and the calculation of the sum she requests is purely speculative; no basis exists, either, for the payment of costs.

CONSIDERATIONS

27. In this case, the Applicant challenges, by reason of the assurances given by the Bank in conjunction with the separation agreement, the application to herself of the change in the Staff Rule whereby persons previously employed in the Bank may not act as consultants to the Bank for more than 120 days in any twelve-month period. Two main and interrelated issues are involved in the consideration of this matter. The first is which version of Staff Rule 4.01, paragraph 8.03 and related provisions should apply to the terms and conditions governing her consultancy after having entered into a mutually agreed separation in 1989: the version existing at the time of separation, as the Applicant argues, or the version as amended in 1994 as maintained by the Bank. The second issue is whether the Bank at the time of separation gave assurances that supplement the separation agreement and which would preclude changes of such terms and conditions in respect of the Applicant.

28. As to the first question, both parties have argued extensively about the implications and significance of the decision of the Tribunal in *de Merode*, a case in which the power of the Bank to unilaterally amend the conditions of employment of existing staff members was upheld when not affecting fundamental and essential elements of such conditions (*de Merode*, Decision No. 1 [1981], para. 31; *Addy*, Decision No. 146 [1995], para. 42). In such a case, the amended rule may be applied immediately to existing staff. However, even in respect of non-essential conditions of employment the Tribunal emphasized the need to meet certain requirements for the exercise of the Bank's powers of amendment, notably the proper consideration of relevant facts and a reasonable relation between the amendment and the objective intended to be achieved (*de Merode*, Decision No. 1 [1981], para. 47).

29. The situation in this case is altogether different from that considered in *de Merode* because, as will be discussed further below, the assurances given by the Bank at the time of separation involve terms that are an essential element of the relationship between the Applicant and the Bank. It is quite true, as the Respondent argues, that the decision in *de Merode* was concerned with existing employment and did not address the issue of separation from service which arises in the present case. However, the same principles and considerations apply in the present case because it also involves a relationship between a staff member and the Bank in the form of a mutually agreed separation, which is part of the conditions of employment.

30. The Tribunal held in a prior case that

It would unduly interfere with the constructive and efficient resolution of ...claims if the Bank could not negotiate--in exchange for concessions on its part--for a return promise from the staff member not to press his or her claim further. If such an agreed settlement were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise arrangements, and there might instead be an inducement to be unyielding and to defend each claim through the process of administrative and judicial review. It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements. (*Mr. Y*, Decision No. 25 [1985], para. 26).

A similar rationale applies to the observance of separation settlements on the part of the Bank.

31. An aspect which is particularly relevant in the circumstances of this case is that the Applicant could not be retained in the Bank's service for reasons entirely alien to her performance or to the need for her work. In fact, the Applicant had obtained the highest performance rating as an express indication of the Bank's satisfaction with her work. Moreover, the various departments for which the Applicant provided specialized services were all in agreement about both the quality and the usefulness of her work. The early decision to declare her position redundant and the later separation agreement came about as a consequence of the budgetary structure of the Bank at the time. The department to which the Applicant's position was attached could not retain her full time, while other departments which required her services could neither make a position available nor pay the corresponding part for the services rendered. As a consequence of this situation, INU was in fact paying for the services that the Applicant provided to this department and for those provided to other departments as well, the aggregate of which resulted in the Applicant's full-time occupation. This situation came to an end when the need arose for a different category of specialists working full time for that department. In spite of the fact that other positions were searched for in the Bank, this did not materialize and the decision to declare the Applicant's position redundant was taken, later evolving into the mutually agreed separation. It has been rightly argued by the Applicant that the situation leading to her separation originated in a weakness of the budgetary system and not in any other reason.

32. It is in this specific context that the terms of the mutually agreed separation were negotiated. Under these terms the Applicant agreed to separation, received a three-year net salary compensation in lieu of the eighteen-month net salary to which she would have been entitled under redundancy, and renounced the appeals and other redress that could have been sought to settle the dispute. A crucial aspect of the negotiation was that the Applicant would be allowed to contract with the Bank as an outside consultant as needed by the different departments requesting her services. Such consultancy contracting would not be subject to time limits or other restrictions, a matter in which specific assurances were given by the Bank officers intervening in the preparation of the mutually agreed separation arrangement as will be discussed further below. This particular element was decisive in the acceptance of the agreement because the Applicant could still work for the Bank in a different capacity as long as her services were in demand, and also because the Bank could in this way continue to provide services that were highly valuable to several departments.

33. The amendment to Staff Rule 4.01, paragraph 8.03, in 1994 changed the situation that had been envisaged at the time of separation. The general objective of the Bank in introducing this limit was straightforward in that it pursued the elimination of the revolving-door phenomenon, that is, a situation in which voluntary separation and the corresponding benefits are followed by reemployment in some other capacity, usually consultancy arrangements, allowing for continuing full-time work. This objective is part of a sound management policy. From this point of view, the Bank has the power to amend the terms and conditions under which it will hire consultants either generally or in relation to specific categories of staff members who have left the Bank's service and it can apply the amendment to any contract of consultancy entered thereafter. Such terms and conditions cannot generally be considered as "essential" for the simple reason that normally there shall be no prior commitment as to consultancy arrangements and any contract to this effect will be governed by the Staff Rules in force at the time it is made.

34. The situation will of course be different if there is a specific assurance, agreement or commitment governing beforehand the terms and conditions of consultancy, or special circumstances intervene eventually allowing for a different conclusion. The real issue will, therefore, not be which version of the Staff Rules applies

but whether there is a specific agreement providing for different terms and conditions that does not allow for unilateral amendment by the Bank in respect of that particular agreement. This question will be discussed next in the light of the circumstances of this case.

35. The Respondent has rightly noted that under the Staff Rules in force at the time of separation there were no time restrictions as to the hiring of consultants, a point which is not controverted. There was, however, another restriction under Rule 4.01, namely the requirement of a written prior authorization of the department director or the vice president of the hiring unit. It is also a fact that the Applicant sought and was given assurances that no cap would apply to her future rehiring as a consultant, a matter which was, as mentioned above, crucial in the Applicant's determination to accept the separation agreement. It follows that these assurances could not be considered, as the Respondent has argued, a mere confirmation of the existing Staff Rules in force at the time nor an aspect that would have been similarly offered to anyone asking for it at the time. It is quite natural that when a staff member is affected by a redundancy and separation process and is offered an alternative consultancy arrangement in lieu of the status of permanent employment, he or she may seek to clarify the unrestricted right to work under the new arrangement, regardless of restrictions that the future might bring. In this particular case the Bank was also interested at the time in the same outcome since it needed the services offered by the Applicant, an interest which was also crucial in the Bank giving the assurances sought.

36. The evidence that such assurances were given is overwhelming. Although the separation agreement signed by the parties does not refer to such assurances, and although there was no separate note recording the understandings included in the relevant file, the collateral agreement has been well established by means of first-hand evidence provided by the various officers involved in the negotiation: the Vice President for Personnel; the Personnel Officer for INU; the Division Chief in office when the position was abolished and the Director of the Department for which the Applicant was working at the time of the amendment of the Staff Rule. All these officers have indicated in writing that the separation was accompanied by the assurance that no restrictions would apply to the Applicant's rehiring as a consultant, with specific reference to the question of the number of days of employment per year.

37. The Respondent has also argued that the Vice President for Personnel did not have the authority to give a guarantee or assurance of the kind sought by the Applicant. The Tribunal rejects this argument because this Vice President is the highest administrative authority for personnel affairs in the Bank's structure and must be deemed to possess the authority to give undertakings falling within the scope of his functions.

38. The Tribunal must now turn to the legal consequences of applying the amended Staff Rule to the particular case of the Applicant. The first conclusion that the Tribunal must reach is that, in the specific circumstances of this case, the 120-day limitation to consultancy employment affects an essential term of the settlement agreement reached with the Applicant at the time of separation. This legal consequence does not arise in ordinary situations since, as explained above, the Bank will have made no prior commitment about the terms and conditions of consultancy and, therefore, it will be a non-essential term in respect of those situations. But in this particular case the existence of prior assurances and of an express commitment changes the nature of the term which thereby becomes an essential element of the relation. The Applicant accepted the separation agreement on the specific assurance given by the Bank and on this basis renounced the remedies that were open to her at the time. The assurances about not introducing employment limitations upon her consultancy were indeed essential terms of the agreement. Precisely because the Applicant was specifically affected by the amend-ment of the Staff Rule she was duly notified of this change and her appointment was renewed for one year on an exceptional basis without the 120-day limitation. The Respondent also stated that no grandfathering was provided for, a view which is right in respect of ordinary situations but which cannot change the assurances given or the commitments made in this particular case.

39. The Respondent has also referred to the three-year net salary compensation received by the Applicant on separation. While it is true that this compensation is larger than the one the Applicant would have received under redundancy, this does not bear any relationship to the question of eventual employment restrictions and does not offset the adverse consequences of such restrictions for the Applicant. The compensation received on

separation only refers to the relin-quishment of the Applicant's Bank employment and her renuncia-tion of her rights of review and appeal. Such renunciation is not a step ordinarily taken without certain assurances and compensation, which is precisely the meaning of the compensation received by the Applicant.

40. The Respondent has argued that any assurance given could not have been intended as a life-time guarantee of employment and that the Appeals Committee, while recognizing that assurances were given, concluded that the Applicant did not have a right to unfettered employment. However, what the Applicant is seeking is not a guarantee of permanent consultancy contracting with the Bank or a general guarantee of employment, but the opportunity to compete for the work required by the Bank as long as there is a demand for her services, a situation altogether different because such a demand may or may not exist and the time of consultancy may be short or long. If this were a case of permanent consultancy the typical revolving-door phenomenon would be again in operation, but this is not the object of the application nor, as will be seen, the extent of the guarantee given by the Bank.

41. The Tribunal must conclude that in light of the above the Respondent has breached the terms and conditions of the separation settlement made with the Applicant because an essential term of those arrangements was changed without her assent.

42. The Applicant has requested, in the first place, (a) the rescission of the Bank's decision of November 15, 1995 accepting the recommendation of the Appeals Committee that she be denied an exemption from the application of Staff Rule 4.01, paragraph 8.03(c); and (b) acceptance of the plea that she be allowed to continue work as a short-term consultant, with no limitation upon the total twelve-month periods of her employment, as long as her services are in demand at the Bank. The Tribunal finds that it is appropriate to grant these requests and will formally so decide. It must also be noted in this respect that paragraph 6.01(a) of the Rule in question grants authority to the Director, Personnel Management Department, to authorize in exceptional circumstances extensions beyond the maximum duration of the appointment, a one-year period having already been authorized under this provision for the Applicant's appointment in 1994. Nothing could be more exceptional than the circumstances of the assurances and commitments given in this case.

43. The Applicant has, however, also added an alternative request, namely, that should the President of the Bank decide that compensation be paid instead, she should be paid compensation for the difference between the earnings she would have received had she been employed as a full-time outside consultant and the pay she may receive for 120 days employment as an outside consultant, for three years, i.e., \$90,000. This second request gives rise to some difficulty because compensation instead of reinstatement is relevant only in a case where the Tribunal has found that the employment of a staff member was unlawfully terminated. In such a case, if the President of the Bank opts to pay compensation to the staff member instead of reinstatement in her former position, damages can be calculated by reference to the loss suffered by the Applicant as a result of the wrongful termination of employment.

44. That is not the situation in this case. Once the Applicant ceased to be a staff member, the Bank was in theory under no continuing obligation to employ her as a consultant at all. The Tribunal has, indeed, recognized that there is in general no entitlement on the part of the staff member to appointment as a consultant or, if appointed for a fixed period, to any extension thereof. If there were evidence that the Applicant would have had the opportunity of working for more than 120 days in any of the 12-month periods since May 1994, when the amended Rule came into effect, and was denied such opportunity by reason of the application of the new rule, then it would have been possible to calculate on an objective basis the damage suffered by her. In the absence of such evidence, the shortfall in the days that the Applicant could have worked is anywhere between 0 and the remainder of the year. The Applicant has supplied some figures of consultancy work done for the Bank which permit a general assessment of the loss suffered by reason of having her appointments capped.

45. The Tribunal will grant compensation because damage has been inflicted upon the Applicant in the period from June 30, 1995 to the present date as a consequence of the breach of the terms of the separation settlement. The Tribunal estimates this compensation in the amount of \$20,000.

DECISION

The Tribunal unanimously decides:

- (i) to quash the Respondent's decision of November 15, 1995;
- (ii) to direct the Respondent to allow the Applicant to seek short-term consultancy employment not limited to the number of days established in Staff Rule 4.01, paragraph 8.03;
- (iii) to award damages to the Applicant in the sum of \$20,000 in respect of breach by the Bank during the period from June 30, 1995 to the present date of its obligation not to limit the number of days within any twelve-month period in which the Applicant might have been employed as a short-term consultant; and
- (iv) the Respondent shall pay legal costs in the sum of \$2,338.54.

Elihu Lauterpacht

/S/ Elihu Lauterpacht
President

Nassib G. Ziadé

/S/ Nassib G. Ziadé
Executive Secretary

At Washington, D.C., April 11, 1997