

Decision No. 118

John Briscoe,  
Applicant

v.

International Bank for Reconstruction and Development,  
Respondent

1. The World Bank Administrative Tribunal, composed of P. Weil, President, A.K. Abul-Magd and E. Lauterpacht, Vice Presidents, and F.K. Apaloo, R.A. Gorman, E. Jiménez de Aréchaga and Tun Suffian, Judges, has been seized of an application, received August 20, 1991 by John Briscoe against the International Bank for Reconstruction and Development.

2. Several procedural decisions were taken in this case:

(i) A consolidated memorandum was submitted by the Applicant and eight other Applicants who filed applications relating to similar subject matter. After hearing the views of the parties the President ordered that the applications not be consolidated but that individual briefs be filed in the nine cases with crossreferencing being permitted, where appropriate.

(ii) Because the Respondent raised jurisdictional issues in its answer, the President on his own motion under Rule 25 ordered that the jurisdictional issues be separated from the merits and that the parties submit pleadings on the jurisdictional issues only.

(iii) Because the Applicant had requested preliminary measures, the procedural decision referred to in (ii) above was made without prejudice to the powers of the Tribunal to decide on such measures at an appropriate future time.

3. Thereafter the usual pleadings were exchanged on the jurisdictional issues. The case was listed on August 24, 1992.

The relevant facts:

4. The Applicant was appointed to the staff of the Respondent on January 8, 1988, as a Senior Economist, level 24. The Applicant at that time held U.S. permanent resident status. In his letter of appointment the Respondent stated:

You are being appointed to the staff of the World Bank in U.S. Permanent Resident Status. Therefore, you are not eligible for expatriate benefits such as home leave and education benefits.

5. The Applicant was originally of South African nationality but had acquired Irish nationality subsequent to his South African passport and citizenship being withdrawn in 1973. U.S. permanent resident status was acquired in 1980.

6. In January 1985 before the Applicant joined the Bank a letter had been circulated to all staff by the Respondent in which it was communicated that the Bank's policy relating to expatriate benefits was being changed. It was stated that, effective January 29, 1985 all "new staff who have held U.S. permanent resident (PR) status or U.S. citizenship at any time in the 12 months prior to appointment to the Bank will be ineligible for expatriate benefits."

7. By letter dated July 12, 1989, several staff members who were in permanent resident status requested the Vice President, Personnel (VPP) of the Bank to consider changing the benefits policy of the Bank. By memorandum, dated November 15, 1989, the Director, Personnel Policy Department (PERPP), sent a paper

reviewing the benefits policy of the Respondent to the Senior Vice President (SVP), External Affairs and Administration. No change in the current policy was recommended. In response to a memorandum, dated August 7, 1990, from the Chairman, Staff Association, the VPP advised the Chairman by letter, dated August 24, 1990, that management had decided not to change the Bank's policy with respect to eligibility for expatriate benefits.

8. In a memorandum, dated December 3, 1990, responding to the request of another staff member in permanent resident status for administrative review, the Director, PERPP, stated that "A decision by management not to recommend a change to Directors does not change terms and conditions of employment and is not a decision subject to review."

9. In an appeal to the Appeals Committee by a third staff member in permanent resident status against the Bank's decision not to revise its present eligibility criteria for expatriate benefits, the Committee in its decision, dated April 30, 1991, stated:

Appellant is appealing the failure of the Respondent to suggest changes in that policy to the Respondent's Board of Executive Directors. Although the Committee is not unsympathetic to the substantive issues raised, it agrees that it does not have jurisdiction to decide the issues raised by this Appeal.

10. In a memorandum dated May 9, 1991, to a fourth staff member in permanent resident status, the Acting Chairman of the Appeals Committee invited the appellant staff member to withdraw his appeal and proceed to the Tribunal, if he so wished, because the substance of his appeal was substantially similar to that of the first four appeals in which the Committee had held that it had no jurisdiction. Consequently, the Applicant who also had filed an appeal withdrew his appeal, it being understood by him and the Appeals Committee Chairman that he could proceed to the Tribunal, if he so wished.

11. By letter, dated July 16, 1991, the Respondent indicated to counsel for the Applicant that the proper date from which the time for applying to the Tribunal would run would be (i) in the case of the four appeals that had been decided, the date on which each of the appellants received the notice of the decision of the Appeals Committee that it had declined to take jurisdiction, and (ii) in the case of the appeals withdrawn, the withdrawal date of each case. In relation to a third group mentioned in the Applicant's counsel's letter, dated July 11, 1991, the Respondent indicated that it took no position at that time because it believed that group not to be of relevance.

#### The Respondent's main contentions on the jurisdictional issue:

12. The Applicant instituted his claim for administrative review against the Respondent over six years after the expatriate benefits policy was established and almost three years after he entered on duty and became affected by that policy. He waited too long to raise the issue he brings before the Tribunal.

13. The Respondent raised the issue of delay in bringing the claim before the Appeals Committee which decided that it had no jurisdiction.

14. The Respondent is not estopped from raising the issue of timeliness of a request for administrative review because all it did in its letter to the Applicant's counsel was to refer to the ninety-day period for instituting a case before the Tribunal.

15. The fact that the issue of timeliness was not raised in the Respondent's response to the Applicant's request for administrative review does not preclude the Respondent from raising the issue before the Tribunal, because the issue raised in the request for administrative review was the failure of the Respondent to change the expatriate benefits policy and the issues raised in the application to the Tribunal which concern the merits of the policy were not raised therein.

16. The Respondent in its letter of July 26, 1991 to the Applicant's counsel made it clear that it reserved the right to submit a jurisdictional challenge.

17. In any event, the fact that a defense was not raised during the administrative review process does not preclude the Respondent from raising it before the Tribunal.

18. The communication of the VPP of August 24, 1990 to the Chairman of the Staff Association is not the decision from the date of which the time for filing a request for administrative review should be calculated. This communication merely confirmed a decision taken much earlier.

19. It is no excuse for the Applicant to say that there was no reason to pursue an action because others were making their concerns known to the Respondent and the Applicant expected a change in policy.

20. None of the reasons given by the Applicant for failing timely to proceed nor the fact that the Applicant believes that the issues before the Tribunal are fundamental to the functioning of the institution, constitute exceptional circumstances justifying non-adherence to the requirements of Article II, para. 2, of the Statute.

21. The Applicant fails to state a claim that falls within the Tribunal's competence because his challenge is of a condition of employment in effect when he joined the Bank.

The Applicant's main contentions on the jurisdictional issue:

22. The ninety day period for the filing of an application before the Tribunal began to run, in the case of the Applicant, from May 24, 1991. The Applicant filed his application in time, on August 20, 1991.

23. The Appeals Committee did not give as a reason for refusing to assume jurisdiction the failure of the Applicant to seek his remedies in a timely manner.

24. When the decision rejecting the Applicant's claims was given by the Director, PERPP, no issue was raised as to the timeliness of the request for administrative review. Indeed, he did state that if the Applicant wished to proceed directly to the Tribunal the Respondent would not oppose this.

25. The Respondent in a letter to the Applicant's counsel indicated that it had no objection to the Applicant, among others, applying to the Tribunal and referred to the date from which the ninety day period would begin to run. It is, therefore, estopped from raising the issue of timeliness, since the application was filed within the prescribed ninety days from the relevant date.

26. The Respondent is incorrect when it asserts that the Applicant did nothing for three years. He did not seek formal redress because other efforts were being made to bring the concerns of those affected by the Respondent's expatriate benefits policy to the attention of the Respondent with the intention of bringing about a change.

27. At no point between the date on which the Applicant joined the Bank and the decision of the VPP of August 24, 1990 did the Respondent raise the issue of timeliness. Thus, that decision is the proper one upon which the Applicant may rely for seeking relief.

28. Exceptional circumstances can also be cited to establish the Tribunal's jurisdiction, because

(a) the application before the Tribunal is based on a fundamental breach of staff principles that preclude the organization from unjustifiably differentiating or discriminating against individuals or groups of staff, nearly 400 staff members having been adversely affected;

(b) throughout the review process, the Respondent, through the Director, PERPP, and the Appeals Committee, specifically instructed the Applicant to resolve the dispute before the Tribunal, and in the case of the directive of the Director, PERPP, explicitly waived the condition of the Applicant's having exhausted all internal remedies;

(c) the Applicant was extremely active through the Applicant's representative group, the Expatriate Benefits Working Group of the Staff Association, to exhaust all internal remedies available to resolve the dispute before initiating the formal review procedures;

(d) at various times during the process the Respondent's management had recognized that there was inequity in its existing policy and recommended various changes until the final administrative decision of the VPP made in August 1990;

(e) the Staff Association of the World Bank Group had constantly maintained during the period before August 1990 that the existing policy was discriminatory; and

(f) the Appeals Committee pronounced that it was not unsympathetic to the substantive issues raised by the applicant, while not giving any reasons why it could not assume jurisdiction, and instructed the Applicant, among others, to proceed to the Tribunal for determination of the issue.

#### Considerations:

29. In his application, the Applicant challenges the Bank's rule that all "new staff who have held U.S. permanent resident (PR) status or U.S. citizenship at any time in the 12 months prior to appointment to the Bank will be ineligible for expatriate benefits." This general rule was made effective on January 29, 1985. It was, in effect, reiterated in the Applicant's letter of appointment given him prior to his taking up service with the Bank in January 1988. That letter stated:

You are being appointed to the staff of the World Bank in U.S. Permanent Resident status. Therefore, you are not eligible for expatriate benefits such as home leave and education benefits.

The Applicant also points to the written communication of the VPP, to the Staff Association, dated August 24, 1990, stating that "Management has decided not to change the current policy with respect to eligibility for expatriate benefits." He contends that this was the last event giving rise to his application, and thus that his request for administrative review, and ultimately his resort to the Tribunal, were timely.

30. Article II, para. 1, of the Statute of the Tribunal empowers the Tribunal to pass judgment "upon any application by which a member of the staff of the Bank Group alleges nonobservance of the contract of employment or terms of appointment of such staff member." The Tribunal, along with other international administrative tribunals, has consistently held that a claim of non-observance of a staff member's contract or terms of appointment must be directed not against the organization's promulgation of some general rule or policy but rather against an application of that rule or policy – be it reflected in an action or an omission – that directly affects the employment rights of a staff member in an adverse manner. In Agodo, Decision No. 41 [1987], paras. 27 and 29, the Tribunal held that

[T]he Statute contemplates the making by the Respondent of a 'decision' that adversely affects the applicant specifically and that will justify "compensation. ... for an injury individually sustained." ....

In all other cases decided by the Tribunal, the applicant has alleged some detriment to his own status, compensation or working conditions resulting from a specific Bank decision affecting him....

See also The World Bank Staff Association, Decision No. 40 [1987], paras. 84-86.

31. The application here is in effect directed against a general rule regarding employment benefits, rather than an individualized application of that rule to the Applicant himself. His application has not been directed at any specific decision by the Respondent denying him expatriate benefits. In fact, at no time did the Applicant specifically request such benefits, nor did the Bank specifically deny such a request. The rule of the Bank regarding expatriate benefits was promulgated in 1985 and was a rule of general effect. Clearly, it could not have been applied to the Applicant before he was hired. Nor can the letter of appointment, as accepted by the Applicant, which did no more than subject the Applicant to the rules generally in force within the Bank governing staff members, be regarded as an individualized application providing in itself a proper basis for a challenge before the Tribunal under Article II, para. 1, of the Statute of the Tribunal. As to the determination by the VPP in 1990 not to recommend a change in the rule, that is no more than a general reiteration of the rule and does not amount to a direct application of it to any particular individual staff member.

Decision:

For the above reasons the Tribunal unanimously decides that the Tribunal has no jurisdiction over the application.

Prosper Weil

/S/ Prosper Weil  
President

C. F. Amerasinghe

/S/ C.F. Amerasinghe  
Executive Secretary

At Washington, D.C., November 13, 1992